

IN THE MATTER OF THE TENURE :
HEARING OF JOHN DE MAIO, :
SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
BOROUGH OF ELMWOOD PARK, : DECISION
BERGEN COUNTY. :
_____:

SYNOPSIS

Board certified tenure charges of unbecoming conduct on six occasions against respondent custodian. Respondent contended the charges were due to circumstances related to personal problems exacerbated by a shift change, and further disputed that Charges One and Two should be included herein, as respondent received prior discipline for the incidents in these charges.

ALJ concluded respondent's conduct fell within the meaning of "misbehavior or other offense" in terms of *N.J.S.A. 18A:17-3*. Moreover, ALJ concluded such persistent misconduct (abusive language and threats) warranted dismissal.

Commissioner rejected respondent's characterization of the letter he received from his supervisor following the incident, which became the substance of Charge Two, as prior disciplinary action. Further, the Commissioner found that even assuming Charge One was not suitably the substance of a tenure charge, he is bound to consider the incident in determining penalty. Under this analysis, the Commissioner sustained the remaining five charges and found dismissal was appropriate.

JUNE 3, 1998

OAL DKT. NO. EDU 1740-97
AGENCY DKT. NO. 11-1/97

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The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions contend that the penalty of removal from his position as custodian is unduly harsh, given that the most recent act included in the charges dates to September 5, 1996, and considering that he has been continuously employed during the period of time in which the charges were before the Commissioner. Additionally, respondent asserts that he was previously disciplined for the incidents on February 8, 1995 (Charge One) and February 26, 1996 (Charge Two), having been suspended for three days for the former incident and having been "reprimanded for insubordination" by letter placed in his personnel file for the latter incident. (Respondent's Exceptions at p. 2) As such, respondent contends that Charges One and Two should be dismissed. Respondent adds,

that is not to say that the charges should be disregarded because of the prior discipline. As the [Administrative Law Judge] ALJ properly pointed out, Charges 1 and 2 could be considered to show

a pattern of improper conduct. However, they should not have been treated as separate tenure charges. (*Id.*)

Finally, respondent avers that the balance of the four charges of verbal abuse toward his superior were not sufficient to require a forfeiture of his position. Rather, respondent reasons that a more appropriate discipline would be suspension.

In reply, the Board argues that, notwithstanding respondent's conduct during the pendency of the proceedings, the charges herein are serious enough to properly warrant his dismissal. (Board's Reply at pp. 1, 2) Further, the Board notes that the ALJ correctly found that previous discipline for the first two charges does not warrant dismissal of said tenure charges. (*Id.* at p. 2) Finally, the Board maintains that, even if only Charges Three through Six are considered, they are sufficient to warrant respondent's dismissal "as they establish a 'series of incidents' and persistent pattern of egregious behavior and abusive, offensive and inappropriate language and conduct toward respondent's superior." (*Id.*)

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision. In so doing, the Commissioner rejects respondent's characterization of the letter he received from his supervisor, Mr. Keenan, following the incident on February 26, 1996 as constituting prior disciplinary action.¹ Further, even assuming, *arguendo*, that respondent's initial three-day suspension following the incident of

¹ In that letter, respondent's supervisor recounts the offensive language which respondent used, then adds

Not only did you verbally abuse me, you had no regard for the three (3) maintenance employees that you vented your frustrations in front of.

I can not and will not accept this blatant form of insubordination.

If you have a concern you wish to talk to me about, I will avail myself to meet with you, but I will not be verbally abused.

Feel free to contact me, if you would like to discuss this unfortunate incident that took place on February 26, 1996. (P-9)

February 5, 1995 is not suitably the substance of a tenure charge, the Commissioner is nonetheless bound to consider that incident when determining the appropriate penalty. See *Redcay, supra*. Under such analysis, and noting that respondent does not dispute the facts underlying any of the charges, the Commissioner finds that the Board has proven the remaining five charges by a preponderance of credible evidence.

As for the recommended penalty, the Commissioner notes that, notwithstanding a prior three-day suspension for misconduct, respondent continued his abusive course of behavior toward his supervisor. Like the ALJ, the Commissioner concludes that dismissal is, therefore, warranted.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Respondent is deemed dismissed from his tenured position as a custodian with the Board as of the date of this decision.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1998

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.