330-00

IN THE MATTER OF THE TENURE	:	
HEARING OF MANUEL SANTIAGO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

SYNOPSIS

Respondent, a tenured custodian, was arrested for possession of marijuana, cocaine and drug paraphernalia. After his arrest, respondent completed a PTI program, and the criminal charges against him were dismissed. The petitioning Board certified tenure charges of unbecoming conduct against respondent based on the arrest.

At the OAL hearing, respondent argued that the illegal drugs in his possession belonged to his son, and that he accepted responsibility for them to protect his son. As such, respondent contended that the tenure charges should be dismissed, or, at a minimum, the penalty of dismissal should be reduced. Petitioner argued that respondent's arrest was not an isolated incident, since he and his family had been the subjects of a police investigation for distributing narcotics as indicated in the testimony of petitioner's witnesses. Petitioner asserted that, even though respondent completed a PTI program, his conduct warranted his dismissal. The ALJ agreed with petitioner, and concluded that respondent's possession of cocaine, marijuana and drug paraphernalia, as well as the testimony regarding respondent's involvement in distribution of controlled dangerous substances, constituted unbecoming conduct warranting dismissal of respondent from his tenured position.

The Commissioner affirmed the decision of the ALJ for the reasons stated therein. The Commissioner agreed that, although custodians are not held to the same standard as tenured teaching staff members, respondent's possession of controlled dangerous substances and drug paraphernalia warranted his dismissal.

October 2, 2000

IN THE MATTER OF THE TENURE HEARING OF MANUEL SANTIAGO, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	: : : : :	COMMISSIONER OF EDUCATION DECISION

The record and Initial Decision[1] issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4. To the extent that these submissions merely reiterate those arguments advanced before and considered by the Administrative Law Judge (ALJ), they are only briefly summarized herein.

Initially, respondent's exceptions maintain that the Initial Decision improperly relied on a hearsay claim that he was involved in the distribution of drugs, averring that the ALJ places great weight on this speculative assertion which has no legitimate evidence in support thereof. He urges, *inter alia*, that the Board presented, and the Initial Decision accepts as true, unsworn statements of an unidentified, paid informant who has a criminal record and who was not presented as a witness. Respondent further avers that the testimony of Detective McDonough, a witness presented by the Board, should never have played a role in the decision making in this matter. Of this, respondent states:

> The Board's police witness was clear that he did not observe any of the activities he was discussing. The witness actually presented had no knowledge of who was present or what actually occurred. The testimony was pure, unadulterated hearsay and should never have played a role in the decision-making in this case. The mere

[1] It is noted for the record that the Initial Decision has both an inaccurate caption and Agency Docket Number which have been corrected herein.

> fact that the phantom informant may have been reliable in unrelated matters simply does not justify reliance on such allegations in the present matter. (Respondent's Exceptions at 2)

Respondent further avers that the Initial Decision improperly determined that the tenure charges were proven and offers in support of this exception the legal arguments set forth in his post-hearing brief. Lastly, respondent maintains that the Initial Decision improperly recommended the sanction of dismissal, in part because it was based upon the hearsay testimony referenced above, and because it is an unduly harsh sanction in light of the circumstances in this matter. In support of his position, respondent sets forth a series of school law decisions in which the Commissioner or State Board examined the totality of the circumstances and determined that termination was not the appropriate sanction, but instead, levied various forms of financial penalties, which he argues should occur in the instant matter. With respect to this, respondent argues, *inter alia*, that:

> The initial decision does not contain any analysis regarding the possibility of imposing another sanction. Instead it relies on a series of illusory, conclusory factors. (Initial Decision at page 8.) There is no explanation for the determination that the "quantity" of drugs "is much more than the single bag supposedly picked up at a window slot." The evidence made reference to a package given to Santiago by his son. (Initial Decision, page 2.) Thus, the conclusion regarding a "single bag" is plainly wrong. Similarly, there is nothing to support the references to the quantity of drugs. The allegation regarding distribution is equally inappropriate for use as a factor towards termination. In short the factors presented are unsupportable and without proper explanation. (*Id.* at 8)

The Board's reply exceptions aver that the ALJ properly examined all the evidence at the hearing, including respondent's admissions, the testimony of McDonough and the direct evidence found on Santiago's person. The Board points to the fact that the ALJ specifically found that respondent's testimony was unbelievable and that McDonough's was reliable. Moreover, the Board avers that the recommended decision does not rely solely on hearsay testimony or upon the statements of an unidentified informer, maintaining that all these factors, when weighed together, support the charge of unbecoming conduct.

