EDU # 5619-99
C # 310-00
SB # 61-00

IN THE MATTER OF THE TENURE HEARING :

OF JOSEPH GRACEFFO, SCHOOL DISTRICT : STATE BOARD OF EDUCATION

OF THE TOWNSHIP OF WAYNE, : DECISION

PASSAIC COUNTY. :

Decision on motion by the Commissioner of Education, October 20, 1999

Decided by the Commissioner of Education, September 21, 2000

For the Respondent-Appellant, Robert M. Schwartz, Esq.

For the Petitioner-Cross/Appellant, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

In May 1999, the Board of Education of the Township of Wayne (hereinafter "Board") certified tenure charges of unbecoming conduct against Joseph Graceffo (hereinafter "respondent"), a tenured vice principal, charging that he had violated N.J.S.A. 18A:40A-12 and the Board's Policy No. 5131.6 by failing to arrange for the immediate medical examination of high school students who had been referred to him by staff members who suspected that the students were under the influence of drugs or alcohol.[1]

---

[1] N.J.S.A. 18A:40A-12 provides, in pertinent part:

> a. Whenever it shall appear to any teaching staff member, school nurse or other educational personnel of any public school in this State that a pupil may be under the influence of substances as defined pursuant to section 2 of this act, other than anabolic steroids, that teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the

Two of the incidents alleged in the tenure charges involved student N.L. On January 21, 1999, the respondent had N.L. evaluated by the school nurse after a staff

---

> principal or, in his absence, to his designee. The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector, if he is available. If a doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil if available. The pupil shall be examined as soon as possible for the purpose of diagnosing whether or not the pupil is under such influence….

Board Policy No. 5131.6, "Drugs, Alcohol and Tobacco," provides, in pertinent part:

> A. Procedure for identifying and assisting students who may be at risk of developing alcohol and/or drug dependencies excluding classes involving anabolic steroids
>
> 1. Whenever it shall appear to any teaching staff member, school nurse and/or other educational or professional medical staff member that a pupil may have used, consumed and/or be under the influence of alcohol or other drugs, that staff member shall report the matter as soon as possible to the building's professional medical staff member and principal or other administrator….
> 2a. In compliance with N.J.S.A. 18A:40A-12, the principal or, in his absence, his/her designee shall immediately notify the parent/guardian and the Superintendent and arrange for the pupil to immediately be medically examined by a doctor selected by the parent/guardian….
> 2b. The principal or his/her designee shall explain to the student's parent/guardian the details of the examination process which will be used by the District if the student is not examined by the parent's/guardian's own doctor….
> 2c. As soon as possible after a student is reported as possibly being under the influence, the principal or designee and the school nurse shall verbally explain to the student's parent/guardian what the symptoms were which led to the reporting….
> 3. If the school authorities are unable to contact the parent/guardian and/or if the doctor selected is not immediately available, the school medical inspector or designee shall be immediately called upon to examine the pupil for the purpose of diagnosing whether or not the pupil is under the influence of alcohol or drugs pursuant to N.J.S.A. 18A:40A-12….
> 4. If such doctor, medical inspector or his/her designee is not immediately available or if the situation becomes life threatening, the pupil shall be immediately taken to the emergency room of the Wayne General Hospital or the nearest hospital, for examination and/or treatment….

member, Susan Ammerman, reported to the respondent that she had detected an odor of marijuana on N.L. When the school nurse told the respondent that she was not able to corroborate the teacher's suspicions, he decided not to arrange for further medical examination. The next day, another staff member, Robert Flower, reported to the respondent that he also had detected the odor of marijuana on N.L. The respondent again failed to arrange for an examination of N.L. Two weeks later, on February 6, 1999, N.L. died of a drug overdose.

