

IN THE MATTER OF THE TENURE :
HEARING OF MYRNA MARRERO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF BAYONNE, HUDSON COUNTY. :
_____ :

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent secretary for alleged improper handling of school funds.

ALJ found that although the criminal charge of theft was reversed on appeal, that result is not binding in the administrative forum. Here the burden of persuasion is preponderance of credible evidence, not guilt beyond a reasonable doubt applicable on the criminal side. ALJ found that the Board met its burden of establishing by a preponderance of credible evidence that respondent intended to convert school money into her own use and would have done so if not for the sting operation involving the police department and school administrators. Moreover, the ALJ concluded that the conduct engaged in by respondent, who had been in a position of trust, was sufficiently serious to warrant the sanction of dismissal. ALJ ordered respondent dismissed from her employment as a secretary.

Having reviewed the audiotapes of the hearing and being satisfied that the ALJ's recitation of the testimony of the witnesses was both accurate and thorough, the Commissioner concurred with the ALJ's reasoning finding respondent's explanation of the events incongruous. Citing Redcay, the Commissioner found that the particular circumstances of this matter to be "sufficiently flagrant" to warrant respondent's dismissal. Commissioner adopted findings and determination in initial decision as his own and directed respondent be dismissed as of the date of this decision.

December 3, 1999

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HEARING OF MYRNA MARRERO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF BAYONNE, HUDSON COUNTY. :
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The record of this matter, which it is noted contained audiotape recordings of the hearing conducted at the Office of Administrative Law (OAL),¹ and the Initial Decision of the OAL have been reviewed. Respondent's exceptions and the Boards's reply thereto were filed in accordance with the directives of *N.J.A.C.* 1:1-18.4.

Respondent's exceptions essentially recast and reiterate those arguments previously advanced to the ALJ in her post-hearing brief. She again argues that the Board did not meet its burden of proof on its charge that she stole money from the school on March 28, 1996. (Respondent's Exceptions at p. 3) In this regard, respondent repeats her allegation that the Board's witnesses "had preconceived opinions regarding [her] guilt," and, as a result, their testimony must be viewed as biased. (Respondent's Exceptions at p. 2) Such bias, she asserts, is particularly relevant when attention is directed to "differences in testimony" regarding procedures for collecting and handling money and the possession of funds outside the school building. (*Id.* at p. 3)

Respondent once again emphasizes that the charge lodged against her was that she stole money from the school on March 28, 1998, not, she argues, that she violated school policy

¹Hearing in this matter was conducted on August 11 and 12, 1998.

by taking money off school premises; that she failed to properly record the funds when they were turned over to her; or that she violated a procedure when she did not deposit the funds in the P.T.O. Box. (*Id.* at p. 3) Next, respondent again advances that because the Board's charge was "theft," guidance as to the extent of the Board's burden in establishing such charge may be gained from an examination of the criminal definition of theft, *N.J.S.A. 20C:20-3*, which, she avers, is the unlawful taking, or unlawful control over the property of another "with purpose to deprive him thereof." (*Id.* at p. 4) As such, respondent maintains, in order for the Board to sustain its burden here it was obligated "to prove that [respondent] had the purpose, or intent, to deprive the [school] of the property." (*Id.*) Respondent contends that the Board has failed to meet its burden of proof in this matter, requiring that the tenure charges be dismissed and that respondent be restored to her position.

Finally, respondent urges that if the Commissioner finds "some form of improper conduct," the circumstances of this matter do not warrant her dismissal but, rather, some lesser penalty should be imposed. (Respondent's Exceptions at p. 6)

In reply, the Board advances that the ALJ's initial "decision is not only well-reasoned and correct on the merits, but reaches the only possible conclusion based upon the evidence presented to him." (Board's Reply Exceptions at p. 3) With regard to respondent's charge of "bias" of the witnesses, the Board argues that to give credence to such a contention would be tantamount to accepting "that the Board's witnesses are lying in order to 'frame' an innocent employee," a finding which is fully belied by the record. (*Id.*) Further, it posits, the testimony of each of the Board's witnesses is fully consistent "on every crucial point." (*Id.*) Respondent's testimony, in sharp contrast, it asserts, "is either flatly contradicted by that of others, is inconsistent, or is just simply incredible." (*Id.* at p. 4) The Board presents, what it purports are, numerous testimonial examples in support of this contention. (*Id.* at pp. 4-7) As

such, it reasons, the ALJ “correctly concluded that Ms. Marrero was untruthful in her sworn statements, and that her attempts to explain her actions were illogical, absurd, and, in the Court’s own language, ‘ludicrous.’” (*Id.* at p. 7)

The Board next states that respondent’s attempt to mask her responsibility for her actions by clothing herself in the mantle of criminal law is no more than an effort to obfuscate the real question before the Commissioner, “whether the Board proved by a preponderance of credible evidence (that is, was it more likely than not) that Marrero took the money with an intent to make it her own.” (Board’s Reply Exceptions at p. 8) It avers that, based on the within record, an affirmative answer to this question is the inevitable conclusion. (*Id.*)

Finally, the Board advances that the within respondent has presented “no mitigating factors” which might serve to justify alleviation of the ALJ’s recommended penalty of dismissal which, it avers, is fully warranted in this matter. (*Id.* at p. 10)

Upon his independent and comprehensive review of the record, including all testimony proffered at the hearing, the Commissioner, finding respondent’s exceptions without merit, determines to affirm the findings and conclusion of the ALJ that the Board has established, by a preponderance of the credible evidence, its charge of unbecoming conduct² against respondent, and that such conduct warrants respondent’s removal from her tenured position.

In reaching his determination here, the Commissioner was fully cognizant that this matter, to a great extent, turns on the credibility of witnesses and the weighing of evidence. The Commissioner’s comprehensive review of the audiotapes of the hearing provides him with no basis to challenge the credibility determinations of the ALJ. Rather, he is fully satisfied that

²As was aptly noted by the ALJ, “[w]hile respondent may have been inartfully charged with ‘theft,’ this is not the forum where the criminal charge of theft under *N.J.S.A. 2C:20-1* is to be tried.” (Initial Decision at p. 17) Rather,

the ALJ's recitation of testimony is both accurate and thorough, and that he carefully measured conflicts, inconsistencies, and plausibility of content in deciding which testimony to credit.

Moreover, the Commissioner was especially mindful that:

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.*** (*In re Perrone*, 5 N.J. 514, 522 (1950))

For the reasons aptly detailed by the ALJ on pp. 15-17 of his Initial Decision, the Commissioner finds respondent's explanation of the events which transpired on March 28, 1996 incongruous.

In considering the appropriate penalty in this matter, the Commissioner duly took into account respondent's lengthy, apparently unblemished record with the Board but, nonetheless, determines that the charge established herein, under the particular circumstances of this matter, is "sufficiently flagrant" to warrant respondent's dismissal. (*See Redcay v. State Board of Education*, 130 N.J.L. 369, 371 (Sup. Ct. 1943); *aff'd* 131 N.J.L. 326 (E. & A. 1944).)

Accordingly, the Commissioner adopts the recommended decision of the OAL, for the reasons clearly stated therein, and hereby orders that Myrna Marrero be dismissed from her tenured position with the Board of Education of the City of Bayonne as of the date of this decision.³

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 3, 1999

"[h]ere, the charge of 'theft,' particularly in light of the specifications to the charge, manifests an intention of the Board to administratively charge respondent with conduct unbecoming an employee." (*Id.* at p. 18)

³ 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.