

IN THE MATTER OF THE TENURE HEARING :
OF ELLEN KENNY, SCHOOL DISTRICT OF :
THE TOWN OF HACKETTSTOWN, WARREN : COMMISSIONER OF EDUCATION
COUNTY. : DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent school nurse for allegedly releasing a student's confidential medical information, pressuring parents, making inappropriate comments, failing to notify the parents of students C.K and D.U. that the results of their scoliosis examinations revealed deviations, and failing to notify the parents of 19 students about the results of their scoliosis examinations, which also showed deviations. The Board sought her dismissal from employment.

In light of the whole record, the ALJ found that respondent's behavior did not rise to the level of conduct unbecoming such that it destroyed public respect for school employees and confidence in the operation of the Board. Her conduct did not justify the imposition of major discipline. Moreover, the Board failed to prove that respondent violated school procedures regarding the results of scoliosis screening of C.K. and D.U. and 19 other students. Respondent had been suspended prior to the time she usually sent the notices of the screening results. Charges were dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own with modification. Upon review of the entire record, including transcripts from five days of hearing, and citing relevant statutes, regulations and Board policy, the Commissioner concurred with the ALJ that respondent's behavior did not rise to the level of unbecoming conduct and did not warrant dismissal from her position. On each charge, the Commissioner was not convinced that the Board demonstrated its allegations by a preponderance of credible evidence.

<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>

January 23, 2004

OAL DKT. NO. EDU 1217-03 AND 1825-03
AGENCY DKT. NOS. 405-12/02 AND 56-2/03
(CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING :
OF ELLEN KENNY, SCHOOL DISTRICT OF :
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board’s exceptions and respondent’s reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, which included transcripts from five days of hearing,¹ together with exhibits, post-hearing briefs, exception and reply arguments, the Commissioner determines to adopt the Initial Decision, with modification, as set forth herein.

Initially, the Commissioner concurs with the ALJ that “[p]roof of the charges against Kenny depends in part on the credibility of the witnesses.” (Initial Decision at 6) In this connection, the Commissioner acknowledges that the ALJ has “carefully considered the testimony and demeanor of the witnesses***” (Initial Decision at 6) and her credibility determinations are entitled to his deference. *See In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550 citing *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989). The Appellate

¹ Hereinafter, transcripts shall be referenced as follows: Tr. 1 - April 7, 2003; Tr. 2 – April 8, 2003; Tr. 3 – April 9, 2003; Tr. 4. – May 13, 2003 and Tr. 5 – May 14, 2003.

Division has 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, decided by the New Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

may not reject or modify any findings of fact as to 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. (emphasis added) *N.J.S.A. 52:14B-10(c)*.

The Board charged respondent with four counts of unbecoming conduct. Count I alleges, in pertinent part:

10. In derogation of her legal duty [to safeguard and ensure the confidentiality of medical records and information about a student’s medical condition and health needs] Ms. Kenny disclosed the details of J.S.’s medical condition and medical needs to an individual not employed by the Hackettstown School District, Renee Gil, who had no legitimate reason for access to confidential medical information concerning J.S.
11. Ms. Kenny’s disclosure of confidential medical information about J.S. was done without the required permission of J.S. or her parents.
12. The release of this information has caused significant distress to the student and her parents and has seriously undermined the integrity of the student health services provided by the Hackettstown School District.
13. The School District administration concluded Ms. Kenny had violated known procedural, legal and ethical requirements for the maintenance of confidential student medical records and information.
14. This improper disclosure of student medical records and information by Ms. Kenny constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1217-03 at 2)

For the reasons fully explicated in her Initial Decision, the Commissioner agrees with the ALJ that “[t]he Board’s evidence that Kenny disclosed confidential information to Renay [sic] Gil about J.S. is unpersuasive.” (Initial Decision at 7)² In so doing, the Commissioner finds that the ALJ’s conclusion is supported by sufficient, competent and credible evidence in the record and, therefore, he may not disturb it. Moreover, even setting aside the issue of the inconsistencies in the testimony of K.C.S. and A.S., as noted by the ALJ (Initial Decision at 8), the Commissioner finds that in light of a categorical denial from both respondent and Ms. Gil that the alleged conversation ever occurred, the Board simply has not proven its allegation by a *preponderance* of credible evidence. Charge I, therefore, cannot be sustained.

