

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

SYNOPSIS

District certified tenure charges against respondent education media specialist for corporal punishment, insubordination and other acts constituting unbecoming conduct.

In light of the record and testimony of witnesses, the ALJ found that there was no adequate basis to conclude that respondent should be terminated. ALJ, however, did find that due to respondent's inappropriate and insensitive comments his behavior warranted a penalty of two months' suspension without pay.

Commissioner affirmed in part, reversed in part the ALJ's decision. While the Commissioner generally concurred with the ALJ's findings and conclusions, he determined that Charge one "a," asserting that respondent twice used a racially derogatory epithet, should be sustained with modification, rather than rejected as determined by the ALJ. Commissioner found more than sufficient corroboration among witnesses to sustain finding that respondent used a racial slur on the day in question. Thus, the Commissioner modified the penalty to include in addition to the two months' suspension without pay, the loss of the 120 days' salary withheld following certification of the within tenure charges.

December 18, 1997

OAL DKT. NO. EDU 3291-97
AGENCY DKT. NO. 61-2/97

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The District's and respondent's exception arguments, along with respondent's reply, were 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 independent review of the entire record in this matter, which included transcripts from the three days of hearings at the OAL, as well as each of the arguments advanced by the parties regarding the initial decision, the Commissioner determines to affirm in part, and reverse in part, the initial decision of the Administrative Law Judge (ALJ). While in all other respects the Commissioner concurs with the ALJ's findings and conclusions, he determines that Charge One "a," asserting that respondent twice used a racially derogatory epithet referring to pupil C.F. and/or other pupils in the class, should be sustained, with modification.

The Commissioner finds that, notwithstanding the variances in testimony among the students regarding respondent's use of the racial slur, that "there is more than sufficient corroboration among the witnesses to sustain a finding" that the respondent, in fact, used the word in some manner on the day in question. See *In the Matter of the Tenure Hearing of Millicent Smith*, 93 N.J.A.R. 2d (EDU) 729, 739. The Commissioner finds it noteworthy that, of the eleven children who testified, nine reported that respondent used the word, albeit in varying contexts. Moreover, as the District noted in its exceptions, "[w]hen the substitute teacher, Ms. Pugh, returned to class to resume her duties, the class told her what had transpired." (District's Exceptions at p. 2) In response to direct questioning from the ALJ, Ms. Pugh averred:

THE WITNESS: They were saying that they were -- that Mr. Burg said that they were going to be homeless and that they weren't going to be anything. And he called them nigger. And one of the young -- one of the students, M.R., was saying yes, Ms. Pugh. He called me a nigger and I'm a Puerto Rican. I'm not a nigger.

And I knew -- I felt that the child was telling the truth, because he was very insulted because he didn't feel like he was a nigger, because I know that he associated that with the color of skin. And he was Puerto Rican, so he didn't consider himself that word.

THE COURT: Who was the first student who told you that Mr. Burg called him a nigger?

THE WITNESS: Well, I really can't say because they all were saying it at one time. But I know that A. and T. were saying how he was calling them that nigger and everything.

And then M. -- and I was saying, well, because I couldn't -- I didn't believe that he would call them that.*** M.R., he made the statement that he called me that word. And I told him I'm not. I'm a Puerto Rican, like that.

So then I knew that something was not right here.

THE COURT: So up --

THE WITNESS: I felt.

THE COURT: -- until that time that M. said that to you, you didn't believe it either?

THE WITNESS: I believe that they were saying -- yes. I believed them. I believe that they were upset about being -- saying that they would never be anything, because that's what C. was crying about. He was saying that he would be --

THE COURT: But did you --

THE WITNESS: -- something.

THE COURT: -- believe that he had called them a nigger, prior to M.R. saying that yeah. He was upset because he wasn't.

WITNESS: Well, I believe what they said. It's just that it was so far fetched, that I -- I guess, maybe I didn't want to believe that someone would say that to a bunch of -- a class full of children. That would be so insensitive.

But then when he said that, that kind of sealed it for me.

*** (Transcript July 31, 1997 at 138-140)

While the ALJ fairly reasons that respondent's use of the words "fools" and "jerks," as well his "homeless" remark, were, given the "rowdiness of the class," apparently unduly highlighted by his inability to place them in any appropriate context, (Initial Decision at p. 9), the Commissioner finds that a preponderance of the evidence supports the conclusion that respondent *did*, as well, use the word "nigger" in the classroom so as to immediately offend the children. In that the number of times respondent used the word, and to whom the slur was directed, is neither ascertainable nor necessarily relevant, under these circumstances, the Commissioner correspondingly sustains the essence of Charge One "a."

Accordingly, the Commissioner adopts the initial decision of the ALJ in part, and reverses in part, to the extent noted above.¹ In order to impress upon respondent the seriousness

¹ The Commissioner notes that the initial decision contains the following errors with respect to students' names: page six refers to the testimony of student D.R., rather than to A.R., and page seven refers to the testimony of student C.H. rather than C.F. Additionally, the testimony recounted on pages 10 and 11 of the initial decision

of his conduct and his substantial need for greater control and sensitivity in dealing with students, the Commissioner hereby directs that respondent forfeit, in addition to the two month's salary recommended by the ALJ, the 120 days' salary withheld following certification of the within tenure charges.² In so determining, the Commissioner also notes that, although he is without the authority to compel respondent to attend training classes designed to address and prevent insensitive conduct in the classroom, the District may elect to do so, within the confines of respondent's tenure and contractual rights.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 18, 1997

apparently reflects numerous edits, as said testimony is inconsistent with testimony contained in the actual transcript. Accordingly, the Commissioner herein notes that, at all times, he relied on the testimony in the transcripts themselves, rather than on the initial decision's recitation of the testimony.

² It is also noted that, notwithstanding the resumption of respondent's salary upon the terms herein stated, respondent has no entitlement to receive a salary amount that includes an award of an increment during his suspension following the Board's certification of tenure charges. See *In the Matter of the Tenure Hearing of Anthony Castaldo*, decided by the State Board, 1986 S.L.D. 3026.