The Board also charged that the respondent had engaged in unbecoming conduct with regard to the following incidents.[2] In 1991, Victoria Musetti, the Student Assistance Specialist, observed a student run out of the respondent's office in an agitated state and knock everything off of the counter in the front office (hereinafter "the rage incident."). She told the respondent that she believed the student might have been under the influence of drugs and that he should be tested. The respondent did not arrange for an examination since he felt that there was not a reasonable suspicion to believe that the student was under the influence.[3] In 1994, a teacher referred three students to the respondent for drug testing. The respondent failed to have one of the students, D.M., tested, allegedly telling Musetti that he did not want another confrontation with D.M.'s mother. On October 23, 1995, a guidance counselor referred a student, A.F., to the respondent for drug testing. The student was not tested until the

---

[2] We note that the incidents from 1991 and 1994 were not included in the tenure charges certified to the Commissioner, but were raised by the Board during the proceedings in the Office of Administrative Law. Although the ALJ granted the respondent's motion to strike those charges, the Commissioner, upon interlocutory review, reversed the ALJ's ruling and allowed the Board to proceed on those charges, concluding that it had adequately set forth the incidents in question so as to allow the respondent to prepare a defense.

[3] Neither the respondent nor the Student Assistance Specialist could remember the name of the student involved in that incident.

following day. Finally, on November 5, 1996 at the end of the school day, Musetti referred a student, J.B., to the respondent, requesting that he be tested for drugs. The next morning, the respondent informed her that he could not implement the test since he was the only administrator in the building at that time. When another vice principal returned around noon that day, she arranged for J.B. to be tested.

In a decision issued on June 19, 2000, an Administrative Law Judge ("ALJ") observed that the parties differed with regard to what triggered the requirements of N.J.S.A. 18A:40A-12 and Board Policy 5131.6. The Board maintained that its policy was triggered whenever a staff member reported a suspicion that a student was under the influence. It contended that once a staff member made such a referral, neither the vice principal nor the school nurse had any role in determining whether the student would be tested. The respondent argued that the drug policy was not triggered by the referral. Rather, the decision to test a student for substance abuse was based on the totality of the circumstances and the standard of reasonable suspicion.

In interpreting N.J.S.A. 18A:40A-12, the ALJ reasoned that the underlying purpose of the statute – to identify students who are substance abusers, assess the extent of their involvement with such substances and, when appropriate, refer them for professional treatment – supported interpreting the phrase "shall arrange for an immediate examination of the student" as a mandatory directive. Thus, the ALJ concluded:

> administrators have no discretion to decide whether to test students '[w]henever it shall appear to any teaching staff member, school nurse or other educational personnel…that a pupil may be under the influence of substances.' N.J.S.A. 18A:40A-12(a). The legislative intent behind the statute reflects a 'zero-tolerance' attitude towards drug abuse and

> the statutory language leaves little room for interpretation. Moreover, there is nothing in the legislative history to indicate that the statutory provision was not intended to be mandatory. Accordingly, whenever a staff member reports a student whom she/he suspects might be under the influence of drugs, the administrator must implement the drug test.

Initial Decision, slip op. at 13.

The ALJ added that:

> logic dictates that no test would be required if a teacher referred a student for testing without having observed significant symptoms of possible drug use. Thus, the mandatory testing requirement is triggered upon a referral from the teacher that is based upon reasonable suspicion.

Id. at 14.

Applying N.J.S.A. 18A:40A-12 and Board Policy No. 5131.6 to the facts of this case, the ALJ concluded that the Board had established the respondent's unbecoming conduct with regard to four of the six charged incidents. She found that the Board had demonstrated that the respondent had violated the statute and policy with regard to the incidents involving students A.F. and J.B. and with regard to both incidents involving N.L. The ALJ found that the delay in arranging for an examination of A.F. until the next day violated the essential spirit and underlying purpose of the policy and law, concluding that the use of the word "immediately" in the statute implied a same-day examination. Similarly, the ALJ concluded that the respondent had violated the statute when he failed to arrange for an immediate examination of J.B., although she noted that all staff members involved in this incident had contributed to the one-day delay.

