

#53-11 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :  
HEARING OF SHAWN JOHNSON, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF THE CITY :  
OF ASBURY PARK, MONMOUTH : DECISION  
COUNTY. :

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SYNOPSIS

The petitioning Board certified charges of conduct unbecoming, misbehavior, and neglect against respondent – a tenured custodian – for leaving the school building before the end of his shift on several occasions and for falsification of time sheets. Respondent contended that he was forced to leave his post early whenever his co-worker – a custodian who possessed a “black seal” license to operate the building’s boilers – wanted to leave early, because respondent did not hold the “black seal” license and was therefore not allowed to remain in the building alone to complete his shift.

The ALJ found, *inter alia*, that: on several dates in the 2008-2009 school year, respondent – by his own admission – left his assigned job prior to the 11 p.m. end of his shift; respondent gave credible testimony that he did so at the direction of a more senior custodian, because respondent did not hold the “black seal” license; and respondent’s testimony was corroborated by the school’s head custodian, who also admitted that Johnson had complained to him about being forced to leave early at the insistence of his co-worker. The ALJ concluded that: the Board met its burden of proof relative to the charges of conduct unbecoming and misbehavior, but did not meet its burden on the neglect charge as the record reflects that respondent performed his actual duties and was by all accounts a good employee; respondent’s lack of any disciplinary history and his reputation as a good worker who performed the tasks required of him – and who advised his immediate supervisor about the problem with his co-worker insisting that he leave early – mitigate against his dismissal from his tenured position. Accordingly, the ALJ ordered that respondent be suspended without pay for the period of one hundred twenty days.

Upon independent review of the record, the Commissioner concurred with the ALJ’s findings and adopted the Initial Decision of the OAL as the final decision in this matter. The Commissioner ordered that petitioner 1) reinstate respondent to his tenured position, and 2) ensure that respondent has not lost more than 120 days of pay and benefits.

<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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February 2, 2011

IN THE MATTER OF THE TENURE :  
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A review of the record in this matter supports the findings in the Initial Decision of the Office of Administrative Law (OAL) that the respondent tenured custodian was a good worker, but was liable for misbehavior and unbecoming conduct when, on a number of occasions, he left work before the end of his evening shift and did not so indicate on his time sheets. The petitioning district certified tenure charges to the Commissioner seeking the termination of respondent's employment.

In the course of the hearing in the OAL, however, testimony was presented by respondent – and corroborated by at least one of petitioner's representatives – that respondent's early departures were the result of the early departures of a senior employee. That employee had a black seal license to operate the building's boiler. On a number of occasions he left work before the end of the evening shift, at which time he advised respondent – who lacked a black seal license – that he could not remain in the building alone.

It is also undisputed that respondent had complained to petitioner's head custodian about the occasions on which he was told to leave work early, but that petitioner's representatives did not institute measures to deter further such incidents. Nor was respondent given permission by his superiors to remain in the building to finish his shift if the employee

with the black seal license were to continue to depart prematurely.<sup>1</sup> As the senior employee apparently did continue to leave before the end of the work shift, respondent continued to be subjected to reductions in his work hours upon the whim of a colleague. With these circumstances in mind, the Administrative Law Judge (ALJ) determined that dismissal was too severe a penalty, and that an 120-day suspension without pay is a consequence that better fits the offense.

There is no question that respondent's falsification of time sheets warrants discipline. However, in light of 1) petitioner's failure – when advised of the problem that precipitated respondent's infractions – to ameliorate same, 2) the testimony of petitioner's representatives that respondent is a hard worker who not infrequently arrived at work early, and 3) the absence of prior disciplinary action against respondent, the Commissioner deems reasonable the determination that dismissal is too severe a penalty in the present case.<sup>2</sup>

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case. Respondent shall be reinstated and petitioner will ensure that respondent has not lost more than 120 days of pay and benefits.

IT IS SO ORDERED.<sup>3</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 3, 2011

Date of Mailing: February 4, 2011

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<sup>1</sup> It also appears from the record that for a period of several months respondent's time cards had shown frequent handwritten entries for the end-of-shift sign-out – as opposed to showing end-of-shift clock stamps. The administrators responsible for approving the time sheets, however, had not investigated this alleged aberration from official procedure.

<sup>2</sup> No exceptions to the reduced penalty recommended by the ALJ have been filed by petitioner.

<sup>3</sup> This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.