

IN THE MATTER OF THE TENURE :
HEARING OF THOMASINA LEMON, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX : DECISION
COUNTY. :
_____:

SYNOPSIS

Board (now State-operated District) certified tenure charges of unbecoming conduct against respondent teacher for alleged corporal punishment, as well as excessive absenteeism.

Having considered the record and the credibility of witnesses from numerous days of hearing, the ALJ found the charges of conduct unbecoming and the subsidiary portion of excessive absence to be fact. ALJ found that several incidents of physical intervention by respondent rose to the level of corporal punishment. In addition, respondent's absences were found to impede the educational goal and cause an interruption in delivering services to the students. ALJ noted that respondent's unsatisfactory evaluations, as well as refusal to comply with directives, was not inefficiency but, rather, conduct unbecoming a teacher. ALJ concluded that the Board sustained by a preponderance of credible evidence, the charges of conduct unbecoming, as well as other just cause. Further, the ALJ concluded that the seriousness of the charges when contrasted against respondent's mitigating evidence, remained of such overwhelming weight as to require respondent's dismissal. ALJ ordered respondent dismissed.

Having conducted his own careful and exhaustive review of the record, which included transcripts from ten days of hearing at the OAL, as well as respondent's exceptions, the Commissioner determined to affirm the ALJ's conclusion with modification as to some of the ALJ's factual findings. Commissioner initially affirmed the Order rendered by the ALJ upon interlocutory review on March 24, 1997, which denied respondent's Motion to Dismiss the within matter for the District's asserted failure to comply with the requisite procedural mandates for bringing tenure charges. Commissioner dismissed the charges which seemed to be charges of inefficiency as the District did not comply with the procedural safeguards identified in *N.J.S.A.* 18A:6-11. Commissioner affirmed the ALJ's conclusion that the District sustained by a preponderance of credible evidence its charges of unbecoming conduct and other just cause. Commissioner emphasized that by her proven inappropriate physical interventions with students, her insubordination and her excessive absenteeism, respondent was guilty of conduct unbecoming a teacher. Citing *Dusel* and *Courtney*, the Commissioner concurred with the ALJ's recommendation of dismissal. Commissioner ordered respondent dismissed from her tenured teaching position in the District as of the date of this decision and referred the matter to the State Board of Examiners for further appropriate action.

SEPTEMBER 17, 1997

OAL DKT. NO. EDU 9264-95
AGENCY DKT. NO. 163-5/95

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Having conducted his own careful and exhaustive review of the entire record in this matter, which included transcripts from the ten days of hearing at the OAL, as well as each of the exceptions advanced by respondent, the Commissioner determines to affirm the conclusion of the Administrative Law Judge (ALJ), with modification and some elaboration upon her factual findings, as set forth herein.

The Commissioner initially affirms the Order rendered by the ALJ upon interlocutory review on March 24, 1997, which denied respondent's Motion to Dismiss the within matter for the District's asserted failure to comply with the requisite procedural mandates for bringing tenure charges.¹ The Commissioner so affirms for the reasons articulated by the ALJ in her Order, and further notes that the record shows that respondent, who was represented by an attorney during the period in question and throughout the proceedings, was duly notified on three occasions that the then Board of Education had

¹ Respondent contends that the District failed to certify tenure charges to the Commissioner within 45 days of serving them upon respondent, in accordance with *N.J.S.A.* 18A:6-13.

repeatedly failed to vote to certify tenure charges on the dates expected, but nevertheless still planned to do so. (Respondent's Exceptions, Exhibits D, E and F) Respondent's attorney raised no objection to the delay. Neither did respondent's Answer to the tenure charges dispute the District's apparent delay in certifying those charges. Finally, to the extent respondent had a viable claim in this regard, her counsel was provided the opportunity by the ALJ to file a Motion to Dismiss, but failed to timely do so.² Respondent's attorney's continued protest that he was without the necessary information to file such a motion, notwithstanding his knowledge of the purported violation, is disingenuous. (Tr. June 10, 1996 at 3, 4)

The Commissioner also accepts the ALJ's recitation of the facts as developed and elicited during the testimony of the various witnesses, notwithstanding respondent's contention that the ALJ's recitation of testimony is erroneous, or that the purported omissions in said recitations are significant. The Commissioner finds that "even assuming *arguendo* that [respondent's] allegations of factual error were correct in their entirety, they would in no way serve to alter the overwhelming balance of evidence in this matter." *In the Matter of the Tenure Hearing of Christine Pellagatti*, 93 N.J.A.R. 2d (EDU) 121, 125. Further, the Commissioner finds no basis in the record on which to overturn the credibility assessments rendered by the ALJ.