The ALJ also concluded that the respondent had violated the statute by not arranging for an examination of N.L. The ALJ found that the communications to the

respondent from both staff members were sufficient to trigger the requirements of the statute.

However, the ALJ found that the Board had not established unbecoming conduct with regard to the student involved in the "rage incident" in 1991. Applying "a sensible rather than a literal interpretation to the law and policy," initial decision, slip op. at 19, the ALJ found that the respondent was in a better position than the Student Assistance Specialist, who had had no prior contact with the student involved in that incident, to understand the reasons behind his rage. The ALJ concluded that a literal reading of the statute, which would require an administrator to automatically test every student referred by a staff member, was not a reasonable or sensible interpretation of the testing provisions.

The ALJ also concluded that the Board had not established the tenure charge involving D.M. Noting that the incident was not even raised until the hearing, the ALJ found that the evidence presented by the parties was "in a state of equilibrium with respect to whether certain facts exist." Id. at 25. Stressing that the burden was on the Board to demonstrate the truthfulness of the charge, the ALJ concluded that there was insufficient evidence to establish that the respondent had violated the statute or Board policy with regard to that incident.

In determining the appropriate penalty, the ALJ observed that the respondent was an experienced administrator who had exhibited poor judgment in not promptly arranging for medical examinations for A.F. and J.B. and by not arranging for an examination of N.L. after receiving separate referrals on consecutive days from two different staff members. Pointing out that the respondent had served in the district for

34 years with an unblemished record and had been active in school and community activities, the ALJ found that these mitigating factors outweighed the respondent's failure to properly implement the district's drug policy. Moreover, the ALJ, who had the opportunity to observe the respondent's demeanor, was persuaded that the respondent was remorseful over the death of N.L. Accordingly, the ALJ recommended that the respondent suffer a permanent reduction of one step on the salary guide and forfeit all salary and benefits from the first 120 days of his suspension.

In a decision issued on September 21, 2000, the Commissioner of Education adopted the ALJ's conclusion that the Board had demonstrated unbecoming conduct with regard to the charges involving students A.F., J.B. and the two charges involving N.L. In reaching this conclusion, the Commissioner clarified that a principal or his designee was obligated under the law to arrange for an immediate medical examination of a student after a staff member advised the designated administrator of his or her belief that the student had exhibited signs of possible substance abuse and "articulate[d] the observations, symptoms and indicators underlying this conclusion." Commissioner's Decision, slip op. at 55. As expressed by the Commissioner:

> There is nothing in the plain language of N.J.S.A. 18A:40A-12, nor in its legislative history, to indicate that the statutory provision requiring an immediate medical examination was not intended to be mandatory upon a staff report of a student who appeared, based on specific observed indicators, to be under the influence of alcohol or other drugs….
>
> Within this framework, the mandatory medical examination is, therefore, triggered upon referral from the teaching staff member based upon the staff member's observation of specific indicators and determination based upon them that the student appears to be under the influence of alcohol and/or drugs. [Emphasis added.] There

> is nothing in N.J.S.A. 18A:40A-12 suggesting, much less authorizing, once a report has been made, that the designated administrator may first seek to validate the referring staff member's observations or judge the reasonableness of his or her conclusions before taking the actions required by statute. Instead, the administrator must act once the student has been reported….Neither is there anything suggesting that the staff member must specifically request that the student be chemically screened or otherwise examined before the required medical examination is arranged….[I]t is the referral itself that, under N.J.S.A. 18A:40A-12 and N.J.A.C. 6:29-6.5, unequivocally requires the principal or his designee to arrange for an immediate medical examination [emphasis omitted] of the student.

Id. at 55-57.

Significantly, the Commissioner emphasized that:

> …a staff member need not be certain that a student is under the influence of alcohol or drugs, but need only have made a reasonable judgment, based upon symptoms and indicators he or she has observed in the student and articulated to the designated administrator, that the student appears to be under such influence.