In Count II of the tenure charges, the Board alleges:

1. In her communications with the parents of the classified student[s], K.S. and A.S., Ms. Kenny has improperly pressured the parents to take actions that they feel are not in the best interests of their daughter.
2. These efforts on the part of Ms. Kenny were made after the parents advised Ms. Kenny that they felt that the program and services provided for their daughter at Hackettstown High School were appropriate to meet their daughter’s needs.
3. Ms. Kenny’s conduct resulted in J.S. being reluctant to report to the school nurse for necessary medical care for fear that Ms. Kenny would overact to the situation.
4. Ms. Kenny’s repeated contacts and efforts to pressure the parents to obtain additional services for their daughter, which the parents did not feel were in the best interests of their daughter, forced K.S. to contact the School District Superintendent, Joanne Calabro, to intervene in this matter.
5. K.S. requested that the Superintendent take action to prevent Ms. Kenny from having any direct contact with the parents.
6. Such actions on the part of Ms. Kenny have placed the student in unnecessary distress over her own medical care, have forced the parents of a High School student to essentially give up their right to receive necessary medical information from the School Nurse; and have created the risk that a student who requires medical

² To the extent the Board urges the Commissioner to consider testimony regarding the release of information to someone other than Ms. Gil, the Commissioner finds that he cannot properly do so since the charges herein are specific to Ms. Gil.

services will be reluctant to go to the school nurse to seek necessary medical care.

7. The School District administration concluded that Ms. Kenny had violated her duties and responsibilities as School Nurse by putting her own interests and needs above the interests of a student.
8. The above conduct on the part of Ms. Kenny constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1217-03 at 3-4)

On this charge, the Commissioner is similarly not convinced that the Board has demonstrated its allegations by a preponderance of credible evidence. As its central piece of evidence, the Board offered Exhibit P-1, a letter sent by J.S.'s parents to the District in May 2002 requesting that the District revisit the issue of their daughter's latex allergy. Although *signed* by K.C.S. and A.S, apparently, the letter was drafted by someone else. (Exhibit P-3) The Board, however, failed to establish on this record that the letter was drafted by, or even at the behest of, respondent. (Tr. 1 at 45; Tr. 3 at 72; Tr. 4 at 22; Tr 5 at 24, 25) Indeed, any allegation that J.S.'s parents were pressured to take action against their will was undercut by the testimony of K.C.S., who indicated that, upon receipt of the draft letter, she found it to be "perfect," and she did not need to change anything before signing and sending it to the District. (Tr. 4 at 22) K.C.S. further admitted that she only *assumed* respondent was the writer (Tr. 4 at 88); respondent, however, persuasively testified that she did not draft the letter. (Tr. 5 at 24) Indeed, even Ms. Steffner admitted that, up until October 2002, when respondent wrote to Steffner revisiting the issue of the latex allergy (Initial Decision at 4), she did not have a problem with respondent's behavior. (Tr. 2 at 48) Neither has the Board shown that respondent's actions placed J.S. in "unnecessary distress over her own medical care."³ (Count II) Consequently, Charge II cannot be sustained.

³ It is not clear on this record whether J.S. still attends Hackettstown High School. K.C.S. testified that, as of January 2003, J.S. was placed under custody of the Division of Youth and Family Services and is still living in New Jersey, although she and her husband are not. (Tr. 4 at 111-112)

In Count III of the tenure charges, the Board alleges:

1. In communicating with the parents of J.S., Ms. Kenny has discussed matters that are unrelated to the provision of student health services and are inappropriate discussions with parents.
2. Ms. Kenny has discussed with the parents a personnel action taken against her by the High School administration for Ms. Kenny's own misconduct.
3. Ms. Kenny has discussed with the parents her own intention to legally challenge the personnel action taken against her and her intention to take legal action against the school district.
4. Ms. Kenny has been critical of the High School principal in her conversations with the parents, A.S. and K.S., and has revealed to the parents information about Ms. Kenny's own disagreements with the High School principal that the parents feel are not the proper subject of discussion between the School Nurse and parents.
5. Ms. Kenny's discussions with the parents were inappropriate and undermined the credibility of the High School Principal and the High School administration as a whole.
6. Ms. Kenny's criticism's of the High School Principal and of the personnel actions taken against her were not related to the health or well being of the student, J.S., nor intended to provide necessary medical information to her parents. Instead, Ms. Kenny's comments were intended to undermine the authority of the High School Principal and to further her own personal interests.
7. The above conduct on the part of Ms. Kenny constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1217-03 at 4-5)

For the reasons set forth in her Initial Decision at pages 9 and 10, and accepting the testimony of respondent as summarized by the ALJ, the Commissioner concurs that although respondent's comments to J.S.'s parents about her principal were inappropriate, such comments do not rise to the level of unbecoming conduct.