As to the ALJ's factual findings set forth on pages 24 and 25 of the initial decision, the Commissioner affirms the first finding, as herein modified:

1. Thomasina Lemon is a tenured teacher employed by the State Operated School District of the City of Newark. She has been employed by the District since 1970. (Tr. July 25, 1996 at 7)

In accordance with testimonial and documentary evidence, the Commissioner next modifies the ALJ's second, third and fourth factual findings as follows:

2. Respondent struck then-fourth-grade student R.L.B. with a ruler about four times and placed him in a cloakroom for approximately one-half hour as discipline. (Tr. June 5, 1996 at 45-47) Respondent also hit M.D. with

² As the record shows, respondent's counsel was, on June 10, 1996, provided ten days in which to file a Motion to Dismiss. (Tr. June 10, 1996 at 7) He failed to file said motion in a timely manner, and instead, filed a Motion to Dismiss on January 27, 1997, after the record closed.

a ruler about eight times and sent him to the cloakroom for discipline. (*Id.* at 42-44)

3. In September of 1994, (Petitioner's Exhibit P-4), respondent put her hands on the neck of S.M.H. and pushed him into a classroom leaving demonstrable fingernail impressions on his neck. (Initial Decision at p. 24)

4. In September of 1994, respondent grabbed M.T. by the arm and forcefully put him into a chair and grabbed E.B. by the arm and, in the ensuing motion, caused E.B. to hit his head against the wall. (*Id.*) The District contacted the Institutional Abuse Unit within DYFS, and four children were removed from respondent's class. (Initial Decision at p. 7; Tr. June 6, 1996 at 53; Petitioner's Exhibit P-4)

The Commissioner determines that the above factual findings support the conclusion that respondent's physical interventions were inappropriate. There is "sufficient corroboration among the witnesses to sustain" such a finding. See *In the Matter of the Tenure Hearing of Millicent Smith*, 93 N.J.A.R. 2d (EDU) 729, 739. The Commissioner is cognizant that

Physical and verbal abuse of students falls within the broader category of "unbecoming conduct." *In re Cowan*, 224 N.J. Super. 737 (App. Div. 1988). N.J.S.A. 18A:6-1 prohibits school employees from inflicting "corporal punishment" on a student, without precisely defining that term. However, the statute provides clarification of its meaning by authorizing the use of such force as may be "reasonable and necessary" to quell a disturbance threatening injury to others; to obtain possession of weapons or other dangerous objects; for the purpose of self-defense; or for the protection of persons or property. Generally, the Commissioner equates "corporal punishment" with "any punishment causing or intending to cause bodily pain or suffering." *Craze v. Allendale Bd. of Ed.*, 1938 S.L.D. 185, 186. *In the Matter of the Tenure Hearing of Charles Courtney*, 92 N.J.A.R. 399, 403.

In the instant matter, the Commissioner cannot find that the harsh physical interventions were in any way reasonable or necessary, in accordance with statutory parameters, particularly in view of the age of the students. (*Id.*)

The Commissioner next adopts, without modification, the fifth, sixth and tenth factual findings as follows:

5. On May 14, 1992 respondent acted in an unprofessional manner by using loud language and profanity as well as threats against the principal of the school in front of students and staff.

6. Respondent ignored written and verbal directives to follow New Jersey statutes and regulations regarding the locking of classrooms during the school day. Although specifically directed by Principal Barillari to leave her classroom door open, Lemon did not do so.

