#253-05 (OAL Decision http://lawlibrary.rutgers.edu/oal/word/initial/edu06860-04_1.doc)

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS WACHENDORF,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF CORRECTIONS, MOUNTAINVIEW	:	
YOUTH CORRECTIONAL FACILITY.	:	
	:	

SYNOPSIS

The Department of Corrections (DOC) filed tenure charges of conduct unbecoming against Thomas Wachendorf, a tenured teacher at Mountainview Youth Correctional Facility, and sought his removal following an incident on May 2, 2004 which led to his arrest on charges of resisting arrest, obstruction of justice, eluding, and for failure to report his arrest to DOC within 48 hours.

The ALJ found -- based on testimony presented at hearing and the police videotape of the incident in question -- that the actions and conduct of the respondent constitutes unbecoming conduct so egregious as to warrant dismissal from respondent's tenured teaching position, and so recommended in his Initial Decision.

Upon careful review and consideration, the Commissioner adopts the OAL's Initial Decision, concluding that the record amply establishes that respondent's behavior on May 2, 2004 constituted conduct unbecoming a teaching staff member, and further concurs that dismissal from his tenured teaching position is warranted. The Commissioner emphasizes that the focus here is not the respondent's guilt or innocence regarding specific criminal charges, but rather whether his exhibited behavior underlying those charges amounts to unbecoming conduct; the behavior in question evidences total disregard and disrespect for the law and the authority of law enforcement officials, and is directly contrary and inimical to the expectations placed on teaching staff members – particularly an educator in a corrections facility which is charged with encouraging the rehabilitation of incarcerated persons and reintegrating them into the community as law abiding citizens. Accordingly, the respondent is hereby dismissed from his teaching position with DOC as of the date of this decision and the Commissioner will refer this matter to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

OAL DKT. NO. EDU 6860-04
AGENCY DKT NO. 258-7/04

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent requested and received an extension of time within which to file exceptions to the Initial Decision. These exceptions and those of the New Jersey Department of Corrections ("DOC") were filed in accordance with the modified timeline.

Respondent's exceptions, in large measure, recast and reiterate his arguments advanced below. Specifically, he submits that he was not found guilty of the charges of eluding, resisting arrest, and obstruction of justice but, rather, entered Pre-Trial Intervention, which he completed on March 3, 2005, resulting in the dismissal of these charges. Moreover, respondent argues, the Administrative Law Judge (ALJ) in his Initial Decision does not conclude, even under the preponderance of the credible evidence standard, that he committed these underlying offenses which formed the basis of the tenure charges against him. Because the ALJ did not find respondent's conduct to constitute eluding, resisting arrest or obstruction, the specific conduct upon which the tenure charges are founded, dismissal from his tenured employment is unwarranted. (Respondent's Exceptions at 2)

Respondent charges that the ALJ recommends termination of his employment for unbecoming conduct, essentially based on two "findings": "(1) that [he] 'disregarded' a police/emergency vehicle for approximately one-half mile after he saw the vehicle (Initial Decision, p. 8) and, (2) that [he] waited 7 seconds before opening the door of his vehicle, which he had stopped in the driveway of his home, after a police officer shouted to him to exit the car." Respondent maintains that these "findings" neither constitute the crimes with which he was charged nor do they equate to conduct for which a tenured teacher should be terminated. (*Id.* at 2-3)

Next, although the ALJ finds the "most credible evidence" of the events which transpired on May 2, 2004 to be the videotape admitted into evidence, respondent submits that "[his] description of the images captured on the video is selective and misleading." (*Id.* at 4) Respondent presents his version of, what he categorizes as, "[t]he undisputed facts" evidenced on the videotape, corroborated by his testimony and that of his witnesses, and submits that the ALJ's two findings, for which he recommended respondent's termination from his position, must be viewed in light of these facts which, he avers, represent the "context of the entire off-duty incident." (*Id.* at 4-6)