Id. at 56-57 (emphasis omitted).

On the basis of this standard, the Commissioner sustained the four tenure charges involving students A.F., J.B. and N.L. The Commissioner concluded that the respondent had "made conscious decisions which he knew, or should have known, contravened statute and the Board's policy," id. at 66, and he agreed with the ALJ that the respondent's failure to arrange for an immediate medical examination of those students was a serious infraction deserving a significant penalty. The Commissioner also concurred with the ALJ that the Board had not demonstrated the tenure charge involving student D.M.

The Commissioner, however, did not agree with the ALJ's conclusion regarding the 1991 "rage incident." The Commissioner concluded that, under the standard he had articulated, the factual circumstances demonstrated by the Board in relation to this incident established the respondent's unbecoming conduct. In so finding, the Commissioner relied heavily upon the fact that Musetti, the reporting staff member, was a certified substance awareness coordinator serving in the position of Student Assistance Specialist.

The import given by the Commissioner to the fact that Musetti was a certified substance awareness coordinator reflected the great emphasis that he placed on the statutory requirements for in-service training of professional staff members with regard to the identification of students who might be under the influence of drugs or alcohol. See N.J.S.A. 18A:40A-15. The Commissioner however found that the in-service training that had been provided by the Board in this case had been "woefully inadequate." Id. at 65. The Commissioner therefore directed the Board to "undertake such revisions of its policies and procedures as are necessary to reflect the requirements of N.J.S.A. 18A:40A-12 and implementing rules consistent with the decision herein, [and] to institute a program of continuing education so that staff members will be able to fulfill their obligations under the law…." Id. at 67.

The Commissioner stressed, in addition, that a drug test did not equate to a medical examination within the requirements of the statute, as suggested by the ALJ, and that the statute's requirement for an immediate medical examination of a student who was reported as appearing to be under the influence of alcohol or drugs dictated that such an examination be conducted by a physician.

Despite his rejection of the ALJ's conclusion that the 1991 "rage incident" did not demonstrate unbecoming conduct, the Commissioner adopted the penalty recommended by the ALJ. Accordingly, he directed that the respondent suffer a permanent reduction of one step on the salary guide and forfeit all salary and benefits from the first 120 days of his suspension, finding that the charges he had sustained warranted such a penalty under the circumstances.

The respondent filed the instant appeal to the State Board of Education, maintaining that the respondent "cannot be found to have exhibited conduct unbecoming or unprofessional conduct if his conduct followed a practice in the district which others followed as well, and if his supervisors not only failed to criticize him for what he did or didn't do, but testified that they agreed with what he did." Appeal Brief, at 39. The respondent insists that his mistakes were based on a common misunderstanding of the obligations imposed by the statute and that there is no credible evidence to support the conclusion that he knew that he was contravening statute or policy. The Board filed a cross-appeal, contending that the appropriate penalty under the circumstances is dismissal of the respondent from his tenured employment.

After a thorough review of the record, we affirm the Commissioner's decision as modified herein.

We agree with the Commissioner that although the tenure charge involving student D.M. cannot be sustained, the Board has demonstrated the respondent's unbecoming conduct by a preponderance of the credible evidence with regard to the charges involving A.F. and J.B. and the two charges involving N.L. The record clearly shows that the respondent made a conscious decision not to arrange for an immediate

medical examination in the cases of A.F. and J.B., as required by N.J.S.A. 18A:40A-12 and the Board's policy, and that he similarly failed to arrange for any examination of N.L. The fact that other staff members may also have misunderstood their obligations under the applicable statute does not excuse respondent's failure to comply with its requirements.

However, contrary to the Commissioner, we agree with the ALJ that the Board has not demonstrated that respondent violated the statute or policy when he failed to arrange for a medical examination of the student involved in the 1991 "rage incident." Although we fully concur that the standard articulated by the Commissioner is the proper standard for judging compliance with the applicable statutory framework, we find that he did not properly assess the factual circumstances of the "rage incident" under that standard.

