

197-00

IN THE MATTER OF THE TENURE :

HEARING OF ROBERT I. GRUNDFEST, :

SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION

OF MADISON, MORRIS COUNTY. : DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent tenured basic skills instructor for allegedly using a school computer to access and view pornography on the Internet during school hours. Respondent denied the charges, claiming that he accessed illicit material on the computer in question on only one occasion and that such access was inadvertent.

The ALJ credited the testimony of J.M., the student who made the allegations underlying the charges, and found that respondent's testimony was not credible. In light of the testimony centering on the computer and its contents presented at hearing, the ALJ relied on the Board's computer expert in determining that the Board had proven by a preponderance of credible evidence that respondent committed conduct unbecoming a teacher by using a school computer to intentionally access and view pornography on the Internet during school hours. The ALJ determined that because 1) the acts took place in school during school hours using school equipment, 2) respondent was willing to discredit a student, 3) respondent was unwilling to admit his conduct and 4) respondent attempted to erase his tracks on the computer, respondent's actions were sufficiently flagrant to justify his dismissal.

Upon an exhaustive review of the record, including the transcripts, the computer experts' reports and other evidentiary documents, the Commissioner determined to reject the recommended decision of the ALJ. Central to the Board's case were 1) the accusations of student J.M. and 2) the computer data evidence. The ALJ found J.M.'s testimony to be "somewhat inconsistent," yet he concluded the testimony was credible. The Commissioner, however, found J.M.'s overall testimony troubling. Not only was he unsure of the month(s) he observed respondent viewing sexually explicit material, but he was also inconsistent in recounting dates, times and number of instances. Moreover, he was the only one to accuse respondent of viewing the material. The three teachers who shared classroom 6A with respondent testified that they never saw him do anything inappropriate on the computer, nor did their students report seeing respondent do anything inappropriate on the computer. Furthermore, the Commissioner found incredible that although J.M. claimed to have observed respondent viewing the material over a three-month period, he did not confide in anyone – not a fellow student, a teacher, his principal, counselor or his parents that this was occurring until the end of the third month. Thus, after a review of J.M.'s testimony with due consideration to the ALJ's observations, and in light of the fact that there was no witness testimony to corroborate J.M.'s accusations, the Commissioner found that J.M.'s testimony lacked credibility. Moreover, the Commissioner determined that the contamination of the computer data evidence caused by the Board's handling of the computer in question (numerous individuals booted the computer, backdated it, etc., looking for evidence) and its failure to limit access to the computer both before the alleged incidents (the computer had no password or log-in procedure and the room was open to teachers, students, janitors and community groups) and after J.M.'s accusations were reported, were fatal to the Board's case. The Commissioner concluded that although there was evidence that pornographic sites were accessed on the computer, it was impossible to conclude with any degree of certainty from the computer data evidence whether the amount of pornography was consistent with any computer that has accessed the Internet, whether someone intentionally accessed the sites or whether any access was inadvertent. In addition, the Board was unable to identify a single specific date on which it was alleged that respondent accessed pornographic sites. Thus, the Commissioner determined that the Board failed to meet its burden of proof substantiating the charges of misconduct by respondent by a preponderance of credible evidence. The Commissioner dismissed the tenure charges and directed respondent's reinstatement with back pay for the period of his suspension at the level of pay that he would have received had the charges not been brought against him.

June 20,2000

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The record of this matter, including hearing transcripts, and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions, respondent's exceptions and the Board's reply thereto were considered by the Commissioner in rendering his decision herein.

In its exceptions, the Board urges the Commissioner to adopt the recommended decision of the Administrative Law Judge (ALJ), emphasizing that the ALJ's decision was predicated on an assessment of the credibility of witnesses which was supported by the evidence adduced at hearing. (Board's Exceptions at 1)

Respondent presents his exceptions in two parts. Section I sets forth Proposed Findings of Fact and Conclusions, and Section II contains specific exceptions to the Initial Decision. In his introductory statement, respondent asserts that the student's (J.M.'s) testimony was so incredible that the ALJ could not rely on critical portions of that testimony, and that the Board so mishandled the computer in evidence that respondent was denied a fair hearing. Respondent argues that, in the place of reliable evidence, the ALJ relied on what he saw as respondent's insufficient responses to the allegations. (Respondent's Exceptions, at Introduction)

