

IN THE MATTER OF : NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF : STATE BOARD OF EXAMINERS
MICHAEL J. LEIBOWITZ : ORDER OF SUSPENSION
_____ : DOCKET NO: 1516-103

At its meeting of October 30, 2015, the State Board of Examiners (Board) reviewed information it had received regarding Michael J. Leibowitz. The Hudson County Prosecutor's Office and the West New York School District (WNY) notified the Board that, in February 2014, Leibowitz allegedly walked into the athletic office in Memorial High School holding a police officer's gun while the athletic director and his assistant were in the office. According to the athletic director, Leibowitz asked, "What is it going to take to make all of our girls' soccer games at 7 p.m.?" Pursuant to a settlement agreement with WNY, Leibowitz's salary and step increases were withheld for two school years and he was transferred to another school within the district. No criminal charges were filed against Leibowitz.

Leibowitz currently holds a Teacher of Physical Education Certificate of Eligibility with Advanced Standing and a Teacher of Physical Education certificate. After reviewing the above information, at its December 10, 2015 meeting, the Board voted to issue an Order to Show Cause to Leibowitz as to why his certificates should not be revoked.

The Board sent Leibowitz the Order to Show Cause by regular and certified mail on December 16, 2015. The Order provided that Leibowitz must file an Answer within 30 days. Leibowitz responded on January 14, 2016. In his Answer, Leibowitz denied the allegations regarding his possession of the gun in the athletic office. (Answer, ¶ 3). He also admitted that he had entered a settlement agreement with WNY wherein his salary and step increases were withheld. (Answer, ¶ 4). In the remainder of his Answer, Leibowitz asked for the dismissal of the Order to Show Cause or, in the alternative, the transfer of the matter to the Office of Administrative Law for a hearing on the merits.

Since there were material facts in dispute, on February 2, 2016, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. ALJ Kimberly A. Moss heard

the matter on June 6, 2017, October 17 2017, December 8, 2017, March 5, 2018 and April 9, 2018. The record closed on July 10, 2018 and ALJ Moss issued an Initial Decision on July 31, 2018. *In the Matter of the Certificates of Michael Leibowitz*, Dkt. No. EDE 02142-16 (Initial Decision, July 31, 2018).

After reviewing the testimony and the record, ALJ Moss found that Leibowitz, the girls' soccer coach, and his assistant coach, Hugo Sanchez, who worked as a WNY Police Officer, were talking in the teachers' lounge about the girls' soccer schedule. (Initial Decision, slip op. at 10.) As a joke, they went to the Athletic Director's office, where Leibowitz entered holding Sanchez's unloaded gun and made the comment regarding the schedule. *Ibid.* Both the Athletic Director, John Fraraccio and the Assistant Athletic Director, Mayra Berckes, were present in the office. *Ibid.* The ALJ found that Sanchez stated the gun was unloaded and that Leibowitz did not point it at anyone. *Ibid.* ALJ Moss also noted that "there were no students present in the vicinity of the Athletic Director's office at that time. *Ibid.* The principal of the school was informed of the incident and spoke to Leibowitz and Sanchez but "he knew that Leibowitz was a prankster and did not believe that he was a danger." *Ibid.* The ALJ also took notice of the fact that the district Board of Education conducted an investigation and determined that there were no health or safety issues and that Leibowitz received a two-year step and increment withholding. *Ibid.*

After summarizing the relevant case law regarding appropriate standards of teacher conduct, ALJ Moss rejected Leibowitz's contention that industrial double jeopardy applied here, noting, "the Board of Examiners was not the agency that imposed the initial discipline and was not involved with the initial discipline." *Id.* at 13. She added that Leibowitz admitted to his conduct and although he did it as a prank, "it shows extremely bad judgment by Leibowitz." *Ibid.* ALJ Moss added that the district had a policy prohibiting weapons and "Leibowitz violated that policy." *Ibid.*

In assessing the appropriate penalty, ALJ Moss determined that "carrying a gun into the Athletic Director's office and demanding a change to the girls' soccer schedule is conduct unbecoming a teacher and grounds for removal." *Ibid.* Judge Moss therefore ordered the revocation of Leibowitz's certificates. *Id.* at 14. Leibowitz filed Exceptions and the Deputy Attorney General (DAG) representing the Board filed Reply Exceptions.