Like the Commissioner, we stress that once a staff member reports that a student appears to be under the influence of alcohol or drugs and articulates the specific indicators that form the basis for his conclusion, a principal or his designee does not have the discretion to reject that conclusion. Commissioner's Decision, slip op. at 55-57.[4] However, we further emphasize, as did the Commissioner, that such conclusion must represent a reasonable judgment based upon the symptoms and indicators the staff member observed in the student. Id. at 56-57. Clearly, such judgment cannot be reasonable if the staff member is not able to articulate which of the

[4] Although not expressly articulated by the Commissioner, it is clear that the "indicators" repeatedly referenced in his decision are those which would be presented to staff members as part of their in-service training. See N.J.S.A. 18A:40A-15.

specific indicators formed the basis for his conclusion or if his perception of the factual circumstances underlying his assessment of the symptoms is patently flawed.

In contrast to the factual circumstances presented by the four charges that have been sustained, those presented by the 1991 "rage incident" are atypical. Musetti's observations, upon which the tenure charge relating to this incident was predicated, were limited to the aftermath of a disciplinary meeting between the respondent and a student, and she was unaware of the context of the conduct she was observing when she made her judgment concerning that conduct. As demonstrated by the record, Musetti had heard the respondent and the student yelling at each other in the respondent's office. She then observed the student come out of the office and, according to her testimony, "he was extremely, extremely angry. His face was contorted, he was bright red, he was very, very hostile….He came out of the office and he knocked everything off of the counter that was within his reach. He came around that counter and he flung open the door, it ricocheted off of the glass portion of the wall and he bolted out of the building." Tr. 12/7/99, at 42.

When Musetti asked the respondent if he thought the student's behavior might have been drug or alcohol related, he responded that the student was just very angry. She testified that "my thoughts were the child's high as a kite. And so I said, I think the child is possibly drug affected and I would like us to drug test this person." Id. at 43-44. She conceded that she did not know why the student had been in the respondent's office and that she had not spoken to the student that day or spent any time with him. Nor did she know any details about what had occurred or been discussed in the respondent's office. Tr. 12/8/99, at 14, 18-19. Musetti further acknowledged that her

suspicions were based solely on her brief observation of the student's agitated behavior after he had left the respondent's office. Id. at 21.

The respondent testified that the student had been in his office "for a long period of time" on a disciplinary matter. Tr. 2/28/00, at 113-14. He recalled that the student had angrily left his office and that he had told Musetti that "the student just came out of my office and he's upset over the issues that I was discussing with him." Id. at 115.

Under these circumstances, in which Musetti had briefly observed the aftermath of the student's meeting with the respondent, and, unlike the respondent, had had no involvement with the student or any knowledge of the circumstances of that meeting or what had occurred therein, we agree with the ALJ that a "sensible" application of the statute would not penalize the respondent for not arranging for a medical examination of that student. In this respect, we again stress that the respondent had just spent considerable time with the student involved in the incident and was in a unique position to know the circumstances leading to the conduct observed by Musetti and to understand the reasons for that behavior. She was not. Musetti was not aware of the reasons for the student's meeting with the respondent, did not know what had occurred in his office just prior to her observation of the student, and had not spoken to the student herself. She had simply observed the student leaving the respondent's office in an agitated state. Indeed, Musetti had no knowledge of the basis for the student's behavior. The respondent did. Under these particular facts, we agree with the ALJ that N.J.S.A. 18A:40A-12 and Board Policy No. 5131.6 did not require the respondent to arrange for a medical examination of that student.

Our conclusion with regard to that incident is reinforced by N.J.A.C. 6:29-6.3, which was in effect during the period relevant to this case and which represented the Department of Education's interpretation of N.J.S.A. 18A:40A-12. That regulation provided, in pertinent part, that:

> (a) District boards of education shall adopt and implement policies and procedures for the evaluation, intervention and referral to treatment of pupils whose use of alcohol and other drugs has affected their school performance or who possess, consume or who on reasonable grounds are suspected of being under the influence of [alcoholic beverages and controlled dangerous substances]." [Emphasis added.]