10. Respondent has not complied with mandated deadlines for submission of lesson plans, registers and other administrative requests for information. (Initial Decision at p. 24)

The Commissioner determines that these findings clearly constitute insubordination. Here, he observes that “[i]nsubordination is synonymous with disobedience, it is an unwillingness to submit to authority. It is more than being merely argumentative or fractious.” *In re Smith, supra*, at 731. The Commissioner finds particularly disturbing the events of May 14, 1992, in that respondent’s unprofessional conduct is all the more offensive when displayed before other staff and students. See *Morris School District Board of Education v. Christine Brady*, 92 N.J.A.R. 2d (EDU) 410, 412. This “****is not the conduct pupils should be encouraged to emulate.” (*Id.* at 420) He further notes that respondent’s flat denial of the events which occurred on this date, in the face of specific and largely uncontroverted testimonial and documentary evidence to the contrary, is simply not credible.

The Commissioner notes that the seventh, eighth and ninth factual findings of the ALJ are as follows:

7. For the evaluation years of 1992, 1993 and 1994, respondent has received unsatisfactory evaluations. Observations were conducted both by Principal Barillari and by an outside evaluator.

8. Out of a total of nine teacher evaluation reports between 1991 and 1994, respondent received eight unsatisfactory observations.

9. Suggestions as to changes in instructional methods contained in teacher observation reports were not implemented. (Initial Decision at pp. 24, 25)

Here, the Commissioner agrees with respondent’s argument that these findings emanate from charges which sound predominately in inefficiency, and that said charges, therefore, trigger the procedural safeguards identified in *N.J.S.A. 18A:6-11*. That is, the charged employee must be provided at least 90 days in which to overcome the inefficiency before the charge may properly be certified to the Commissioner. See *Bd. of Ed. of the Township of Teaneck, Bergen County v. Willburn*, 91 N.J.A.R. 2d (EDU) 48, 58, *aff’d* 92

N.J.A.R. 2d (EDU) 328, aff'd Dkt. No. A-4663-91 (App. Div. April 12, 1993). In that the record does not evidence the District's compliance with the procedural mandate, the Commissioner determines to dismiss the charges found at 3a, 3b, 3c, and 5 of the Second Count. He further determines not to reach to the ALJ's seventh, eighth and ninth factual findings, as noted, *supra*, as well as the related analysis in the initial decision.

The Commissioner next affirms, with elaboration, the ALJ's findings with respect to respondent's record of absenteeism:

11. During the 1990-91 school year, respondent was absent 20.5 days.

12. During the period from 1991 to the end of the 1992 school year, respondent was absent 35 days. Her absences caused problems with the continuity of instruction; respondent's substitute plans were often unavailable or not up to date. (Initial Decision at p. 7; Tr. June 6, 1996 at 58)

13. During the school year 1992-93, respondent was absent a total of 27 days.

14. During the 1993-94 school year, respondent was absent a total of 43 days. Petitioner was notified by memorandum dated April 27, 1994 that, due to her excessive absences, she would not be approved for use of funds for professional improvement, in that such use would require her to be out of the building once again. (Initial Decision at p. 7; Tr. June 6, 1997 at 62; Petitioner's Exhibit P-24)

With respect to these absences, respondent argues, *inter alia*, that they are not excessive when one considers that an employee is permitted 15 sick leave days by contract.³ Respondent also argues that the District did not duly notify her of her problematic absentee record, in accordance with its policy. However, the Commissioner rejects these assertions, in that an employee's absenteeism may be considered excessive even though related to legitimate health problems, where such absences negatively impact on students, and where the teacher was advised that her attendance needed improvement. *State-Operated School District of the City of Jersey City v. Pellicchio*, 92 *N.J.A.R.* 2d (EDU) 267, 271, aff'd 93 *N.J.A.R.*

³ Respondent's contract provided for a total of 15 sick leave days per year, and an additional 10 sick leave days for employees with 25 years of service. (Exhibit R-1 at p. 41) Respondent, however, did not have 25 years of service as of the time of her noted absences. Testimony further established that the sick leave days were cumulative. (Tr. June 11, 1996 at 17)