Respondent's Proposed Findings of Fact and Conclusions contains a summary of his teaching background, an explanation of his transfer to the Kings Road School in 1995 and the details of his teaching assignment for the 1997-98 school year. He also explains his disputes with the principal with respect to his teaching evaluations, his coaching responsibilities, and his assignment as

substitute teacher when the classroom teachers were absent. (*Id.* at 1-3)

Respondent claims that J.M., while in his classes, had behavioral problems which necessitated disciplinary measures, such as “time outs,” in-school suspensions and visits to the principal’s office. (*Id.* at 3-4) Respondent also claims that J.M. had threatened him with respect to his continued employment, as reflected in testimony at hearing:

The student had many behavioral problems at the school. Most critically, one day while in 4th grade, the student lashed out at Bob Grundfest, saying, “I can get you fired, you know.” He said this after Mr. Grundfest had been strict with him for failing to do his homework. (11/16/99, p. 77-1 to 78-22)

The student admitted on direct examination that he “may have” threatened Mr. Grundfest and “could have” told him he wanted to see him fired. (10/12/99, p. 76-14 to 22) (*Id.* at 3)

Continuing his Proposed Findings of Facts and Conclusions, respondent explains that his classroom, Room 6A, was a small classroom that had windows to the outside and windows in the door and had been converted for use by four instructors by the addition of low dividers. Besides the four teachers assigned to the room, two other teachers used the room on a regular basis. He argues that despite the fact that staff, students and faculty frequently walked in and out of the room, no one except J.M. testified to seeing respondent do anything inappropriate with the computer, including fellow teacher, Nancy Croessmann, who was scheduled for classes in the room at the times when respondent taught J.M. and had a direct view of the computer screen from her work area. Likewise, the computer was shared by the six teachers who regularly used the room, plus it was available to any additional teachers and students who wanted to use it. The computer was not password-protected and had no log-in procedure to identify the user, and there was open access to the room in which the computer was located not only for staff and students, but also for community groups who used the school evenings

and weekends.¹ Thus, respondent concludes, anyone could access the Internet who wanted to do so. (*Id.* at 4-7)

Citing extensively to testimony, respondent explains in detail the events of February 26 and February 27, 1998 surrounding the allegations made by J.M. and his meeting with the principal wherein he was confronted with the charges. Respondent takes issue with the fact that the principal did not identify his accuser and disputes the principal's contention that he admitted viewing pornographic pictures. Respondent emphasizes that in that conversation, he admitted only that he had *inadvertently* pulled up material, words not images, that someone might deem inappropriate. (*Id.* at 8, 9)

Respondent argues that the Board has never been specific about when the alleged inappropriate conduct occurred. J.M. and the Board's attorney gave contradictory versions of the times and dates, he contends, claiming at various times that the inappropriate computer access occurred in both the afternoon and morning sessions with the student and in other instances indicating that it was solely during the afternoon sessions. Further, at hearing, the student couldn't identify even the month in which the alleged inappropriate Internet access began to occur or the number of times it had occurred. Respondent maintains that J.M.'s inability to identify the dates/times of the alleged inappropriate usage, plus the fact that the student's accusations contradicted other witnesses' testimony, renders J.M.'s testimony unreliable. (*Id.* at 10-15)

Respondent maintains that he did not delete any files from the computer and suggests that when Bob Padian, principal of Madison High School, changed the date on the computer from March 2, 1998 to February 27, 1998, any files accessed during that time would have a false February 27, 1998 date. Respondent also suggests that if the Cache and History files had been deleted as alleged, those files should have been empty when Michael Ricciardi, a computer consultant for the

¹ The record reflects that Room 6A was unlocked before school and was locked after the room was cleaned by the custodians on the night shift.

Board, opened them on March 5, 1998, but they were not. Respondent further explains that this computer was particularly prone to freezes and crashes. (*Id.* at 17)

Additionally, respondent argues that it is impossible to determine whether the pornographic cookies on the computer were purposely downloaded and if so, when and by whom, whether they were the result of an access that occurred in the course of a Netscape browser entering a Web page which had references pointing to these sites, or whether the cookies on the computer could have all come from Mr. Ricciardi's Internet search on March 5, 1998. He further explains that, on the one date that it *is* possible to infer that the computer was accessed for pornographic purposes, December 30, 1997, the school was closed for winter break and respondent was home recuperating from hernia surgery. (*Id.* at 20)

