

#286-07 (OAL Decision: Not yet available on-line)

IN THE MATTER OF THE TENURE :  
HEARING OF IESHA MCCAIN, :  
BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION  
TOWNSHIP OF IRVINGTON, :  
ESSEX COUNTY. : DECISION

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### SYNOPSIS

Petitioning school district certified a tenure charge of conduct unbecoming against respondent – a tenured secretary – for actions which included, *inter alia*: habitual and repeated absence from work, failure to maintain regular working hours, use of disrespectful and profane language, and failure to cease the sale of commercial items on school premises during working hours.

The ALJ found insufficient proofs to sustain the charges involving respondent’s absences and irregular work hours, but found as fact that: the respondent continued to sell commercial items after she was informed that it violated Board policy and was instructed to cease; and respondent did engage in verbal disputes with a supervisor, constituting inappropriate behavior that adversely affected the workplace. The ALJ concluded that the charge of unbecoming conduct is sustained; and that a suspension for six months and the loss of a salary increment constitutes sufficient discipline under the circumstances of the case.

The Commissioner adopted the Initial Decision of the OAL, with modification. The Commissioner found that there was evidence presented that showed that the respondent on several occasions did leave work early without permission; this, together with the evidence that respondent failed to heed the prohibition against selling goods and that she used disrespectful and unprofessional language, results in the substantiation of the charge of unbecoming conduct. Accordingly, the Commissioner ordered that respondent be suspended for a period of six months, and that she lose any salary increment she would have been entitled to in the 2006-2007 school year.

<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>
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July 16, 2007

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The record of this matter, including post hearing briefs,<sup>1</sup> the Initial Decision of the Office of Administrative Law (OAL), and respondent's exceptions have been reviewed.<sup>2</sup> The Commissioner adopts the Initial Decision as the final decision in this matter, with modification.

At the outset, it should be noted that respondent did not, in her exceptions, specifically challenge the Administrative Law Judge's (ALJ) factual findings. Further, the Commissioner recognizes the standard governing the Commissioner's review:

The agency head 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. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

*N.J.S.A. 52:14B-10(c)*<sup>3</sup>

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<sup>1</sup> The parties did not submit a transcript of the hearing.

<sup>2</sup> No reply exceptions were filed with the Commissioner.

<sup>3</sup> Decisional law, too, has long held that an agency head must generally defer to credibility determinations made by the ALJ who had the opportunity to hear the testimony and observe the demeanor of the witnesses. *In the Matter of the Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied*, 121 *N.J.* 615 (1989); *S.D. v. Div. Med. Assistance and Health Services*, 349 *N.J. Super.* 480, 485 (App. Div. 2002); *D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of Princeton Regional School District*, 366 *N.J. Super.* 269, 273 (App. Div. 2004), citing *State v. Locurto*, 157 *N.J.* 463, 470 (1999). See also *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952), *certif. denied* 10 *N.J.* 316 (1952).

The record supports the ALJ's conclusion that the evidence presented did not prove excessive absenteeism on the part of respondent, although the frequency of her absences admittedly impacted her department and was of legitimate concern. Similarly, the evidence reviewable by the Commissioner is consonant with the ALJ's finding that after the January 24, 2006 memorandum referencing respondent's failure - when leaving the job - to punch her time card, that particular behavior ceased. The Commissioner does not, however, accept the ALJ's conclusion that "there was no evidence presented at the hearing that respondent had ever left early without permission." (Initial Decision, p.9)

The Commissioner is mindful of the testimony of respondent's supervisor, Beverly Fisher, that she was unaware of respondent ever leaving early without her permission. However, Fisher left work at 2 p.m. each day - 2 ½ hours before respondent's dismissal time. Thus, she would not necessarily be aware of an early departure by respondent. There are references in Exhibits P-4, P-9 and P-11 to respondent leaving work early without permission. Further, during the March 10, 2006 meeting between respondent, Business Administrator Michael Steele, Fisher and Jeffrey Steele - Fisher's assistant and respondent's supervisor in Fisher's absence - respondent conceded that she had left early the prior workday, that neither Fisher nor J. Steele were available and that she did not notify B.A. Steele of her early departure. Indeed, the evidence indicates that on the afternoon of said meeting, respondent became angry and left early without permission. (P-11, Initial Decision, pp. 7-8)