In Count IV⁴ of the tenure charges, the Board alleges, in pertinent part:

4. Pursuant to New Jersey statute, regulations, Department of Education Guidelines, and School District policies and procedures the High School Nurse performs scoliosis screenings for Hackettstown High School students each year.

⁴ This charge was brought separately from the prior three counts. For the purposes of this decision, it shall be considered Count IV.

5. The results of such screenings must be documented and placed in the student's health file.
6. Where the results of the scoliosis screening deviate from the norm, the school nurse is required to notify the parents in writing of the results and advise them of the need for additional evaluation by the family health care provider.
7. During the 2001-2002 school year scoliosis screenings were conducted by Ms. Kenny beginning in October 2001.
8. A number of students screened by Ms. Kenny, including the students C.K. and D.U., showed deviations from the norm.
9. Ms. Kenny failed to notify the parents of C.K. and D.U. in writing of the results of the scoliosis examinations which demonstrated deviations.
10. The failure of Ms. Kenny to send out written notices to the parents of C.K. and D.U. was not discovered until January 2003 when a substitute nurse assigned to the High School discovered that the results of the scoliosis screenings of the two students had not been provided to the parents.
11. The parents of C.K. and D.U. were not notified of their child's scoliosis screening results and the need to follow up with their family physician until notices were sent out by the substitute nurse in January 2003.
12. During the 2002-2003 school year scoliosis screenings were conducted by Ms. Kenny beginning in October 2002.
13. Those screenings revealed nineteen (19) freshman students who showed deviations from the norm.
14. Ms. Kenny failed to send written notice to the parents of the results of the scoliosis screenings.
15. Written notices of the results of the scoliosis screenings for the nineteen freshman students were sent out by the substitute nurse in January 2003.
16. The actions of Ms. Kenny in failing to provide the required written notice to the parents of the scoliosis screening results and the recommendation for a follow-up examination has unnecessarily delayed the process for insuring proper detection of scoliosis at the earliest stage.
17. Ms. Kenny's failure to provide the required written notice of scoliosis screenings to parents in a timely manner constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1825-03 at 1-3)

Respondent testified that in the absence of specific guidance from the District regarding when and how to notify parents pursuant to a scoliosis screening, she developed her own procedures and made it her practice to complete all screenings first, then notify parents,

when she had detected a “positive screening”. (Tr. 5 at 49, 50, 56) She further testified that she never received any directions to the contrary. (Tr. 5 at 56) Indeed, Principal Steffner testified that she never established any specific policies with respect to scoliosis screens and she had no involvement with the screening. (Tr. 1 at 84) Superintendent Calabro also testified that she was not familiar with the procedures for scoliosis screening in the high school. (Tr. 3 at 30-31) Neither was she aware whether there was a timetable for sending out the notices, if any, or what the high school’s past practice had been in this regard. (Tr. 3 at 31-32)

There does not seem to be any dispute on this record that respondent initiated the scoliosis screenings for the 2002-03 school year in October 2002, and was suspended soon thereafter. Furthermore, as the ALJ noted, “The evidence support[s] respondent’s argument that during Kenny’s employment, the Board accepted the practice to notify parents of screening results at the conclusion of the semester.*** Kenny’s suspension in November occurred prior to the time she usually sent the notices of the screening results.” (Initial Decision at 11) The Commissioner finds, therefore, that, under these circumstances, respondent should not be held accountable for failing to notify the parents of the 19 students for whom deviations were detected in October 2002.