In Section II of his exceptions, respondent argues that, despite the ALJ's finding J.M.'s testimony inconsistent and his finding that it was impossible to conclude from the evidence whether someone intentionally accessed pornographic websites, the ALJ concluded that respondent was guilty of conduct unbecoming a teacher. The effect of the Initial Decision, therefore, was to shift the burden of proof from the Board to respondent. As stated in respondent's exceptions:

In place of these affirmative proofs, the ALJ relied on the fact that, in his opinion, Respondent could not come up with a suitable explanation for files that appeared to be deleted or with a suitable response to the student's accusations. He wrote that, among other things, it was "*the absence of any other evidence to explain the creation date of the MagicCookie file*" that compelled the conclusion that Grundfest deliberately deleted the MagicCookie file on February 27, 1998. (ID 17) Requiring Respondent to produce such information shifted the burden of proof from the Board to the Respondent, standing the tenure statutes on their head. [footnote omitted] Instead of relying on the Board's inadequate proofs that Grundfest deleted files on February 27, the ALJ relied on his own view that Grundfest was unable to prove that the files were not deleted.

Similarly, the ALJ shifted the burden when it came to Grundfest's denial of the charges. The ALJ concluded that "Grundfest's carefully constructed testimony that his access was 'inadvertent' and 'accidental' was not credible." (ID 19) Again, the ALJ relied on the absence of an explanation by Respondent to

prove that the alleged acts occurred, reversing the burden from the Board to Grundfest. Instead of considering the failure of the Board to prove that Grundfest admitted inappropriately using the computer, the ALJ instead relied on his disbelief of Grundfest's response to the charges. (emphasis in text) (Respondent's Exceptions, Section 2, at 2)

Citing *In re Wolf*, 231 N.J. Super. 365, 370 (App. Div. 1989), "[c]hildren's testimony, especially when it contradicts previous statements, 'must be used with great caution...particularly where, as here, such use requires a final adjudication grounded primarily on the basis of the testimony,'" respondent reiterates his argument that J.M.'s testimony was not credible, arguing that in a room where three other teachers worked, J.M. and J.M. alone said that he had witnessed respondent accessing pornography, yet J.M. could not identify when this access allegedly occurred, rendering J.M.'s testimony more than just "somewhat inconsistent" as the ALJ found, and not the kind of testimony on which a man's career should be destroyed. Respondent challenges the believability of J.M., saying that "[i]t defies imagination that a fifth grade boy could see his teacher looking at pictures of naked ladies on the computer every day for three months and not a tell a soul." Respondent also takes issue with the fact that the Board paid for J.M.'s attorney. (Respondent's Exceptions, Section 2, at 4-7)

Citing *Wakefield v. Pinchak*, 289 N.J. Super. 566, 573-74 (App. Div. 1996), respondent maintains that due process requires that the accused be provided with specific dates when the alleged acts are alleged to have occurred. Because it is undisputed that the computer in question was freely available to all students and staff, respondent argues, the Board's failure to identify specific dates and times of the alleged impermissible access was unfairly prejudicial to respondent, since it made him responsible for explaining all pornography linked to the computer. (Respondent's Exceptions, Section 2, at 9, 10)

Respondent avers that the Board's failure to state who had made the charges against him, and its failure to identify dates/times the alleged acts occurred, violated his right to be informed of the charges and his accuser. He claims that he responded to the principal as he did since he knew

that a student couldn't have seen anything inappropriate because nothing had occurred when students were present. However, since he did surf the net after school hours, he thought it possible he could have offended a fellow teacher who might have seen a swimsuit banner ad. This lack of information, respondent argues, compromised his ability to defend himself accurately and with precision. (*Id.* at 11, 12)

The computer evidence was contaminated by Board employees, respondent maintains, and thus should be discounted. Further, the computer evidence could not prove who accessed the computer, or when it was accessed, since there was no log-in procedure or password protection. Since both experts agreed that pornography could be found on any computer that surfed the Web, the ALJ concluded it is impossible to determine whether someone intentionally accessed pornographic sites or whether the access was inadvertent. The ALJ also specifically found that the Board contaminated the integrity of the evidence. (*Id.* at 13, 14)

Respondent disputes the ALJ's conclusion that respondent deleted files, stating that that conclusion is flawed because the February 27, 1998 date is unreliable. Not only is it impossible to verify that the clock was either functioning or reliable at the time in question, but the ALJ himself concluded that the Board personnel had contaminated the evidence:

“it is now impossible to determine with independent certainty whether a time stamp on a file in the Macintosh reading February 27, 1998, is the true date or the false date.” (ID 7, *n.* 29). Despite making this finding, **the ALJ nevertheless based his conclusion that Respondent deleted files on February 27, 1998 on a time stamp on a Macintosh file reading February 27, 1998** (ID16), a conclusion that is directly controverted by the finding that any February 27, 1998 date on a file on the Macintosh is unreliable. (emphasis in text) (*Id.* at 17)

Further, respondent claims his due process rights were violated because he had no opportunity to examine the computer for evidence before it was contaminated by Board employees, and also because he was denied discovery of J.M.'s student records which could have provided

evidence of emotional and family problems that existed at the time the student made the allegations. (*Id.* at 19, 23-26)

Finally, citing *In re Fulcomer*, 93 N.J. Super. 404, 420 (App. Div. 1967) (where extraneous considerations impact penalty decisions, the rights of the accused can be seriously prejudiced), respondent argues that the ALJ's reliance on respondent's "*unwillingness to admit his conduct*, his *willingness to discredit a student*, and his attempts at erasing his tracks" were improper considerations when determining penalty. Respondent maintains that the right to deny charges and to confront his accuser is a fundamental aspect of due process and that it is improper to penalize him for exercising his rights. (emphasis in text) (Respondent's Exceptions, Section 2, at 21)

In its reply exceptions, the Board disputes respondent's argument that the ALJ shifted the burden of proof from the Board to respondent. The Board insists that the ALJ's decision was based first and foremost upon credibility findings and that the ALJ simply believed the Board's witnesses and did not believe respondent. (Board's Reply Exceptions at 2, 3)

The Board urges the Commissioner to adopt the ALJ's credibility determinations, stating that the ALJ found J.M.'s testimony credible, that it was consistent with what the child had reported a year and a half earlier and that the supervisor of the one teacher assigned to the classroom during J.M.'s afternoon tutoring sessions testified that the teacher was frequently out of the room. The Board avers that there is no evidence to support the allegation that J.M. threatened respondent and that J.M. had, in fact, testified that he liked respondent. The Board argues that its underwriting of a portion of J.M.'s legal costs in this proceeding should not be taken as evidence of an effort to "subvert" or "suborn" the testimony of J.M. (*Id.* at 4-6)

The Board argues that J.M.'s testimony is buttressed by clear evidence because the computer was "rife" with pornographic content, including a large amount of access to pornographic "news groups," which, the Board maintains, cannot be inadvertently accessed but must be accessed

through subscriptions. Further, given his knowledge of “news groups,” the preponderance of credible evidence points to respondent. (*Id.* at 6-8)

Respondent’s assertion that his rights were violated when the principal confronting him did not inform him of the identity of his accuser or the specifics of the allegation against him is without merit, the Board contends, because respondent should have been truthful regardless of the identity of his accuser. The Board states that the adverse inference the ALJ drew from respondent’s evasive and suspicious responses when he was confronted with the accusations was appropriate. (*Id.* at 8)

The Board further argues that the computer provides ample evidence in support of the findings of the ALJ, citing the fact that a number of files, such as the MagicCookie File, the Cache log, the Address Book and other Netscape files were deleted by “someone” on February 27, 1998 and that respondent was the only person with the motive and opportunity to do so. The Board also argues that the Board’s witnesses established proof as to the chain of custody and that those witnesses testified as to the computer clock’s accuracy up until the date it was sent to Ontrack for data retrieval. (*Id.* at 9, 10)

The Board challenges the testimony of respondent’s expert, Mr. Goldstein, which concluded that files could have been deleted through a computer crash or through inadvertence, saying that he lacked credibility. (*Id.* at 11) Defending its conduct on the handling of the evidence, the Board asserts that there is no evidence that the computer evidence was contaminated and that a chain of evidence was presented which explained minute-by-minute, day-by-day what actions the Board took and what effect such actions had on the data on the computer files. Further, witnesses independently verified that they had turned on the computer on certain days and the functions performed. (*Id.* at 12)

Finally, the Board urges the Commissioner to adopt the ALJ’s recommended penalty, stating that termination of respondent’s tenure is entirely appropriate and fully supported by the evidence. The Board avers that the ALJ acted properly in excluding the use of the student’s records

and that respondent's attempt to bring extraneous material into the matter was nothing less than a "red herring," which was properly rejected. (*Id.* at 13, 14)

Initially, the Commissioner notes his agreement with Dr. Feinsod, Madison Superintendent of Schools, that the charge of accessing pornographic materials on a school computer is reprehensible and, if proven true, violates a sacred trust between the teacher and his students. (Tr. 10/5/99, at 66-67)

Sustaining tenure charges for unbecoming conduct, however, is a very serious matter. The ramifications for respondent would be not only the loss of his tenured employment, but also the automatic referral of the matter to the State Board of Examiners for possible revocation of his teaching certificate, and the possible loss of his pension benefits. Since the penalty for respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderance of credible evidence that 1) pornographic materials were intentionally accessed on the school computer in question, and that 2) respondent was the one who accessed those materials.

