

IN THE MATTER OF THE TENURE :
HEARING OF HENRY ALLEGRETTI, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
TRENTON, MERCER COUNTY. :

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent French teacher, based on accusations of sexual misconduct, including that he displayed a condom in class and commented that it was too small for him, made a condom into a balloon-type giraffe, discussed aspects of his personal sex life with students, made inappropriate comments of a sexual nature to female students, taught his students profane words in French and used a book to tap a female student on the buttocks.

Based on the evidence presented at the hearing, the ALJ concluded that the Board had established, by a preponderance of the relevant credible evidence, that the allegations serving as a basis for the tenure charges were true. The ALJ further found that respondent's actions did not warrant termination in light of his prior lengthy and unblemished record of service, and because he did not appear to exhibit the type of predatory conduct typically evident in sexual misconduct cases. Therefore, the ALJ recommended that the penalty imposed be the forfeiture of 120 days salary and loss of salary increments respondent would have earned had the charges not been brought against him. The ALJ further recommended that respondent be examined by a psychologist or psychiatrist prior to reinstatement to his position.

The Commissioner adopted the Initial Decision with modification. The Commissioner concurred that the charges proven did not warrant dismissal, but stressed that respondent's behavior cannot be countenanced in the school environment and increased the ALJ's recommended penalty to loss of six months salary plus increments for 1999-2000 and 2000-2001. The Commissioner also ordered respondent to be examined within 60 days by a psychologist or psychiatrist of the Board's choosing and expense.

March 22, 2000

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The record of this matter¹ and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and respondent's reply exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

The Board's exceptions contest the conclusion of the Administrative Law Judge (ALJ) that the nature of the charges themselves and respondent's overall professional record do not warrant termination of employment. While acknowledging that in those cases where a tenured teacher was terminated, the conduct was more egregious than in this instance, the Board contends that termination is the appropriate penalty because the ALJ sustained six separate charges involving the use of inappropriate language and inappropriate conduct against respondent. The Board argues that students should not be exposed to this type of behavior from teachers, and that the penalty of a 120-day suspension without pay and the loss of an increment is a mere slap on the wrist. (Board's Exceptions at 2, 3)

The Board agrees with the ALJ's assessment that respondent should be required to undergo a psychological or psychiatric examination before being permitted to return to work,

¹ The parties did not provide the Commissioner with transcripts of the hearings in this matter.

assuming that the Commissioner upholds the ALJ's determination, but suggests that there should be some incentive for respondent to be examined as soon as possible. (*Id.*)

In his exceptions, respondent objects to the ALJ's references in the Initial Decision to related determinations made by the Division of Youth and Family Services.² Respondent also reiterates his argument that all of the incidents that were alleged to have occurred were during a two-day period when all the female students in the school were attending a family planning seminar in which sexual issues were discussed. It is respondent's position that many of the comments attributed to him were misconstrued, misinterpreted or embellished by students who were sensitive to sexual issues because of the seminar being held at that time. Respondent argues that the charges speak in terms of sexual misconduct and that, while ALJ found that he acted injudiciously in regard to some of the incidents, the judge did not find him guilty of sexual misconduct. Thus, he reasons, the penalty imposed by the ALJ was too severe. (Respondent's Reply Exceptions at 1, 2)

Upon review, the Commissioner determines to affirm the decision of the ALJ with modification as noted below. Initially, the Commissioner concurs that respondent's use of inappropriate language and his inappropriate conduct with his students is conduct unbecoming a teacher. Although the ALJ's findings turn on the credibility of witnesses, the Commissioner is satisfied, based on the record before him, that the ALJ appropriately measured the plausibility of content in deciding the credibility of witnesses and the proper weight to assign to testimony in

² N.J.S.A. 9:6-8.10a, which limits the release or disclosure of child abuse records, reports and information obtained by DYFS in investigating such reports, was specifically modified in 1996 to authorize the Office of Administrative Law to disclose such records:

- b. The division may *** release the record and reports referred to in subsection a., or parts thereof, *** to:
 - (6) A court or the *Office of Administrative Law*, upon its finding that access to such records may be necessary for determination of an issue before it, and such records may be disclosed by the court or the *Office of Administrative Law* in whole or in part to the law guardian, attorney or other appropriate Person upon a finding that further disclosure is necessary for determination of an issue before the court or *Office of Administrative Law* ***. (emphasis added)

reaching his factual findings and conclusions. It is noted that credibility determinations of the finder of fact, who observed the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them. This is especially true, where, as here, transcripts of the proceedings were not provided to the Commissioner. However, even *excluding (arguendo)* the students' testimony and statements, and accepting *all* of respondent's testimony as true, the Commissioner's conclusion is unaltered.

As to the appropriateness of the recommended penalty, the Commissioner finds it necessary to balance the totality of the record herein with the need to stress most emphatically that behavior of the type evinced by respondent cannot be permitted in the school environment. The Commissioner agrees with the ALJ that, in view of all the facts in this matter, including respondent's prior unblemished history, that the extreme penalty of loss of tenured employment is not warranted. However, the Commissioner also agrees with the Board that no student should be exposed to this type of behavior from a teacher, and that respondent's use of inappropriate language and conduct as seen here is a serious infraction deserving a harsh penalty. (Board's Exceptions at 3) The Commissioner therefore finds the penalty imposed by the ALJ, the loss of 120 days salary and loss of salary increments respondent would have earned had the charges not been brought against him, insufficient to impress upon respondent the seriousness of the charges proven in this matter, which include: displaying a condom in class and commenting that it was too small for him, making a condom into a balloon-type giraffe, discussing aspects of his personal sex life with students, making inappropriate comments of a sexual nature to female students, teaching his students profane words in French and using a book to tap a female student on the buttocks. Rather, the Commissioner modifies the penalty to include a loss of salary for six months plus the withholding of salary increments for the 1999-2000 and 2000-2001 school years.

Although respondent did not offer a medical defense, the Commissioner concurs with the ALJ that, given the apparently uncharacteristic behavior of respondent over a two-day period, respondent is to be reinstated to his position only after he is determined to be fit by a psychologist or psychiatrist to be selected and paid by the Board. Such examination is to be completed within 60 days of the date of this decision.

Accordingly, the Initial decision of the OAL is affirmed for the reasons expressed therein, except as modified above with respect to penalty.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: March 22, 2000

³ 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. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.