The foregoing, added to the evidence that respondent failed to heed the prohibition against selling goods, and that she used disrespectful, unprofessional and profane language toward her supervisor in the presence of other employees, results in the substantiation of the charge of unbecoming conduct - as defined, for example, in *In the Matter of the Tenure*

*Hearing of Motley*, EDU 7421-97 (May 5, 1999), pp. 25-26, *aff'd as modified*, decided by the Commissioner (August 4, 1999), *aff'd*. State Board (December 1, 1999):

“Unbecoming conduct” is an elastic term broadly defined to include any conduct “which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services.” *Karins v. City of Atlantic City*, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct “need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. *Hartmann v. Police Dep't of Ridgewood*, 258 N.J. Super. 22, 40 (App. Div. 1992). Despite the apparent vagueness of this standard, “it fairly and adequately conveys its meaning to all concerned.” *Laba v. Newark Bd. of Educ.*, 23 N.J. 364, 384 (1957). In the context of a school tenure case, “the touchstone is fitness to discharge the duties and functions of one’s office or position.” *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 29 (App. Div. 1974), *certif. den.* 65 N.J. 292 (1974).

The Commissioner cannot find fault with the ALJ’s recommendation that the penalty imposed on respondent should be less than termination. The evidence supports the ALJ’s conclusions that the evaluation of respondent should be tempered by the existence of a “culture” of employees selling goods in petitioner’s transportation department, by J. Steele’s unprofessional behavior, and by the familial relationship between J. Steele and B.A. Steele, which may have had an influence upon how respondent’s behavior was regarded and handled. Further, the ALJ had the opportunity to observe the credibility and demeanor of and possibly the dynamics between respondent and other witnesses.

Finally, the Commissioner rejects the two arguments set forth in respondent’s exceptions. Respondent argues that it was inequitable for her to be the only employee punished for selling goods and for her to receive a penalty that is greater than the 60 day suspension that J.

Steele allegedly received for his conduct. In the record, however, there was no evidence presented concerning a suspension imposed upon J. Steele. Assuming *arguendo* that there was such a suspension, the record contains no information about the basis of J. Steele's penalty. By way of contrast, it was established that respondent's penalty was based upon unprofessional behavior, disregard of the prohibition on selling products at work, and irregularities in her working hours. Further, it was established that respondent sold goods after she was directly warned not to do so in a January 24, 2006 memorandum. Respondent presented no evidence that other employees continued to sell items after being warned.

Citing *In the Matter of the Tenure Hearing of Adelpia Poston, School District of the City of Orange, Essex County*, OAL DKT. NO. EDU 3876-05, decided by the Commissioner, October 19, 2006, respondent argues that the principles of progressive discipline were violated by imposing a six month suspension and an increment withholding because respondent "has never received any significant penalty," including suspensions and increment withholdings, "imposed upon her by the Irvington Board of Education." (Respondent's Exceptions, p.2)

The Commissioner finds that the lesser penalty imposed upon the respondent in the Poston case was largely a function of the fact that all of the charges brought against Poston, save the one charge of inappropriate language in front of a student, were found to be unsubstantiated. In any event, the penalty recommended by the ALJ is reasonable and warranted in this case. It is well established that unfitness to remain a tenured school employee may be demonstrated by a single incident if sufficiently flagrant. *See, e.g., In re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967).

Accordingly, the tenure charge of unbecoming conduct against respondent is upheld. Respondent is suspended for six months and loses any salary increment she might have received for the 2006-2007 school year.

IT IS SO ORDERED.<sup>4</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 16, 2007

Date of Mailing: July 16, 2007

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<sup>4</sup> 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.*