Upon an exhaustive review of the record, including transcripts of the nine days of hearings, the computer experts' reports and other evidentiary documents, the Commissioner cannot accept the recommended decision of the ALJ because the record does not support his conclusions. Central to the Board's case in this matter are (1) the accusations of an 11-year-old boy, J.M., who testified that he saw respondent view "like porno stuff; naked people" (Tr. 10/12/99, at 70), and (2) the computer data evidence.

Like the ALJ, the Commissioner finds J.M.'s testimony "somewhat inconsistent" because J.M. testified that respondent began viewing pornographic material on the computer in "September. Like December. November. One of those," (Tr. 10/12/99, at 71), and that, after prompting by petitioner's counsel, J.M. testified that he saw his teacher viewing pornographic sites only after another student transferred out of his language class in December 1997. (Initial Decision at 3) Although some variance is expected in the testimony of minors, it has long been established that

student testimony must be examined with great caution, *e.g.*, *In the Matter of the Tenure Hearing of Barry Deetz*, decided by the State Board November 7, 1984, *aff'd* Docket No. A-1264-84T5 (App. Div. 1985), *certif. denied*, 101 *N.J.* 321 (1985). Although not necessarily required in evaluating student testimony, it is noted that there is no witness testimony corroborating J.M.'s accusations.²

Despite finding his testimony "somewhat inconsistent," the ALJ credited J.M.'s testimony, concluding that "[respondent's] lewd actions were observed at least once by J.M., an 11-year-old boy who was made to suffer the subsequent anxiety of revealing the incident***." (*Id.* at 20) Notwithstanding his obligation to accord due consideration to the ALJ's opportunity to observe witnesses to assess their credibility, the Commissioner's primary responsibility in this matter is to adduce whether the evidence produced at hearing supports the charges against respondent by a preponderance of credible evidence. In this instance, the Commissioner finds that the record does not support reliance on J.M.'s testimony. See *Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40, 42, 50-54 (App. Div. 1962) and *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967).

Not only was J.M. unsure which month(s) he observed respondent viewing sexually explicit material as indicated above, but he was also inconsistent in recounting which days of the week, the time of day and the number of instances.³ J.M. also testified that the alleged incidents occurred when he was in respondent's class for writing.⁴ (Tr. 10/12/99, at 70) Although J.M. had writing only three days a week, he testified that he saw respondent accessing pornographic material every time he went into the classroom and that he went there every day. (Tr. 10/12/99, at 74) Upon further

² The Commissioner does not concur with the Board that respondent's statement to Principal Lippiett, "and then he said that, yes, it was true, but he had done it inadvertently, that sometimes when searching for other items an inappropriate image could come up on the screen, and then he gave me an example***," constitutes an admission of guilt by respondent. (Tr. 10/4/99, at 25)

³ The Board establishes the dates that respondent is accused of accessing sexual material on the Internet between December 1, 1997 and February 27, 1998 based on J.M.'s testimony that the access occurred in his writing classes when he was the only student assigned to respondent, but the Board admits that there is no evidence that respondent looked at sexual material on any specific day between December 1 and February 27. (Tr. 11/16/99, at 120)

⁴ It is undisputed that J.M.'s writing classes with respondent were Monday and Thursday afternoons from 2:00 to 2:30 p.m. and Friday mornings from 11:30 a.m. to 12 noon.

clarification by the Board's attorney, J.M. testified that he witnessed the inappropriate behavior "five or seven times" and "Way more than once." (Tr. 10/12/99, at 75)

