

IN THE MATTER OF THE TENURE :
HEARING OF KENNETH MILLER, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE : DECISION
BOROUGH OF BOUND BROOK, :
SOMERSET COUNTY. :
_____ :

SYNOPSIS

Board certified tenure charge of unbecoming conduct against respondent physical education teacher. The unbecoming conduct was based on twelve Specifications dealing with incidents that occurred between 1987 and 1996 alleging corporal punishment or touching of students.

Following review of the testimony, exhibits and arguments of the parties, the ALJ concluded that respondent should be removed from his position. ALJ found that Specification 12, wherein respondent knocked a ball away from a student and pushed him against the wall and made an inappropriate ethnic remark, was proven to be unbecoming conduct. Moreover, the ALJ found that this incident, together with other incidents and the number of warnings received by respondent, warranted respondent's removal from his position. ALJ ordered respondent dismissed from his tenured position.

Upon careful consideration of the record, respondent's exceptions and the ALJ's analysis with respect to the penalty, the Commissioner concluded that the ALJ's determination was well reasoned and supported by the record. Commissioner upheld the findings and conclusions of the ALJ regarding unbecoming conduct and directed respondent's dismissal from his tenured teaching position. Matter was forwarded to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

December 28, 1998

OAL DKT. NO. EDU 8612-97
AGENCY DKT. NO. 312-8/97

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The record of this matter and initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions to the initial decision filed by the Board and respondent were timely pursuant to *N.J.A.C.* 1:1-18.4. However, the Board's reply to respondent's exceptions were not timely filed pursuant to that regulation.

The Board's exceptions are supportive of the Administrative Law Judge's (ALJ) conclusion that respondent exhibited conduct warranting his removal as a tenured teacher. However, it avers, *inter alia*, that respondent has also exhibited a nine-year pattern of unbecoming conduct warranting his removal and contends the ALJ improperly dismissed several of the Specifications underlying the single charge of unbecoming conduct it filed. With respect to this contention, the Board takes exception to the ALJ's failure to sustain the Specifications which were supported by hearsay evidence and those Specifications in which she found inappropriate conduct.

More specifically, the Board excepts to the ALJ's conclusion that Specification 2 (picking up and throwing a student against a wall) should be dismissed pursuant to the residuum

rule at *N.J.A.C. 1:1-15.5(b)* since it was based on hearsay. Citing *In the Matter of the Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 751 (App. Div. 1988), the Board argues that the Appellate Division has previously held in tenure proceedings alleging unbecoming conduct that there need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as the combined probative force of the relevant hearsay and the relevant competent evidence sustains the Commissioner's ultimate finding of unbecoming conduct. In the instant matter, the Board maintains that there was abundant competent evidence supporting specifications similar to Specification 2, *i.e.*, Specification 1 (striking A.D. with a hockey puck), Specification 3 (unjustified physical touching of D.F.) and Specification 12 (pushing M.A. against a wall) which the ALJ properly found to be conduct unbecoming a teacher. Thus, it is the Board's position that under *Cowan*, the ALJ should have found Specification 2 proven as well. (Board's Exceptions at p. 2)

The Board further argues that in those instances where the ALJ found inappropriate conduct by respondent, as opposed to unbecoming conduct, in connection with Specifications 4, 5, 6 9 and 10, such Specifications should not have been dismissed. On the contrary, the inappropriate conduct associated with each of those Specifications should have been considered part of a continuing course of unbecoming conduct and viewed as a whole to support a pattern of conduct unbecoming a teacher.