2d (EDU) 30. In the instant matter, respondent's principal testified that, on numerous occasions, when respondent was returning from sick leave, she requested documentation from respondent to substantiate her use of sick time, but did not receive such documentation.⁴ Principal Barillari further attested that she spoke with respondent in this regard, that she sent her communications in accordance with District policy,⁵ and that respondent also attended conferences, along with her union representative, to discuss these issues. Principal Barillari indicated that, once the conferences were held, respondent would produce the requested documentation covering the period of time in which she had been out sick. (Tr. June 11, 1996 at 19-21) The Commissioner further notes the Annual Evaluation Report prepared by Principal Barillari for respondent dated June 10, 1992 which indicated that her attendance needed improvement (Exhibit P-29), as well as the testimony presented by Assistant Superintendent Nelms establishing that respondent received notice of her attendance problems, as per the District's policy. (Tr. December 11, 1996 at 43)

Recognizing that "[t]he point at which absenteeism is judged to be chronic falls within the prerogative and discretionary authority of the Board subject to a determination by the Commissioner of Education ***,⁶" *In the Matter of the Tenure Hearing of Blanche Sheets, School District of the Township of Colts Neck, Monmouth County, 1979 S.L.D. 790, 798*, the ALJ's fifteenth factual finding is affirmed as follows:

15. Respondent's pattern of absences [is] excessive and causes interruption in instructional continuity requiring the use of substitute teachers to continue classroom instruction during her absence.

As to the ALJ's final factual finding that "[n]o testimony of any nature was elicited regarding any instance of physical abuse or physical mismanagement in 1994," (Initial Decision at p. 25), the Commissioner sets aside this finding as inconsistent with the record and with the factual findings, *supra*, at numbers three and four.

Finally, the Commissioner affirms the ALJ's conclusion that the District has sustained, by a preponderance of credible evidence its charges of unbecoming conduct and other just cause. The

⁴ Principal Barillari later clarified that these were, indeed, requests, in that District policy does not compel the employee to provide such documentation under all circumstances. (Tr. June 11, 1996 at 20)

Commissioner herein reiterates that by her proven inappropriate physical interventions with students, her insubordination and her excessive absenteeism, respondent is guilty of conduct unbecoming a teaching staff member. As to the appropriate penalty, the Commissioner has considered respondent's apparently sound teaching record and her extended employment within the District, but nonetheless concurs with the ALJ's recommendation that respondent be dismissed from her tenured position in the State-Operated School District of the City of Newark. The Commissioner recognizes that fitness for a particular position requires a balancing of interests. *In the Matter of the Tenure Hearing of Arlene Dusel*, 1978 S.L.D. 526, 531. "Unfitness for a position in the school system may be shown by a single incident, if sufficiently flagrant, but is 'best shown by numerous incidents.'" *In re Courtney*, *supra*, at 403, citing *Redcay v. State Bd. of Ed.*, 130 N.J.L. 369, 371 (Sup. Ct. 1934), *aff'd* 131 N.J.L. 326 (E. & A. 1944). The Commissioner finds that the totality of the testimonial and documentary record clearly supports the ALJ's conclusion.⁶

In reaching this conclusion, the Commissioner underscores the now axiomatic language of a prior tenure decision maintaining that

[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 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. *** *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 S.L.D. 302, 321.

The Commissioner herein notes with concern that respondent's instances of unbecoming conduct toward her pupils are serious and should not be discounted. "School officials need not wait until some child is badly injured before removing a teacher prone to violence." *In re Courtney*, *supra*, at 403. Respondent's pattern of absences is sufficiently high to raise serious concerns about her professional commitment and responsibility, see *In re Courtney* at 402, and her defiance of authority and disregard for established procedures and mandates of the District serve to interfere with smooth District operation. Taken together, the evidence demonstrates that her removal is warranted.

⁵ The Attendance Improvement Plan.

Accordingly, the initial decision of the OAL is affirmed, as modified herein. Respondent is dismissed from her tenured teaching position with the District as of the date of this decision. This matter is further referred to the State Board of Examiners pursuant to *N.J.A.C. 6:11-3.6* for action against her certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 17, 1997

⁶ To the extent the initial decision may be read to suggest that any of the factual findings may independently constitute sufficient grounds for dismissal, said affirmation is specifically disavowed.