Further, the Board was unable to corroborate J.M.'s accusations with witness accounts. Counsel for the Board acknowledged that he had interviewed the teachers and none of them ever saw respondent put anything on the screen of a sexual nature, nor did any students, other than J.M., complain of seeing anything of a sexual nature.⁵ (Tr. 10/5/99, at 211, 212) Likewise, the school's principal, Barbara Lippiett, who testified on behalf of the Board, did not provide any testimony of observing respondent access inappropriate material, although the *possibility* existed for her to observe such activity, if it were occurring during class times, in that it was her stated practice to visit room 6A frequently and always unannounced. (Tr. 8/26/99, at 64 and 10/4/99, at 55-56) It is also noted that J.M. accuses respondent of viewing pornographic material in classroom 6A, which is separated by low dividers and assigned for use by four teachers, Nancy Croessmann, Marilyn D'Amelio, Debra Neeley and Respondent Robert Grundfest, and their students. Teachers Marie McGuire, John Connolly, Barbara Koes and Joan Hart periodically used the room and the computer in question. Nancy Croessmann, Marilyn D'Amelio and Debra Neeley, the three teachers assigned to room 6A with respondent, testified on his behalf. They were unanimous in stating that room 6A was very active with students and teachers constantly going in and out of the room,⁶ and that they had never seen respondent do anything inappropriate on the computer. (Tr. 10/5/99, at 158, 206 and 223) Marilyn D'Amelio, who tutored a student in the classroom at the same time on Friday mornings that J.M. had his writing sessions with respondent, and Nancy Croessmann, who tutored students with schedules that mirrored both J.M.'s morning and afternoon writing sessions,⁷ testified that they could see the computer screen

⁵ The Commissioner notes that J.M. reported to Ms. Lippiett that another student, K.S., may have seen inappropriate materials, but when questioned by Ms. Lippiett, K.S. said she had never seen respondent use the computer at all when she was with him. (R-9, in evidence)

⁶ J.M. testified that Ms. D'Amelio and Ms. Croessmann and some students were in and out of the classroom during his classes. (Tr. 10/12/99, at 105-107)

⁷ Ms. Croessmann testified that she rarely left room 6A. (Tr. 10/5/99, at 200, 201)

from their work areas and that they did not see anything inappropriate, nor did their students report seeing respondent do anything inappropriate on the computer. (Tr. 10/5/99, at 156-159, 205, 206)

J.M.'s uncorroborated testimony must, therefore, be evaluated in light of its inconsistencies regarding the dates and times of the alleged activities, and in conjunction with other statements J.M. made on the record. J.M. admitted that he sometimes lied about whether or not his homework was done and sometimes made up things about what happened on the playground to avoid getting into trouble. (Tr. 10/12/99, at 84) Respondent claims that J.M. threatened him, claiming that J.M. told him that he could get him fired, which J.M. was unable to deny, testifying that he "may have but I don't recall," and upon additional questioning explained further:

As I said before, I don't recall doing it but I may have 'cause--I mean I don't remember doing it in the fifth grade or anything but I could have said it in like third grade 'cause I had him in my class, too.
(Tr. 10/12/99, at 76)

Finally, based on the Board's timeline that J.M. observed respondent viewing sexually explicit material between December 1, 1997 and February 27, 1998, it is important to note that J.M. did not confide in anyone--not a fellow student, a teacher, his principal, his counselor or his parents, that this was occurring until the end of the third month. (Tr. 10/12/99, at 94, 97, 107-109)

Accordingly, after a thorough review of J.M.'s testimony with due consideration to the ALJ's observations, noting the tender age of the student, and in light of the fact that there is no witness testimony to corroborate J.M.'s accusations, the Commissioner must reject the ALJ's reliance on J.M.'s testimony.

The Commissioner, therefore, turns to an assessment of the validity of the computer evidence, which must be viewed 1) in light of the lack of Board policy regarding the use of school computers and the lack of security for the computer in question prior to J.M.'s accusations, and 2) whether the computer evidence was compromised by Board employees investigating J.M.'s allegations.

First, as specified in the record, the Board did not have a policy in place governing the use of school computers prior to J.M.'s accusations. (Tr. 10/4/99, at 78-81) Further, the computer in question was not password-protected and there was no log-in procedure. Respondent's classroom, Room 6A, where the computer was located, was unlocked by a custodian before school and locked again by the custodian on the evening shift after the room was cleaned. The room and computer were available to the four teachers and their students assigned to the room, as well as at least three other teachers who periodically used the computer and the classroom. *Anyone* could have used the computer after school and into the evening before the room was locked, including someone affiliated with a community group in conjunction with events scheduled at the school. (Tr. 10/4/99, at 62-65, 77, 78 and Tr. 11/16/99, at 134, 135)