Respondent's exceptions contend that the ALJ's finding of unbecoming conduct for Specification 3 was not supported by credible evidence. He avers, *inter alia*, that any minimal touching that occurred between D.F. and him is not grounds for such a conclusion. He further avers that a teacher is allowed to prevent a student from hurting himself or others and that, under the circumstances, his conduct was clearly acceptable and within the realm of a

teacher's responsibilities and duties. More specifically, respondent argues in regard to this Specification that

***This incident that formed the basis of Specification 3 is not included in the definition of corporal punishment and should therefore not be the basis of a charge of unbecoming conduct. [The ALJ] recanted the relevant facts of the Specification and determined that simply because there was touching, Mr. Miller's conduct was conduct unbecoming a teacher. Mr. Miller stated that D.F. ran into his arm when he put his arm out to try and stop him from leaving the classroom. Mr. Miller also stated that D.F. was pushing chairs and tables and was acting "crazy." Just because Mr. Miller received previous warnings regarding his demeanor with students does not mean that Mr. Miller was supposed to disregard his duties as a teacher. Mr. Miller used minimal force, if it can be even called force, to prevent a student from possibly injuring himself or ruining school property. [He] did not violate the corporal punishment statute nor did he use unnecessary force when dealing with D.F. The facts, even as stated by [the ALJ], do not warrant the conclusion that Mr. Miller's conduct on May 17, 1989 was conduct unbecoming a teacher. (Respondent's Exceptions at p. 6)

As to Specification 8 wherein the ALJ found respondent's conduct unbecoming based on putting his arm around a student's shoulders, having students walk on his back, and asking students for or giving students shoulder massages, respondent urges that these actions must be taken in context. Respondent argues, *inter alia*, that the very nature of the position of physical education teacher results in a different relationship with students than they have with other teachers. He acknowledges that, in hindsight, having students walk on his back or asking students for or giving students shoulder massages may be improper, but they are not sufficient for determining he engaged in conduct unbecoming a teacher. (*Id.* at pp. 2-3)

Respondent's exceptions with respect to Specification 12 point out that the ALJ acknowledged that there were several different accounts as to what happened on November 4, 1996. Regarding this, respondent contends

***The allegations range from Mr. Miller placing his hands on M.A.'s shoulders, to throwing him against the wall where the student was actually lifted off the floor. It should also be noted that M.A. was said to be several feet from the wall in one instance and approximately one foot from the wall in another instance. All the conflicting statements made by the students, who were approximately twelve years old at the time of their testimony, makes it difficult to conclude what exactly happened on November 4, 1996. In this situation, the teacher should be given the benefit of the doubt. (*Id.* at p. 3)

Respondent goes on to reiterate that the children's testimony regarding the November 4, 1996 incident should be evaluated with extreme care, again citing *Palmer v. Audubon Board of Education, 1939-40 S.L.D.* 183. He urges that the ALJ's conclusions that respondent's actions in this matter constitute corporal punishment and conduct unbecoming a teacher do not accurately reflect the evidence presented, once more stressing the conflicting nature of the testimony with respect to the incident. He states

***M.N. and M.H. testified that M.A. was lifted off the floor and thrown into a wall by Mr. Miller. M.A. stated that Mr. Miller held him by the shoulders and pushed him against the wall. Mr. Miller stated that he held M.A. by the shoulders and pulled him over to a black line. Mr. Miller did say it was possible that M.A. came in contact with the wall. The amount of physical force that was used is significant in that it may or may not be the basis for corporal punishment. (*Id.* at p. 4)

Respondent further argues at page 4 of his exceptions that if a teacher intends to inflict pain and suffering, the teacher has traditionally been severely dealt with, but, where contact was not punitive, the matter has been seen as less serious and has "required a more measured response in terms of the penalty to be imposed." *Board of Education of the City of New Brunswick v. Patricia Jo Murphy, 92 N.J.A.R. 2d (EDU) 527, 535* (additional cites omitted).

In the instant matter, respondent avows that he did not intend to inflict pain and suffering on M.A. and, even if the actions he took are found to constitute corporal punishment.

the penalty of dismissal from his teaching position is too harsh a punishment. In support of this, he cites *In the Matter of the Tenure Hearing of Mary Ellen DiPillo, School District of the Township of Randolph, Morris County*, 95 N.J.A.R. 2d (EDU) 206. He also argues with respect to penalty that the *Wagner* tenure case cited by the Board and quoted by the ALJ at page 20 of the initial decision did not result in dismissal of that teacher who was found to have made sexual comments about students and had placed his hands on the buttocks of several female students outside of the class. Respondent further avers that there is no proof in the instant matter, nor was any offered, that any actions he committed were of a sexual nature. In summary, he urges that the tenure charges against him should be dismissed or, in the alternative, in the event some Specifications are upheld, that the penalty imposed by the ALJ should be reduced to conform with similar penalties under similar circumstances.

