

#139-15 (OAL Decision: Not available online)

IN THE MATTER OF THE TENURE :  
HEARING OF AMANDA EISENHOUR, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION  
OF HOWELL, MONMOUTH COUNTY. :

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SYNOPSIS

In January 2012, the Board certified tenure charges of conduct unbecoming against Amanda Eisenhower – a tenured special education teacher in petitioner’s school district – for alleged abusive behavior toward a student and for failure to follow procedures for security during Alternate Proficiency Assessment (APA) testing. The matter was heard in the OAL in May 2012, and the Initial Decision was issued in December 2012. The Commissioner issued a final decision in February 2013, in which he concurred with the ALJ that the Board had established that respondent was guilty of unbecoming conduct, but found that the charges against respondent were of a serious nature, warranting a penalty more severe than that recommended by the ALJ. Accordingly, the Commissioner ordered that the respondent’s increment be withheld for two years and that – pursuant to *N.J.S.A. 18A:6-14* – she be suspended without pay for 120 days following the certification of tenure charges; further, the Commissioner ordered an additional 360 day suspension without pay, as well as appropriate training – with cost to be borne at respondent’s expense as applicable – in the use of assistive techniques for dealing with difficult students and the protocol for the APA. Subsequently, respondent appealed the penalty imposed by the Commissioner. The Appellate Division remanded the matter to the Commissioner for analysis and consideration of the mitigating factors and the proportionality of the penalty for the respondent’s unbecoming conduct.

On remand from the Appellate Division, the Commissioner found, *inter alia*, that: the factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher’s prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring; in this case, there was no indication that respondent’s conduct was premeditated or done with the intent to punish, however physical force in the school environment will not be tolerated; the ALJ’s recommended penalty was not sufficient to impress upon respondent the seriousness of her errors in judgment; respondent engaged in two separate and unrelated incidents of unbecoming conduct, one involving excessive use of physical force with a student, and one involving a breach of testing protocols; a review of the hearing transcripts indicates that respondent did not admit or accept responsibility for her conduct, and thus there is concern that the behavior could reoccur; the penalty imposed must be significant enough to effectively communicate that although she may remain a teacher in the school district, respondent’s unbecoming conduct was completely inappropriate and can never be repeated. Accordingly, the Commissioner determined that the appropriate penalty herein shall be the withholding of respondent’s increments for two years; suspension without pay for 120 days following certification of the charges; an additional suspension without pay of 360 days; and appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA, at respondent’s own expense where applicable.

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.

April 27, 2015

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This case involves tenure charges brought by the Board against respondent, Amanda Eisenhour, a special education teacher in the Howell Township School District. The Board charged the respondent with unbecoming conduct for exhibiting abusive behavior involving improper physical contact towards students, and for failing to follow the appropriate security measures in connection with Alternate Proficiency Assessment (APA) testing. The Administrative Law Judge (“ALJ”) found that the respondent was guilty of unbecoming conduct, including use of excessive physical force with a student, and a breach of testing protocols. The ALJ recommended: loss of respondent’s increment for two years; forfeiture of the 120 days of pay withheld pursuant to *N.J.S.A. 18A:6-14* following the certification of tenure charges; and an additional 150 day suspension without pay. The ALJ also recommended that the respondent be provided with the appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA.

In a decision dated February 11, 2013, the Commissioner concurred with the ALJ that the Board established that the respondent was guilty of unbecoming conduct. The Commissioner was also in accord with the ALJ’s determination based on the circumstances and considerations existing in this matter, that the removal of respondent from her tenured position was an unduly harsh penalty. However, recognizing the seriousness of the charges, the

Commissioner found that the penalty recommended by the ALJ was not sufficient to impress upon respondent the seriousness of her errors in judgment. The Commissioner emphasized that inappropriate physical force will not be tolerated under any circumstances, and the breach of testing protocols by tampering with assessments is extremely serious. The respondent appealed the Commissioner's February 11, 2013 decision, and on June 18, 2014, the Appellate Division remanded this matter to the Commissioner for an analysis and consideration of the mitigating factors and the proportionality of the penalty for the respondent's unbecoming conduct.

The factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. *In re Hearing of Ostergren, Franklin School District*, 1966 S.L.D. 185; *In re Hearing of Kittell, Little Silver School District*, 1972 S.L.D. 535, 541; *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967). It is also well recognized that by virtue of the unique position they occupy educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 S.L.D. 302, 321

[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.* (Emphasis added)

It is well established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *Fulcomer, supra*, 93 N.J. Super. at 421 (citations omitted)

After a comprehensive analysis of the nature and circumstances surrounding respondent's conduct in this case, the Commissioner concurs with the ALJ that, based upon the mitigating and aggravating factors outlined in the Initial Decision, the conduct proven at the hearing does not warrant the removal of the respondent's tenure. Notably, there is no indication that the respondent's conduct was "premeditated, cruel or vicious, or done with the intent to punish." See, *In re Fulcomer, supra*, 93 N.J. Super. at 421. However, the Commissioner again finds that the penalty recommended by the ALJ is not sufficient to impress upon respondent the seriousness of her errors in judgment displayed in this matter.

Despite the fact that the respondent has received positive evaluations during her tenure with the District, the respondent engaged in two separate and unrelated incidents of unbecoming conduct that involve excessive physical force with a student, and a breach of testing protocols. When considering the nature of the incidents under the *Fulcomer, supra*, analysis, it is often important to assess whether the students were directly impacted by the inappropriate conduct. See, *In the Matter of the Tenure Hearing of Lauren Cooke, School District of the Township of Egg Harbor, Atlantic County*, Commissioner Decision No. 503-10, decided November 22, 2010 (When determining the appropriate penalty for the respondent's use of inappropriate name calling in reference to another staff member, the Commissioner considered the fact that the respondent never treated the students inappropriately and her comments were not directed at a student or made around the students.) The fact that the unbecoming conduct proven in this case was not isolated to the faculty or staff, but instead directly impacted the special education students in the District, is an aggravating factor in determining the proportionality of the penalty.

Further, the Commissioner has previously stated that physical force in the school environment will not be tolerated. See, *In the Matter of the Tenure Hearing of Edith Craft, School District of the Township of Franklin, Somerset County*, Commissioner Decision No. 366-11, decided September 1, 2011. In that case the Commissioner emphasized that:

There are a series of cases which are routinely cited by litigants involving incidents of physical contact between a teacher and a student. Although the penalties given in those cases can offer some insight into appropriate penalties to be imposed in future matters, it is important to recognize that cases involving physical force are extremely fact sensitive and require a case-by-case analysis. Moreover, conduct on the part of teaching staff members that occurred several decades ago may not be consistent with the type of behavior that will be tolerated in this day and age.

Although the student was not injured in this case when the respondent yanked him by the arm, the Commissioner finds the respondent's behavior particularly troubling under the circumstances because her use of excessive force involved a special education student who may not be in a position to understand the situation. Moreover, the excessive force was witnessed by three other staff members, and it had an impact on the school environment. 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.

Additionally, with regard to the respondent's present state, a review of the transcripts indicates that the respondent did not admit or accept any responsibility for her conduct. The respondent denied using excessive force on the student, and with respect to the testing protocols, she simply provided excuses for the breaches.<sup>1</sup> There is a concern that, without accepting responsibility or acknowledging the extent of the inappropriate conduct, there could be

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<sup>1</sup> The ALJ did note that the respondent was not insubordinate or resistant to learning new teaching methods or skills.

a likelihood of the behavior recurring. Consequently, a significant penalty must be imposed on the respondent that effectively communicates to her that although she may remain a teacher in the District, her conduct was completely inappropriate and can never be repeated.

Therefore, the respondent's increments shall be withheld for two years and – pursuant to *N.J.S.A. 18A:6-14* – the respondent is suspended without pay for 120 days following the certification of tenure charges, and the respondent shall also be suspended for an additional 360 days without pay. Furthermore, the respondent shall receive, at her own cost and expense to the extent there is same, the appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA.

IT IS SO ORDERED.<sup>2</sup>

COMMISSIONER OF EDUCATION

Date of Decision: April 27, 2015

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<sup>2</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)