Since there were no security measures in place in regard to the use of the computer, the Board admits that it cannot identify a single specific date on which it is alleging respondent accessed pornography. Both the Board's expert and respondent's expert agree that there is no way to determine when a particular web site was accessed or who accessed it since there was no password or log-in procedure, and the Macintosh didn't track the accessed sites by recording the time and/or date.⁸ (Tr. 11/15/99, at 111, 216 and 11/18/99, at 127) The only date the Board was able to link with respondent was February 27, 1998.⁹ By relying on the creation dates and last-modification dates in the data files records, the Board concluded that respondent had deleted files on February 27, 1998 shortly after he was confronted with J.M.'s accusations against him. The Board reasons that this circumstantial evidence points to respondent as he was the only person with the motive and opportunity to delete files on that date. However, the deletions on February 27 cannot be read to point solely to respondent because the record reflects that the computer evidence was compromised when

⁸ Noticeably absent from the Board's investigation into this matter is a request to the Internet service provider for a listing of websites accessed with the dates and times.

⁹ The only date that the Board was able to infer from the data on the computer that the computer was accessed for pornographic purposes was on December 30, 1997. (Exhibit M21) Respondent testified that December 30, 1997 was a day during which the school was closed for winter vacation, and that he was at home recuperating from hernia surgery on that date. (Tr. 11/18/99, at 4, 5)

one of the Board employees, Bruce Padian, in the course of his investigation into this matter on March 2, backdated the computer to February 27, 1998. Respondent's expert, Dr. Goldstein, testified that resetting a date backwards would mean that the computer would have found some files that had a date later than the computer date, which is not a good condition to have on the computer, and could possibly lead to failures or crashes on the machine. (Tr. 11/18/99, at 114) On cross-examination, the Board's expert, Mr. Kremen, was questioned about the effect of this backdating, as follows:

Q And on your web site, you publish a -- an on line forensic publication. Is that right?

A Yes.

Q You're familiar with Mark Friedman (phonetic) and Chicara Boon (phonetic)

A Yes.

Q Do they write for your web publication?

A Yes.

Q I'm going to -- is one of the articles they wrote, *Old Rules for New Stuff, Pretrial Discovery and Seizure of Computer Based Evidence*?

A Yes.

Q Did you have any role in writing that?

A No.

Q Have you reviewed it?

A I've read it. Yes.

Q It -- it says in here, most files also contain a date and time stamp of when the file was last changed. If, for example, the date and time are later than the date of a letter or memorandum, that may mean that the memorandum may have been written after the fact. Of course, the memorandum may just as easily have been accessed and rewritten, with no changes at a later date. The date and time stamp is not infallible. In fact, it is very easy to manipulate, with the proper software tools. Accordingly, just because the date and time stamp appears to be a certain

date, do not believe that date to be an absolute fact. Now, do you recall that being published in your journal?

A Yes.

Q Is that statement true?

A Yes.

Q A few -- a sentence later, it says, like any other digital data, the date and time stamp is highly manipulative. Do you agree with that statement?

A Yes.

Q Now, when Mr. Padian changed the date, any file that was created at the time he was looking at the computer would be dated February 27th. Correct?

A That's correct.

Q Any file that was accessed when he was looking at the computer would have an access date of February 27th. Correct?

A Correct.

Q Any file that was deleted would have a deletion date of February 27th. Is that correct?

A That -- a file doesn't -- a file would never have a deletion date.

Q It was -- if it was created, it would have a February 27th date. Right?

A Right.

Q And a modification date of February 27th. Correct?

A Correct.

Q It's those three. Creation, access and modification. Right?

A Correct.

Q And you don't know any particular -- when any particular file was deleted, because there is no deletion date that's available. Correct?

A Well, there's also -- right. You would not find a deletion date or time.

Q Okay. Now, as a forensic computer consultant, would you ever advise a client to change the date on a computer before you'd had a chance to make a mirror image copy of the data on that computer?