Upon conducting his own independent and comprehensive review of the record in this matter, which included transcripts of the six days of hearings before the ALJ and the transcript of the municipal court proceeding relative to Specification 12, the Commissioner concurs with the conclusion of the ALJ that respondent's actions, as proven, constitute conduct unbecoming a teacher for the reasons expressed in the initial decision. In the process of the detailed examination of the record, the Commissioner gave careful consideration to the Board's Exceptions regarding the Specifications which were dismissed by the ALJ and was unpersuaded that the ALJ erred in her findings and conclusions relative to those Specifications. The hearsay testimony and documentary evidence with respect to Specification 2 clearly are not supportive of a finding and conclusion of unbecoming conduct, even accepting *arguendo* the Board's interpretation of *In re Cowan* with respect to the residuum rule and hearsay testimony. Thus, it is concluded the ALJ gave appropriate weight to that testimony and evidentiary documentation,

i.e., dismissing the Specification insofar as unbecoming conduct being proven but concluding “that it is significant that during the 1987-88 school year, both [Principals] Hirschman and Reimer expressed concern regarding Miller’s physical involvement with his students.” (Initial Decision at p. 7) As to the Board’s exceptions relative to the other Specifications which were dismissed despite findings by the ALJ of inappropriate actions by respondent in each of the Specifications, the Commissioner again concurs with the ALJ that the such actions did not rise to the level of conduct unbecoming a teacher.

The Commissioner, upon detailed examination of the record in its entirety, has likewise given careful consideration to respondent’s exceptions with respect to Specifications 3, 8 and 12¹ and is satisfied that the ALJ properly considered all testimony and weighed its content according to the credibility of witnesses, an admittedly difficult task for the ALJ in the instant matter due to the number of witnesses who are children and, in a number of the Specifications, the amount of time which has elapsed. The Commissioner, therefore, finds no basis to challenge either the credibility determinations of the ALJ, who had the benefit of observing the witnesses firsthand, or her findings and conclusions with respect to the charge of unbecoming conduct against respondent.

As stated by the Commissioner in *In the Matter of the Tenure Hearing of Quinones, State-Operated School District of the City of Newark*, 96 N.J.A.R. 2d (EDU) 649

“Testimony may be disbelieved but it may not be disregarded. ***citing *Middletown Tp. v. Murdoch*, 73 N.J. Super. 552 (App. Div. 1962). The finder of fact may accept or reject, in whole or in part, the testimony of any witness. ***citing *Application of Howard Sav. Bank*, 143 N.J. Super. (App. Div. 1976). The Commissioner also recognizes the need to examine the testimony of children with great caution. (at 653)

¹ It is noted for the record that respondent did not submit any exceptions related to Specification 1 (striking a student with a hockey puck), a Specification which was sustained by the ALJ as unbecoming conduct.

Contrary to respondent's assertion that the ALJ's conclusions with respect to Specification 3 were not based upon credible evidence and that any minimal touching that occurred between D.F. and him do not provide grounds for the ALJ's conclusion of unbecoming conduct, the Commissioner finds the ALJ's findings and conclusions supported in the record and appropriate. As stated by the ALJ

Having observed D.F., I **FIND** that both his demeanor and testimony showed that he still has a hostile attitude toward Miller. I do not find his testimony to be completely credible and I **FIND** that he exaggerated Miller's actions. However, based on the testimony of both Miller and D.F., and as supported by the principal's letter (P-15), I **FIND** that Miller did have at least one physical contact with D.F. on May 17, 1989. Although I **FIND** that D.F.'s conduct was belligerent and that an apology was warranted, there was no justification for Miller to leave his class and follow D.F. in to the classroom, and for Miller's touching of D.F., especially in light of the previous warnings he had received regarding his demeanor with students. (Initial Decision at pp. 9-10)

Insofar as respondent's exceptions with respect to Specification 8 are concerned, the Commissioner flatly rejects any effort on respondent's part to characterize having students walk on his back or receiving or giving shoulder massages as merely "improper" and not conduct unbecoming a teacher. Moreover, he finds the record fully supportive of the ALJ's finding and conclusions with respect to Specification 12, finding them reasoned and her assessment of the children's testimony in keeping with the standards of proper judicial review.

