

IN THE MATTER OF THE TENURE :  
HEARING OF ROGELIO HERNANDEZ, :  
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION  
OF THE CITY OF NEWARK, ESSEX : DECISION  
COUNTY. :  
\_\_\_\_\_ :

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent teacher, alleging physical abuse of students.

ALJ found that respondent's employment records showed that the administration from 1994 provided recommendations to respondent on improving his dealing with student disciplinary problems. Respondent, however, was inflexible in his lack of interest in improving his performance. ALJ concluded that respondent in his rough handling of students was guilty of two incidents of corporal punishment constituting unbecoming conduct. (*Redcay*) ALJ determined removal was warranted. Thus, the ALJ ordered respondent removed from his position.

Having reviewed the record, including transcripts of the hearing, the Commissioner determined to affirm the initial decision with modification. Commissioner found that the record supported the conclusion that the District proved by a preponderance of credible evidence that respondent's actions with respect to students, A.F. and R.R., constituted corporal punishment, and that his conduct was unbecoming a teaching staff member. Commissioner found no basis in the record before him to challenge the credibility determinations made by the ALJ. Citing *In re Dusel*; *In re Courtney*; and *In re Sammons*, the Commissioner affirmed the ALJ's conclusion and ordered respondent dismissed from his position as of the date of this decision. Matter was referred to State Board of Examiners for action, as it deems appropriate. Commissioner modified the decision as to the ALJ's finding on respondent's request for the intercom key; Commissioner found respondent did, in fact, request a key.

May 10, 1999

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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 and the District’s reply thereto are duly noted as submitted in accordance with *N.J.A.C. 1:1-18.4*.

Respondent’s exceptions contend that: (1) the Administrative Law Judge (ALJ) erred in concluding on page 9 of the initial decision that he never requested a key to the intercom, when his testimony proved otherwise, and said error is material and prejudicial to respondent; (2) the ALJ erred in referring to the dismissed Charge One, on page 13 of the initial decision, in her examination of respondent’s notice from the District that it had concerns about respondent’s methods of dealing with student disciplinary issues; (3) respondent, after the incidents underlying Charges One and Two, received satisfactory evaluations from the District and “absolutely no discipline” as a consequence of these incidents (Respondent’s Exceptions at p. 5); (4) the District failed to prove by a preponderance of credible evidence the incidents with respect to A.F. (Charge Two) and R.R. (Charge Three); and (5) even assuming such charges were proven, termination is too severe a penalty for respondent.

In reply, the District asserts that: (1) the ALJ's error on page 9 with respect to respondent's request for an intercom key was neither material nor prejudicial to respondent; (2) the ALJ did not err by referring to the dismissed Charge One when finding that respondent was on notice that the District had questions regarding respondent's disciplinary methods; (3) despite respondent's satisfactory annual evaluations and the District's failure to withhold his salary increments following the first two incidents, termination is warranted; (4) Charges Two and Three have been proven by a preponderance of credible evidence; and (5) termination is an appropriate penalty, under these circumstances.

Upon careful and independent review of the record in this matter, which included transcripts from the hearing conducted at the OAL on January 15, 1999, January 19, 1999, January 20, 1999 and February 10, 1999,<sup>1</sup> the Commissioner determines to affirm the initial decision of the ALJ, with modification as set forth herein.

Initially, the Commissioner concurs that the record supports the parties' conclusion that respondent did, in fact, request a key from the administration of his school to enable him to use his classroom intercom for student discipline problems. (T4:113) However, the Commissioner concurs with the District that the ALJ's error in this regard is neither material to the outcome, nor prejudicial to respondent. As the District properly argued with respect to the R.R. incident (Charge Three):

\*\*\*The District's failure to provide Respondent with an intercom key did not give him license to physically abuse a student who posed no physical threat to Respondent at the time of the incident. To suggest that this incident would have been avoided had Respondent had a key is another example of Respondent seeking to avoid responsibility for his actions. (District's Reply at p. 8)

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<sup>1</sup> The hearing transcripts are hereinafter referred to as T1 (transcript from January 15, 1999), T2 (transcript from January 19, 1999), T3 (transcript from January 20, 1999) and T4 (transcript from February 10, 1999).