Respondent completed the scoliosis screenings for the 2001-02 school year in the Spring of 2002. With respect to the student C.K., respondent testified:

[H]er curve was so mild, that it was probably negative. In fact, I have to say I over screen. This curve I felt it was negative, but because it was at the end of the year, I didn’t have the opportunity to screen her again. So, rather than send this form [Exhibit P-13] home, I called the parent, and I got her answering machine. So, I waited a couple of days – it might have been a day or two days later, and I called again, and I got the answering machine again. So, what I said is I said, you know, “I screened your child for scoliosis. It looks fine to me, but you may want to have your

pediatrician look at it over the summer.” And I didn’t send the letter. (Tr. 5 at 53-54)

C.’s mother denied that she ever received a call or message from respondent. (Tr. 2 at 83-84)

Similarly, with respect to the second student, respondent testified that D.U. was a twin whose sister had already been screened and was found to have a mild curve; a letter indicating the same was sent home in December 2001. At that time, respondent spoke with the twins’ mother, and, in response to her concern about a scoliosis screening for D.U., respondent explained that D.U. would not be screened until later in the 2001-02 school year. Respondent testified that the girls’ mother told her that she would have *both* girls checked out by their doctor. Therefore, respondent testified, although D. had a mild curve, “I didn’t send a letter, because the mother had told me she was going to take them both to the doctor.” (Tr. 5 at 55) The next school year, the girls’ mother confirmed with respondent that she had done so. (*Id.*)

Initially, the Commissioner notes that the relevant statute provides:

Every board of education shall provide for the biennial examination of every pupil between the ages of 10 and 18 for the condition known as scoliosis in accordance with standards jointly established and promulgated by the Departments of Health and Senior Services and Education. Such examination shall be carried out by a school physician, school nurse, physical education instructor or other school personnel properly trained in the screening process for scoliosis. **Every board of education shall further provide for the notification of the parents or guardian of any pupil suspected of having scoliosis. Such notification shall include an explanation of scoliosis, the significance of treating it at an early stage, and the public services available, after diagnosis, for such treatment.** (emphasis added) *N.J.S.A.* 18A:40-4.3.

Additionally, the Board has a policy regarding health examinations and immunizations, revised February 13, 2002, which provides, in pertinent part:

In order to protect the health of the children and staff in district schools, all regulations of the state department of education, the

state department of health and the local board of health shall be scrupulously observed, particularly those dealing with contagious/infectious diseases or conditions. ***

The chief school administrator shall formulate regulations for this policy and for regular pupil health examinations at appropriate grade levels *** for *** scoliosis *** and other physical examinations required by law. Any health defects revealed by any examination given by the school health services must be reported to the parent/guardian. The board shall review the regulations and adopt those required by law. (Policy 5141.3, Exhibit J-2)

Here, even assuming that there was sufficient cause to notify the parents of C.K. and D.U that their children may have scoliosis, it is undisputed that respondent did not do so *in writing*.⁵ The ALJ, however, found that respondent *did* telephone C.K.'s mother on two occasions to provide her notification (initial decision at 11); that finding is supported by sufficient, competent and credible evidence in the record. Furthermore, the Board offered no evidence to dispute respondent's testimony with respect to the notification of D.U.'s mother.

Although the Board seeks to invoke guidelines promulgated by the New Jersey Department of Education to establish that parental notification regarding scoliosis screenings must be in writing, and, therefore, respondent was remiss in failing to send P-13 and P-15 to the parents of C.K. and D.U. (Board's Exceptions at 7-9), under these particular circumstances, where it has not been clearly established that notifications were warranted; where, if warranted, neither statute nor code requires that such notification be in writing; and where the record is devoid of evidence that the Board developed procedures consistent with direction provided by

⁵ Respondent argues, in this connection, "that the two students for whom notes were found by the substitute nurse had mild curvatures and, given her tendency to over screen, she wanted to re-screen the students before notifying the parents.*** [She] was the only witness with any type of medical background, who testified with regard to the significance of the findings she made for the two students. *The only other witness with any type of medical background, the substitute nurse, never checked to see if the results on the notices were accurate, or, if any documentation existed which showed the students had actually been screened.***"* (emphasis in text) Respondent's reply at 34)

the Department's *School Health Services Guidelines*,⁶ the Commissioner cannot sustain Charge IV.

Accordingly, the Initial Decision is adopted for the reasons expressed therein, and amplified above.

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2004

Date of Mailing: January 29, 2004

⁶ The *School Health Services Guidelines* underscore that the goal of the mass screening program mandated by law is early identification, and, therefore, "Students diagnosed with scoliosis should be under the care and supervision of a family healthcare provider or clinic. ****" (*Guidelines* at 32, Exhibit J-4) Additionally, as an "accompanying critical issue," the guidelines state, "When screening results deviate from norm, notify the parent/guardian in writing of these results and of the need for additional evaluation by the family healthcare provider." (*Id.* at 33)

⁷ 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.*