

IN THE MATTER OF THE TENURE :
HEARING OF DONALD HAMMARY, :
SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
CITY OF ASBURY PARK, MONMOUTH : DECISION ON REMAND
COUNTY. :

SYNOPSIS

The Board filed tenure charges of unbecoming conduct and other just cause against respondent special education teacher/guidance counselor for three incidents involving racial remarks, profanity, failure to counsel students and use of excessive force to discipline a student.

At the OAL, the parties agreed to a settlement. The Commissioner rejected the settlement, as it did not comport with the *Cardonick* standards for settling tenure matters in that it failed to set forth the nature of the charges and the circumstances justifying settlement, and failed to reflect respondent's understanding that the matter would be referred to the Board of Examiners for possible revocation of his certificates. The matter was remanded to OAL for further proceedings. The matter proceeded to hearing.

Following 20 days of testimony, the ALJ found that the Board's witnesses were more credible than respondent and most of his witnesses. The ALJ concluded that the Board had proven its charges of unbecoming conduct against respondent and had demonstrated his unfitness to be a teacher. The ALJ ordered respondent terminated from his employment.

In light of the record and the credibility determinations of the ALJ, the Deputy Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33, adopted the Initial Decision as his own and ordered respondent dismissed from his tenured position as of the date of this decision. The Deputy Commissioner directed that a copy of this decision be transmitted to the State Board of Examiners for action as it deems appropriate.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

November 10, 2003

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions primarily challenge the Administrative Law Judge's (ALJ) credibility determinations and factual findings, along with the ALJ's recommendation that respondent be terminated from his tenured position. As the Board notes in its reply, however, respondent has neither provided the Commissioner with copies of relevant portions of the hearing transcripts nor "made any effort to cite any portion of those transcripts which support his conclusory assertions that Judge Miller's credibility determinations were flawed." (Board's Reply at 2) Furthermore, the Board contends that the ALJ, who observed the witnesses firsthand, is in the best position to make credibility determinations. (*Id.* at 3)

Upon careful and independent review of the record in this matter, which included transcripts from only two of the 20 days of hearing in this matter,¹ and based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Deputy Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33, concurs that petitioner has proven its charges of unbecoming conduct against respondent. As the Board correctly observes, the ALJ's credibility determination is

¹The transcripts were from hearings held on June 25, 2002 and July 9, 2002 and included the testimony of only four of the 25 witnesses in this matter.

entitled to the Deputy Commissioner's deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of the Tenure Hearing of Tyler*, 236 N.J. Super. 478, 485 (App. Div.) *certif. denied*, 121 N.J. 615 [1990]." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 N.J.A.R.2d (EDU) 549, 550. The Appellate Division affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14.² Like the ALJ, the Deputy Commissioner is satisfied, therefore, that the charges and proofs established herein reflect conduct which cannot be tolerated in a school setting, warranting respondent's loss of his tenured position.

Accordingly, the Initial Decision is adopted for the reasons expressed therein. Respondent is dismissed from his position as a tenured teacher as of the date of this decision. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate, pursuant to *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.³

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: November 10, 2003

Date of Mailing: November 10, 2003

***Note: Original document erroneously paginated. Corrected for publication on web.**

² The Court also noted *then* pending legislation providing that "the agency head may not reject or modify any findings of fact on the issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*Ibid. citing* A. 1484, 209th Leg., §10(b), later enacted as *P.L.* 2001, *c.* 5 and now codified at *N.J.S.A.* 52:14B-10(c))

³ This decision 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.*