Further, even assuming, *arguendo*, that any aspect of his actions on May 2, 2004 could be construed as unbecoming conduct, respondent cites to a string of education law cases involving charges of unbecoming conduct or other just cause where termination was found to be the appropriate penalty and submits that the two findings which the ALJ in the present matter found sufficient to sustain the tenure charges against him are far less egregious and fall well short of the type of conduct which the Commissioner has deemed sufficient to terminate a tenured teacher. (Respondent's Exceptions at 16) Also, again referencing his cited cases,

respondent points out that tenure charges of unbecoming conduct have been sustained by the Commissioner in instances where there is a nexus between the teacher's conduct and his or her fitness for duty. Here, in contrast, he avers, the May 2, 2004 incident "was a one-time circumstance, occurring off-duty, not involving any students, and unconnected to [his] position as a teacher." (Id. at 19) The ALJ's attempt to fashion a nexus between his two findings and respondent's fitness to teach with his off-handed assertion that "allowing Wachendorf to continue teaching in a correctional facility sends the wrong message to the Mountainview residents," respondent maintains, is conclusory and purely speculative in nature, as there is no evidentiary support that Mountainview students are even aware of the tenure charges or that respondent would not be able to perform his duties effectively upon reinstatement. (Respondent's Exceptions at 17-18) Moreover, he asserts, in making his penalty recommendation the ALJ erred in failing to consider any mitigating factors. Respondent submits that he is a 13-year State employee, with no prior history of discipline. Pursuant to *West New York v. Bock*, 38 *N.J.* 500 and its progeny, which espouse the principle of progressive discipline, an employer is obligated to review an employee's entire record before meting out discipline. It is abundantly clear, respondent argues, that given his long, unblemished work history, the first step in the disciplinary process cannot be termination. (*Id.* at 19-20)

Finally, respondent points out that the ALJ determined that the DOC's Human Resources Bulletin 84:19 is unreasonable and unenforceable (Initial Decision at 10), and, therefore, clearly erred when he, nonetheless, found respondent guilty of violation of this policy and imposed a two-week suspension for such violation. Not only is it impossible for an unenforceable policy to form the basis for a tenure charge, he argues, but the instant record neither establishes that respondent's conduct with respect to the notice provision of this policy

equated to unbecoming conduct nor does it provide a basis for a two-week suspension. (Respondent's Exceptions at 21-22)

The DOC's exceptions concur with the findings and conclusions of the ALJ with one objection. It professes that the ALJ made a factual finding which is in error and must be rejected by the Commissioner. Specifically, with respect to the construction and interpretation of the DOC's Human Resources policy, HRB 84-19, the ALJ found as fact:

> [t]he position of Corrections that only the employee can notify the institution of an arrest, only the immediate supervisor can receive notification, and that both must be done within 48 hours of the arrest is arbitrary, capricious and unreasonable. A policy which does not allow for serious medical conditions, or vacations or absences of personnel cannot be considered reasonable and enforceable. (Initial Decision at 9-10)
> (DOC's Exceptions at 2)

The DOC submits that neither the construction of this policy nor the DOC's interpretation of it were at issue at the hearing and there was no testimony with respect to either of these topics. Consequently, the DOC charges, the record contains no credible evidence in support of this finding. Moreover, it proposes, this finding is not necessary to the ALJ's valid conclusion that the policy was violated as "neither Wachendorf nor his representative, notified Corrections of Wachendorf's arrest until after a Readington police officer advised Mountainview Principal Investigator Smith on May 10 of the incident." (Initial Decision at 10) (DOC's Exceptions at 3)

Upon careful review and consideration of the record in this matter, which included transcripts of the three days of hearing conducted at the OAL[1] and a videotape of the May 2, 2004 incident at issue herein, the Commissioner, finding respondent's exception advancements without merit, determines to adopt the Initial Decision of the ALJ, as he concludes that the record before him amply establishes that respondent's behavior with respect to the

[1] Hearing was held on December 1, 2004, January 4, 2005 and February 4, 2005.

incident surrounding the DOC's tenure charges constitutes conduct unbecoming a teaching staff member. He further concurs with the ALJ that, under the circumstances existing here, respondent's dismissal from his tenured teaching position is warranted.