In his Exceptions, Leibowitz argued that the sanction of revoking his certificate for his misconduct was grossly disproportionate. (Exceptions, p. 1). He noted that the facts adduced at hearing demonstrated that his misconduct “was a bad prank constituting a moment’s worth of bad judgment out of a 22-year teaching career praised as exemplary” by his superiors. (Exceptions, p. 1). He added that the incident was intended to involve only three friends who regularly pulled pranks on each other and that Judge Moss specifically found that it was not witnessed by any student. (Exceptions, p. 1). Leibowitz also stated that he cradled the gun and did not hold it as one would normally hold a gun and that it was employed as a prop, not an instrumentality of violence or potential violence. (Exceptions, p. 2). He also reiterated that neither his principal at the time nor the district wanted the matter to get to the Board and that the harsh punishment he received at the local level was considered sufficient. (Exceptions, p. 2).

Leibowitz argued that the doctrine of industrial double jeopardy should apply in this matter where the “employer seeks to discipline an employee multiple times for the same misconduct.” (Exceptions, p. 23). He noted that he had already been severely sanctioned for the incident and that “it would be the height of unfairness” to revoke his certificates for the exact same incident, even if the doctrine did not technically apply to his case. (Exceptions, pp. 24-25).

He also claimed that the principal’s recollection of events was the most reliable account of what occurred because Fraraccio and Berckes went to him only four days after the incident, before Berckes had an “incentive to shade her recollection or to exaggerate her subjective reaction to what had occurred.” (Exceptions, p. 25). Leibowitz emphasized that although the prank was inappropriate, nothing would be accomplished by imposing the draconian punishment of revoking his certificates. (Exceptions, p. 28). He argued that the punishment he had received had sufficiently impressed upon him the wrongfulness of his conduct and that he would never “pull a similar prank.” (Exceptions, p. 28). He added that revoking his certification would not safeguard students as no student was put in jeopardy by his conduct. (Exceptions, p. 28). He also noted that supervisors had testified that he was an exemplary teacher whose dismissal would be a great loss to the district. (Exceptions, p. 29). Leibowitz reiterated that while gun violence in

schools was a real concern, his career should not be sacrificed this since this incident was not of that nature and his behavior had been appropriately punished by the district. (Exceptions, pp. 29-30).

In her Reply Exceptions the DAG argued that Leibowitz's Exceptions were without merit and that the ALJ had issued "a well-reasoned, comprehensive decision setting forth the relevant facts and applying the appropriate legal standard to come to the conclusion that Respondent's conduct not only constituted unbecoming conduct, but that his certificates should be revoked." (Reply Exceptions, p. 2). The DAG also noted Leibowitz had not presented any basis that would require the Board "to conclude that the ALJ's findings and conclusions are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence in the record." (Reply Exceptions, pp. 2-3). She further stated that there was nothing inappropriate or unreasonable about ALJ Moss' conclusion that Leibowitz should lose his certificates and "[s]imply because that determination dramatically affects [Leibowitz] and his livelihood, does not make the determination any less valid." (Reply Exceptions, p. 4). The DAG argued that, by downplaying his actions, Leibowitz misunderstood both the nature and the gravity of his actions because "having a gun in school shows an astounding lack of judgment and self-restraint." (Reply Exceptions, p. 5). She added that there were no "directly analogous cases to the situation at hand because no reasonable educator would ever think to do something of this nature." (Reply Exceptions, pp. 7-8). The DAG claimed that Leibowitz's lapse made his "qualifications to be a teacher highly questionable." (Reply Exceptions, p. 8). She therefore argued that "the ALJ's determination to revoke his certificates was reasonable." (Reply Exceptions, p. 8).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of September 21, 2018, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision, the Board voted to adopt the Initial Decision, with modification as to penalty.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. There is no doubt

that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. As noted above, after assessing the evidence and credibility of the witnesses, ALJ Moss concluded that Leibowitz carried a gun into the Athletic Director's office and made a comment about the girls' soccer schedule. Even viewed in its most benign form as a prank, Leibowitz's conduct indicates a serious lapse in judgment. After reviewing the entire record, the Board agrees with the ALJ's assessment regarding Leibowitz's unbecoming conduct but disagrees with the appropriate resultant penalty. Leibowitz has a long and otherwise unblemished record. Moreover, he quickly recognized the error of his actions, was contrite and accepted responsibility for his breach. The Board therefore believes that a fitting penalty in this matter is a suspension of his certificates.

Accordingly, on September 21, 2018, the Board voted to adopt the Initial Decision with modification as to penalty and ordered a nine-month suspension of Leibowitz's certificates. On this 1st day of November 2018, the Board formally adopted its written decision to adopt, with modification as to penalty, the Initial Decision in this matter and it is therefore ORDERED that Michael J. Leibowitz's Teacher of Physical Education Certificate of Eligibility with Advanced Standing and Teacher of Physical Education certificate are hereby SUSPENDED for a period of nine months, effective immediately. It is further ordered that Leibowitz return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

RRH/MZ/th

Date of Mailing:
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.