Additionally, the Board argues that, even assuming *arguendo* the Initial Decision did rely upon some hearsay evidence, hearsay testimony is admissible in an administrative hearing and "'shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence the circumstances of its creation and production, and, generally, its reliability.' *N.J.A.C.* 1:1-15.5(a)." (Board's Reply Exceptions at 3) However, as recognized by the Board, such hearsay testimony may not serve as the sole basis for the ultimate finding of fact pursuant to *N.J.A.C.* 1:1-15.5(b), the residuum rule, which requires that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." As to this, the Board avers that, in the instant matter, the introduction of hearsay evidence was proper, and any reliance upon it was appropriate, as there were other credible facts upon which the ALJ could base his determination.

Moreover, the Board argues, protection of the identity of a confidential informant has been upheld in New Jersey both in the criminal context and the administrative setting, citing in support thereof *State v. Oliver*, 50 *N.J.* 39 (1967); *State v. Williams*, 239 *N.J. Super*. 620 (App. Div. 1990); and *Jersey City Police Department v. Harrison*, 95 *N.J.A.R.*2d (CSV) 269 (1995). With respect to this, the Board avers that:

> The instant case is almost identical to *Harrison*. Santiago admittedly had drugs on his possession, had unexplained money on his possession, had a cocktail napkin in his pocket with evidence of drug sales and was where the informant said he would be. Thus, the introduction of the hearsay evidence was proper. (Board's Reply Exceptions at 5)

Consequently, the Board argues, the hearsay evidence merely supported the other direct evidence of drug possession. Furthermore, it is the Board's position that:

> Contrary to the position asserted by Respondent, the initial decision did not rely on any hearsay evidence. A review of the decision clearly illustrates that the initial decision determined that the possession of drug paraphernalia alone was what led to the determination that there was unbecoming conduct. The decision

> clearly references the fact that Santiago had on his person drugs, and that at the very least, either the drugs in his front pants pocket or that found in his jacket pocket were his. *See* p. 3 of initial decision. Thus, any argument that the judge improperly relied upon the hearsay evidence that Santiago was selling drugs is incorrect.
>
> Thus, the decision by the ALJ was entirely proper, as it was within his discretion to allow [that] hearsay evidence be admitted. Although there was no reliance on this evidence, even had there been some, the residuum rule makes the reliance proper. (*Id*. at 6)

The Board next argues that the Initial Decision properly determined that respondent's behavior was sufficient to prove the tenure charges, averring, *inter alia*, that his knowing possession of drugs constitutes a single act sufficient to warrant discharge, independent of respondent's participation in PTI and in light of the standard to which public school employees are held. In support thereof, the Board cites, among other cases, *Wolfe, supra; Olek, supra;* and *In the Matter of the Tenure Hearing of Theresa Luccarelli, Board of Education of the Borough of Brielle*, 97 *N.J.A.R.*2d (EDU) 537 (1997).

Upon careful and independent review of the record of this matter,[2] the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ for the reasons stated in the Initial Decision, both as to the sufficiency of the charges against respondent and the appropriateness of the recommended penalty of termination. Initially, the Commissioner concludes that the ALJ gave appropriate weight to the testimony and proper consideration of the residuum rule and hearsay testimony in this matter. Further, the Commissioner fully concurs with the ALJ's conclusion at page 8 of the Initial Decision that, although custodians may not be held to the same high standards as teachers, they still work within the confines of the school community and must be held to a standard that reflects the same, particularly in light of the State's commitment to combating the widespread drug problems in the schools. In so determining, the Commissioner finds that the State Board of Education's holding in

[2] The Commissioner notes that transcripts of the hearing are not included as part of the record in this matter.

Alfredo Arocha and Lazaro Gonzalez v. Bd. of Education of the Hudson County Area Vocational Technical Schools Board, (April 3, 1985), a case involving two custodians convicted of drug-related offenses, bears repeating herein. It reads:

> Although other school employees are not necessarily required to meet the same standard of conduct as teachers, we find that all employees in the public school system who are charged with care of students or have significant contact with students serve as adult role models and contribute to the student[s'] education through what students see, hear, experience and learn about them. We conclude that, given this state's commitment to solving the widespread drug problem in the schools, each employee who is charged with the care of students or has significant student contact is under a duty to conduct himself in a manner that in no way encourages or condones the use of drugs. *** (Slip Op. at 6-7)

As to penalty, the Commissioner agrees with Board that this single incident of drug possession, under the factual circumstances presented herein, and in light of the ALJ's credibility determinations, is sufficient to warrant respondent's removal as a janitor with the City of Elizabeth Board of Education.

Accordingly, the Initial Decision is adopted as the final decision of this matter. Respondent is hereby dismissed, as of the date of this decision, from his tenured custodian position in the employ of the City of Elizabeth Board of Education.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2000

Date of Mailing: October 2, 2000

[3] This decision, as the Commissioner's final determination, 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.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.