In so determining, the Commissioner first finds that the criminal justice system outcome of the criminal charges which form the basis of Count 1 of the tenure charges is wholly irrelevant here. It is well settled that diversion or dismissal of criminal charges has no impact whatsoever on a finding of unbecoming conduct in a tenure matter as to the incident(s) underlying those charges or the imposition of an appropriate penalty. *In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville*, 1978 *S.L.D.* 526, supplemental decision 1979 *S.L.D.* 153, *aff'd* State Board of Education, 1979 *S.L.D.* 155; *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph*, 1980 *S.L.D.* 721, *aff'd* State Board, 1980 *S.L.D.* 728, *aff'd* App. Div., 1981 *S.L.D.* 1537; *In the Matter of the Tenure Hearing of R. Scott McIntyre, Hunterdon-Voorhees Regional School District*, 96 *N.J.A.R.* 2d (EDU) 726. Such is the case because of the fundamental differences in the purpose and scope of these adjudicating forums. Not only is the quantum of proof necessary to sustain criminal charges significantly enhanced from that required to prove tenure charges in administrative proceedings, *i.e.*, beyond a reasonable doubt as opposed to a preponderance of the credible evidence, but, most significantly, the interests implicated in a tenure matter are intrinsically distinct from those in a criminal matter. As observed by the Commissioner in *Dusel, supra*:

> The "interests" to be protected herein are not those associated with a possible indictment or conviction in a criminal matter, but those concerned with fitness to hold a position as an instructor of school pupils. The right of these pupils to be taught by teachers who are free from the taint of patently illegal or flagrantly unbecoming acts is also at issue. (at 531)

For the above reasons, it is neither possible nor necessary for the ALJ to find respondent "guilty" of the criminal charges by a preponderance of the credible evidence in order to reach a determination of unbecoming conduct, notwithstanding these charges form the basis of the tenure charge against him. Rather, the touchstone of a charge of unbecoming conduct is fitness to discharge the duties and functions of one's office or position. *See Laba v. Newark Board of* Education, 23 *N.J.* 364 (1957); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (App. Div. 1974), *certif.* denied 65 *N.J.* 292 (1974) Said differently, a finding of unbecoming conduct does not require a violation of any specific law, rule or regulation, but is based primarily on a violation of an implicit standard of good behavior. Thus, the focus of the inquiry in this tenure matter is not respondent's guilt or innocence of specific criminal charges but, rather, whether his exhibited behavior underlying those charges amounts to unbecoming conduct.

The Commissioner, next, rejects as incongruous respondent's categorization of the factual underpinnings upon which the ALJ based his determination and criticism of his recitation of the events which transpired on the police videotape. More particularly, upon his reasoned review of both the transcripts and the videotape, the Commissioner is in full agreement with the ALJ's summarization in this regard:

> Having viewed the video during the hearing and again in preparation of this decision[,] I find the testimony of Thomas Wachendorf to be incredible and the testimony of Robert Wachendorf to be unsupported by the video. The overhead flashing lights on DeWire's vehicle were in operation for 4 minutes and 15 seconds before Wachendorf entered his driveway and are seen reflecting off Wachendorf's car. DeWire's siren was sounding for the final 3-1/2 minutes of the pursuit; the loud "squawk" horn was heard on the video tape for approximately 3 minutes. Automobiles approaching Wachendorf and DeWire from the opposite direction pulled to [the] shoulder of the road as required by law. After Wachendorf finally stopped his car and DeWire walked to the driver's door, Wachendorf delayed opening

> the car door. Wachendorf waited 7 seconds – and four shouts from DeWire – before starting to open the door. I noted that DeWire holstered his weapon before ordering Wachendorf to exit his vehicle. Wachendorf admitted that he saw DeWire's car behind his vehicle before Wachendorf turned into his driveway, yet he did not drive to the shoulder of the road and stop. Wachendorf traveled about ½ mile knowing a police car was behind his vehicle, signaling Wachendorf to stop. When Wachendorf finally stopped he made no effort to inquire why he was being pursued. On the contrary, *Wachendorf's every effort – during and after the police pursuit – "stone-walled" the police.* I **CONCLUDE** that Wachendorf's disregard of the police/emergency vehicle and the police officer is conduct which brings discredit to himself and his public employer. ***(Initial Decision at 7-8) (emphasis supplied)

Like the ALJ, the Commissioner is persuaded that the respondent's explanations for his actions lack substance. He offers a curious concatenation of events to explain his behavior which, the Commissioner observes, lack persuasive evidential corroboration in the within record. Rather what is abundantly apparent is that respondent's deportment *throughout* this incident evidences a total disregard and disrespect for the law and the authority of law enforcement officials. Such behavior is directly contrary and inimical to the expectations placed on teaching staff members and, undeniably, conduct unbecoming a teacher, most particularly for an educator in a corrections facility which is charged with the responsibility of "provid[ing] an environment for incarcerated persons which encourages rehabilitation and reintegration into the community" (*N.J.A.C.* 10A:1-1.1(6)) as law abiding citizens.