Consistent with that regulation and as set forth above, the Commissioner repeatedly stressed in his decision that, while a staff member need not be certain that a student is actually under the influence of alcohol or drugs, his judgment that the student appears to be under the influence must be a reasonable one, based on symptoms and indicators articulated to the designated administrator. See N.J.S.A. 18A:40A-11 (boards shall adopt and implement policies and procedures for the evaluation, referral for treatment and discipline of pupils involved in incidents of possession or abuse of substances on school property or at school functions or who show significant symptoms of the use of those substances).

We turn now to the appropriate penalty to be imposed on the respondent. In determining that penalty, it is necessary for us to consider the nature and gravity of the respondent's conduct under all of the circumstances involved, including mitigating and extenuating circumstances, and any injurious effect the conduct may have on the proper administration of the school district. In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967). As found by the ALJ:

> Graceffo is an experienced administrator who exhibited poor judgment by not promptly testing A.F. and J.B. and by not testing N.L. after receiving a referral from Ammerman and Flower. Except for the pending charges, Graceffo's record is unblemished. He has served the District for thirty-four (34) years in many positions including teacher, director and coordinator of several departments and vice principal. He has also been active in school and community activities. These mitigating factors outweigh Graceffo's failure to implement the drug policy referenced in the charges.
>
> I have considered the Board's argument that any penalty short of dismissal will be futile, because if Graceffo is allowed to return to the District he will continue to live by his purported philosophy of laws were meant to be broken. Petitioner's Brief at 100. The argument is unpersuasive. I have observed Graceffo's demeanor and the demeanor of all the witnesses who appeared at the hearing. I am persuaded that Graceffo is remorseful over the death of the student who attended his school and that he has learned a lesson from all the embarrassment and humiliation that he has suffered from having to endure this protracted ordeal. Moreover, Graceffo's employment record does not square with the image of a reckless lawbreaker that is portrayed by the Board.

Initial Decision, slip op. at 30-31.

Notwithstanding the respondent's contention that he had acted with the approval of and in a manner consistent with that of other administrators in the district, we find that both N.J.S.A. 18A:40A-2 and the Board's policy are clear in requiring that the principal or his designee immediately notify the parents or guardian of a student reported to be under the influence of drugs or alcohol and arrange for an immediate medical examination of that student. The respondent failed to comply with those mandates on four separate occasions. In considering the nature and gravity of the offense under all the circumstances, including the fact that the Board has not countered any of the ALJ's credibility determinations, we reject the Board's argument that dismissal of the

respondent from his tenured position after 34 years of unblemished service is the appropriate penalty. However, we agree with the Commissioner that it is necessary to "impress most emphatically upon respondent the seriousness of his conduct." Commissioner's Decision, slip op. at 66. We therefore impose on the respondent the penalty recommended by the ALJ and adopted by the Commissioner – a permanent reduction of one step on the salary guide and forfeiture of all salary and benefits from the first 120 days of his suspension.

We recognize in so doing that we have set aside the Commissioner's determination with regard to the 1991 "rage incident." However, like the ALJ and the Commissioner, we have sustained the four charges against the respondent that involved students A.F., J.B. and N.L. Given the nature of these charges, we concur with the ALJ's determination that the respondent's conduct in failing to arrange for the immediate medical examination of those students warrants the imposition of this penalty.

In rendering our decision today, we recognize that new regulations became effective on May 7, 2001 providing for procedures for substance abuse intervention. See N.J.A.C. 6A:16-4.1 et seq. In view of our determination herein, we direct the Commissioner to review those regulations to ensure that they are consistent with our decision and that he propose to us any revisions that are necessary or advisable.

Attorney exceptions are noted.

December 5, 2001

Date of mailing _____