The Commissioner finds the District's argument in this regard to be particularly persuasive, given respondent's testimony that he was aware that School Safety Officer Donna Thomas was, on the day of the R.R. incident, posted outside his classroom and, further, given respondent's testimony that it was his practice to signal Ms. Thomas to come to his room when a student needed to be brought to the office. (T4: 33, 34)

Next, the Commissioner concurs that "[t]he record does not support respondent's assertion that he was never told that his method of dealing with students needed improvement," and that such notice was provided as early as 1994, the date of the incident which gave rise to the circumstances underlying Charge One. (Initial decision at pp. 12-13) Moreover, the ALJ's reference to the DYFS report attendant to that incident *specifically indicates* that she made no assumption that respondent was guilty of the abuse as alleged; rather, the ALJ clearly states that she considered the report to evaluate respondent's credibility. (*Id.* at p. 13) The Commissioner further notes, as did the ALJ, that respondent's June 1994 Professional Improvement Plan indicated that respondent should "[p]articipate in staff development activities that focus on Conflict Resolution and Assertive Discipline." (Exhibit R-1P) His final evaluation also noted that respondent needed to "[d]evelop positive responses for typical disciplines common to upper grade students." (*Id.*) To the extent respondent contends that these and subsequent notices were insufficient to warn him of the District's concern, because they were tempered, in some way, by positive feedback and generally satisfactory evaluations, the Commissioner finds that such feedback does not diminish, or give respondent reasonable cause to dismiss, the concerns which were noted in his evaluations and professional improvement plans.

Finally, like the ALJ, the Commissioner finds that the record supports the conclusion that the District has proven, by a preponderance of credible evidence that

respondent's actions with respect to A.F. and R.R. constitute corporal punishment, and that his conduct was unbecoming a teaching staff member. In so finding, the Commissioner notes that he finds no basis in the record before him to challenge the credibility determinations made by the ALJ.

As to the appropriate penalty, the Commissioner has considered respondent's record of employment with the District since 1992, and concurs with the ALJ's recommendation that respondent be dismissed from his tenured position in the State-operated School District of the City of Newark. Recognizing 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, and that "[u]nfitness 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*, 92 N.J.A.R. 2d (EDU) 399, 403, citing *Redcay v. State Board 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 supports the ALJ's conclusion.

In reaching his determination, 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 the 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.

Like the ALJ, the Commissioner notes with concern that respondent's instances of unbecoming conduct toward 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. As the District aptly argued:

\*\*\*It is also clear from the testimony of both Respondent and Petitioner’s witnesses that security was readily available in each instance. Respondent’s behavior exemplifies a desire to personally handle disciplinary situations with physical force. Obviously, Respondent felt that A.F. and R.R. challenged his authority \*\*\*. In both instances, Respondent responded to the challenge of his authority with unnecessary physical force. \*\*\* These two incidents paint a portrait of a teacher who has little tolerance for student disobedience. Instead of following school procedures, however, Respondent chooses to settle differences with students by the use of extreme physical force. Judge Klinger correctly concluded that the aggravating circumstances in each of these situations make it undesirable for Respondent to remain in the classroom. (District’s Reply at p. 30)

Equally troubling is respondent’s inability to recognize, or in any way acknowledge, that his conduct was inappropriate. Taken together, the evidence demonstrates that his removal is warranted.

Accordingly, the initial decision of the OAL is affirmed, as modified with regard to the ALJ’s finding on respondent’s request for the intercom key. Respondent is dismissed from his 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 his certificate as it deems appropriate.<sup>2</sup>

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 10, 1999

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<sup>2</sup> 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.