Finally, turning to the requirement of notification of arrest, pursuant to DOC's Human Resources Bulletin 84-19, as amended, (Exhibit P-2), to the extent that the DOC may interpret this policy to require that only the employee may notify of an arrest and that notification must be communicated directly to the employee's immediate supervisor within 48 hours, the Commissioner concurs with the ALJ that such a stringent requirement, under a number of circumstances such as those existing here, would be impossible to satisfy and, therefore, would

render application of the policy arbitrary, capricious and unreasonable. However, the Commissioner finds it unnecessary to reach to the reasonableness of the policy as applied here as he agrees with the ALJ that there is no evidence in the record that *anyone* notified Wachendorf's supervisor *or any other person at his job site* of his arrest within 48 hours of such arrest.

In considering the appropriate penalty in this matter, the prior education law decisions cited by respondent in support of mitigation of penalty in consideration of what he claims is the "less serious" nature of his offense, his 13-year exemplary work record and his contention that his conduct here was not work related, are not particularly beneficial to him in the context of this case. As elucidated in *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* 1966 *S.L.D.* 185:

> The Commissioner finds significant differences between these ***cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion *each matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.* (Ostergren, at 188) (emphasis supplied)

Said differently, because in tenure matters each case is extremely fact sensitive, meaningful comparisons between cases can be difficult to make. The Commissioner's full review persuades him that none of the cases advanced by respondent is similar enough in nature or factual circumstances to the instant matter so as to provide precedential support for respondent's position.

The Commissioner, additionally, does not share respondent's belief that because the incident at issue herein occurred while he was off-duty and didn't involve students that there

is no nexus between his offending actions and fitness for his position. Rather, as correctly observed by the ALJ:

> The responsibility of a teacher is not mitigated by when or where the improper behavior occurs nor the backgrounds of his/her students. Whether teaching in a suburban school district, inner-city school, or a State youth correctional facility, the teacher must set the standard of appropriate conduct. Respect for lawful authority becomes a greater responsibility for the teacher of a student body who [has] already demonstrated a great lack of respect for the rule of law. Wachendorf's return to his classroom at Mountainview would be vindication of his flaunting of lawful authority. ***Permitting Wachendorf to return to Mountainview, ***makes a farce of the risk associated with interfering, ignoring and obstructing law enforcement officers at work.
> (Initial Decision at 8-9)

Although duly considering respondent's lengthy, apparently unblemished record with the State, the Commissioner concludes that these factors, which ordinarily could serve to militate against respondent's dismissal, are greatly outweighed by the seriousness of his conduct in this matter. It is without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987, 1003. As such, some actions are "so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as to raise manifest doubts as to the continued performance of that person in the profession." (*Ibid*.) The Commissioner concludes that such is the case here.[2]

[2] It is noted that the civil service concept of progressive discipline plays no role whatsoever in this matter. Although as a State employee, respondent's employment rights and responsibilities are generally controlled by the provisions of Title 11A and the implementing regulations set forth in Title 4A, as a State employee working as a teacher in a State institution, respondent was granted tenure pursuant to *N.J.S.A.* 18A:60-1.1 which specifies:

> The Legislature hereby finds that it is in the best interest of the State of New Jersey to provide job security during good behavior and efficiency for the teachers and other certified professional educators employed in State institutions within the Department of Corrections and the Department of Human Services.

Accordingly, for the reasons expressed therein, the Commissioner adopts the Initial Decision of the OAL, and hereby orders that Thomas Wachendorf be dismissed from his teaching position with the New Jersey State Department of Corrections, Mountainview Youth Correctional Facility as of the date of this decision. This matter shall be transmitted to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: July 14, 2005

Date of Mailing: July 14, 2005

> To accomplish this goal it is appropriate to provide tenure protection for such professionals teaching in such State institutions *subject to the provisions set forth in this act.* (emphasis supplied)

As such, dismissal or reduction of salary for these individuals for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause is governed by subarticle B of article 2 of chapter 6 of *N.J.S.A.* 18A. (*See N.J.S.A.* 18A:60-2), not rules and regulations of civil service.

[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.*