Notwithstanding inconsistencies in the testimony of the child witnesses with respect to Specification 12, there was ample consistency among witnesses with respect to the critical facts of the matter. As stated by the ALJ in pertinent part

Miller stated that after he knocked the ball away from M.A., M.A. looked at him and Miller told him that he had directed him to stop playing with the ball. Miller stated that he "held him[M.A.] by the shoulders and pulled him over to the black line (5T87, lines 3-4).

Miller denied throwing M.A. into the wall (5T90), but admitted that M.A. might have hit the wall (5T124).

Although the students and Miller disagreed as to exactly what happened, I **FIND** that Miller did not direct M.A. to move behind the black line, but rather used his hands on M.A.'s shoulders to move him, and used enough force so that M.A. hit the wall and his shirt was torn. The students were credible witnesses to the fact that Miller forcefully moved M.A. out of the play area. Miller then walked away and made a comment. Although A.W., M.N. S.L. and M.H. varied in their testimony as to the exact words Miller used, they all testified that it was a derogatory comment indicating that Spanish students learned English quicker than Turkish students (3T18,49,86,113). ***

Miller's version of what he said is not substantially different from the testimony of the students. I **FIND** that Miller made a remark about Hispanic students' ability to learn English, and although he may not have specifically mentioned a comparison to Turkish students, such a comparison was obviously intended based on the circumstances. I **FIND** that the comment was inappropriate and was intentionally demeaning to M.A. (Initial Decision at pp. 27-28)

Finally, as regards respondent's argument that even if the Commissioner upholds the findings and conclusions of the ALJ regarding unbecoming conduct, the penalty she assessed is too harsh, the Commissioner concludes, upon careful consideration of the record, respondent's exceptions and the ALJ's analysis with respect to penalty, that the ALJ's determination is well reasoned and supported by the record. He, therefore, adopts as his own the recommendation of the ALJ that respondent should be dismissed from his tenured teaching position. As well articulated by the ALJ

Having reviewed the testimony, exhibits and the arguments of the parties, I **CONCLUDE** that Miller should be removed from his position. During his first year as a physical education teacher Miller was involved in an incident with A.D., and although no disciplinary action was taken, Miller received a letter from the principal counseling him about physical incidents with students (P-16). He received another letter later that school year about [a physical] incident with another student (P-4) Thereafter, he

received a number of letters cautioning him not to physically touch students (P-15; P-12; P-23; P-13). However, the record clearly shows that Miller ignored these warnings. On November 4, 1996, Miller knocked the ball way from M.A. in order to startle M.A., but without concern that the ball could then bounce away and hit and harm another student. There is nothing in the record that indicates that Miller had a reason to touch M.A. There was no provocation for Miller to use force to get M.A. to stand behind the play area line; he could have directed M.A. to move behind the line. Also, there was no justification for the inappropriate comment Miller made at the time.

The November 4, 1996 incident, and the fact that Miller was involved in other incidents and had previously received a number of warnings, warrants his removal from his position. A school cannot tolerate a teacher who cannot change his methodology after receiving warnings about inappropriate conduct, and who has difficulty accepting the fact that certain forms of behavior are improper around students. The fact that Miller is a physical education teacher means that some physical contact with his students is appropriate, but this does not justify touching students outside of those limited times. and most certainly does not justify touching a student with force equivalent to corporal punishment. (Initial Decision at pp. 35-36)

Accordingly, the initial decision of the OAL, directing that respondent be dismissed from his tenured position as a physical education teacher as the appropriate penalty in this matter, is adopted for the reasons expressed therein. This matter shall be forwarded to the State Board of Examiners for review in accordance with *N.J.A.C. 6:11-3.6*.²

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 28, 1998

² 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.