A No. I would not.
(Tr. 11/15/99, at 128-132)

The ALJ also noted that by backdating the Macintosh, Padian contaminated the integrity of the evidence, making it impossible to determine with independent certainty whether a time-stamp on a file reading February 27, 1998 is a true or false date. (Initial Decision at 7, footnote 29)

Second, the Commissioner turns to the Board's process of investigating the computer evidence following J.M.'s accusations. On February 26, 1998, the day before respondent was confronted with J.M.'s accusations, Bill Moesch, the director of Special Services, was the first of four Board employees to inspect the computer prior to its being forwarded to Ontrack for data retrieval. Mr. Moesch turned on the computer, looked at some of the most recent files for sexual content and found nothing that gave him any concern, so he turned the computer off. (Tr. 10/4/99, at 188, 189) On March 2, 1998, Bruce Padian, principal of Madison High School, examined the Macintosh. He plugged it in and booted it up, but did not connect the modem. Padian then changed the computer's clock from March 2, 1998 to February 27, 1998, the last date that respondent had access to the computer, then he searched the files on the hard drive. Finding no sexually explicit content, he reset the clock back to March 2 and shut the computer down. (Tr. 10/4/99, at 205-208)

On March 3, 1998, School Business Administrator Michael Hayser took custody of the Macintosh and transported it to his office. (Tr. 10/5/99, at 36) On March 5, 1998, Michael Ricciardi, booted up the Macintosh and examined the files. Finding no sexually explicit content in the files, Mr. Ricciardi further contaminated the evidence when he connected the modem and accessed the

Internet and proceeded to conduct a search on the Donner Party to investigate respondent's explanation that he had inadvertently accessed a pornography site when he had searched for the Donner Party as part of his research for a school project. Mr. Ricciardi testified that some of the listings he retrieved in the search were of a sexual nature. (Tr. 10/5/99, at 86, 101-104)

On March 23, 1998, Robert Hinchcliffe, a senior technical analyst with Fleet Securities, booted up the computer, but did not connect the modem. Mr. Hinchcliffe found the "MagicCookie" file, which was time-stamped with a creation date of February 27, 1998 at 1:57 p.m. and contained six domain names that were pornographic in nature. He then printed out the MagicCookie file. (Initial Decision at 8)

On March 25, 1998, the computer was sent to Ontrack Data Recovery for retrieval of the hard drive data. As noted by the ALJ in a footnote:

According to an Ontrack technical report prepared by Ms. McNary, dated October 4, 1999, the Macintosh was not booted in order to retrieve the hard drive data, *as booting can "change the evidence, including the file count."* [R-24, in evidence] Ms. McNary testified that *when a computer is booted, certain files and corresponding dates may be altered*, although this alteration is usually limited to operating system files. The last date Grundfest had access to the Macintosh was February 27, 1998. *It was booted at least three times before Ontrack recovered the deleted files.* (emphasis added) (Initial Decision at 8, footnote 37)

Thus, the Commissioner finds that the contamination of the computer data evidence caused by the Board's mishandling of the Macintosh computer in question is inexcusable and fatal to its case. It is undisputed that the computer in this matter was in an unlocked room for most of the day and evening where it was available for use by a significant number of people. It is also uncontested that the computer was neither password protected nor log-in protected. Although there is some evidence that pornographic sites were accessed on the Macintosh computer in question, the Board has failed to provide the information necessary to conclude with any degree of certainty from the computer data evidence whether the amount of pornography is consistent with any computer that has accessed

the Internet, whether someone intentionally accessed pornographic sites, or whether any access was inadvertent.¹⁰ Further, because Board employees contaminated the computer evidence, it is also not possible to determine who accessed the pornographic sites or on what date(s) the access occurred. Such contamination also precludes a determination on whether files were deleted by respondent on February 27, 1998 as charged, or whether they were deleted inadvertently by Mr. Padian when he backdated the computer on March 2 in the process of his investigation, or by an unknown person at some other time.

For the reasons set forth above, the Commissioner determines that the Board has failed to meet its burden of proof substantiating the charges of misconduct by respondent by a preponderance of credible evidence.

Accordingly, the Commissioner dismisses the tenure charges against respondent and directs his reinstatement with back pay for the period of his suspension at the level of pay that he would have received had the charges not been brought against him.

IT IS SO ORDERED.¹¹

COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2000

Date of Mailing: June 20, 2000

¹⁰ Respondent's expert, Dr. Goldstein, testified that anyone innocently surfing the worldwide web can very often encounter pornographic sites. (Tr. 11/18/99, at 128) The Board's expert, Mr. Kremen, opines that the volume of pornographic data was too voluminous to have been accessed inadvertently, but he offered no comparative evidence to substantiate his statement, and did not provide any evidence that someone used sexually explicit search terms to pull up pornography. (Tr. 11/16/99, at 14, 15 and Initial Decision at 13)

¹¹ This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.