

268-01

IN THE MATTER OF THE TENURE :
HEARING OF EDWARD JACKUS, :
SCHOOL DISTRICT OF THE CITY OF :
ELIZABETH, UNION COUNTY, :
AND : COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE : DECISION
HEARING OF SHARON GAINES, :
SCHOOL DISTRICT OF THE CITY :
OF ELIZABETH, UNION COUNTY. :

SYNOPSIS

In consolidated matter, the Board certified tenure charges of unbecoming conduct against two respondent vice principals for allegedly aiding and abetting the principal of their school, School 17, in failing to hold two fire drills each month as required by *N.J.S.A.* 18A:41-1 and failure to notify the administration that their school did not hold the requisite number of fire drills (two drills each month within school hours).

The ALJ determined that, in this situation, the duty to conduct fire drills and to file reports was clearly placed on the principal. The ALJ stated, "Even by the most general standards of good conduct, the inaction of the vice principals would not likely affect morale or efficiency by destroying public respect for or confidence in school operations or services." The ALJ concluded that the principal's misconduct should not be thrust upon the vice principals and that, therefore, respondents did not engage in conduct unbecoming a vice principal. Motion for Summary Decision was granted. The ALJ determined that the charges should be dismissed.

The Commissioner agreed with the ALJ's determination that respondent's Motion for Summary Decision could be decided to the extent of ascertaining whether or not respondents were guilty of unbecoming conduct. Moreover, the Commissioner agreed with the ALJ's recitation of the law and citing of the *Motley* decision on what constitutes unbecoming conduct and he concurred with the ALJ that unbecoming conduct may be based on a failure to act where there is a duty to do so and that "a duty to act is the touchstone for unbecoming conduct based on failure to act." The Commissioner, however, did not agree with the conclusions of law reached by the ALJ that the charge of unbecoming conduct levied against each respondent should be dismissed. The Commissioner determined that, under the facts of this matter, the unbecoming conduct charge rested upon the inaction of the vice principals who have a professional duty to ensure the health, safety and well-being of the students and staff under their care and supervision. The Commissioner emphasized that "[t]he very fact that the law requires fire drills to be conducted *at least two times each month* in schools underscores the grave importance of such safety drills for ensuring the emergency preparedness of students and staff." Moreover, this duty gave rise to a duty on respondents' part to act on/report the continuous, long-term violations of law in that respondents' failure to act on/report such violations was no less serious than the failure of the principal to hold fire drills, given that the health, safety and well-being of students and staff were seriously jeopardized. The Commissioner further concluded that, under the circumstances of this matter, wherein the health, safety and well-being of students and staff were seriously jeopardized, an undue burden would not have been placed on respondents to act on their knowledge of long-term, continuous violations of safety law and Board regulation, even if one accepts *arguendo* that respondents did not know if the principal was failing to report noncompliance with the fire drill law. Thus, the Commissioner sustained the charge of unbecoming conduct against respondents. However, because the ALJ dismissed the tenure charges, the record was insufficiently developed to determine either the assignment or mitigation of penalty. Therefore, the Commissioner was compelled to remand this matter to the OAL solely for proceedings as necessary to develop a full and factual record in order that recommendations may be made, as appropriate, with respect to penalty.

AUGUST 24, 2001

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| This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner. |
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OAL DKT. NOS. EDU 1537-01 AND EDU 1601-01 (CONSOLIDATED)
AGENCY DKT NOS. 6-1/01 AND 7-1/01

IN THE MATTER OF THE TENURE :
HEARING OF EDWARD JACKUS, :
SCHOOL DISTRICT OF THE CITY OF :
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The record and Initial Decision issued by the Office of Administrative Law (OAL) in his consolidated tenure charge matter have been reviewed. Petitioner's (Board) exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4, as were the reply exceptions filed by Respondent Jackus. Respondent Gaines' reply exceptions were untimely filed.¹ Further, it is noted for the record that while the Board recognizes that *N.J.A.C.* 1:1-18.4 does not provide for a response to reply exceptions, the Board submitted such a response because it contends that the

¹ Pursuant to *N.J.A.C.* 1:1-18.4, Respondent Gaines' reply exceptions were due on July 30, 2001. On July 31, 2001, Ms. Gaines' counsel filed reply exceptions via facsimile transmission acknowledging that they were due on July 30 but requesting relaxation of the rule because he "was out of [his] office for a portion of last week." While *N.J.A.C.* 1:1-18.8(a) permits time limits for filing exceptions and replies to be extended for good cause, *N.J.A.C.* 1:1-18.8(b) requires that a request for such extension be submitted no later than the day on which time period for filing is to expire. This did not occur herein. Moreover, that regulation provides that the time period for requesting an extension may only be waived in case of emergency or other unforeseeable circumstances. Because counsel's justification for not filing reply exceptions on or before July 30, 2001 does not meet the requisite criteria for relaxation of the filing time limit, the reply exceptions are deemed to be untimely.

replies filed by respondents do not address the Board's exceptions and, therefore, should have been filed as primary exceptions to the Initial Decision.²

Initially, it is noted that the Board's exceptions essentially reiterate and/or recast arguments previously made before and rejected by the Administrative Law Judge (ALJ); therefore, the exceptions will only be briefly summarized below.

In its exceptions, the Board argues, *inter alia*, that the ALJ erred in granting respondents' Motion for Summary Decision because there are numerous issues of material fact to be decided. As to this, the Board urges that the ALJ erred in deciding this matter purely on a legal question as to whether the vice principals could be held responsible for the failure of their school to hold fire drills, when the crux of the charges against respondents is their knowledge of a violation of Board policy and their failure to report and/or correct this violation. The Board vehemently objects to the ALJ's ruling that as a matter of law the tenure charges should be dismissed as respondents cannot be held responsible for fire drills, urging instead that vice principals, in light of their administrative certificates and position, are aware that schools must conduct two fire drills per month. Further, the Board reiterates its assertion that respondents failed to ensure that the school followed this rule of law and Board regulation and, therefore, are guilty of unbecoming conduct, urging that "[t]he issue to be decided by the [ALJ] at a hearing is whether the Vice-Principals are guilty of unbecoming conduct by their failure to ensure compliance with Board policy. The Respondents deny that they have violated Board policy. Thus, a material fact must be decided by the [ALJ]." (Board's Exceptions at 5)³

² Since there is no provision in law for submission of a response to reply exceptions, the Board's submission will not be considered by the Commissioner in reaching a final decision in this matter.

³ The Commissioner also notes for the record that the Board's exceptions argue that "[b]ased on the Commissioner's transmittal of this matter for a hearing [pursuant to the provisions of *N.J.S.A.* 18A:6-16], the issue of whether [respondents] could be held responsible for the fire drills at School No. 17 had been decided. The law of the case precluded the [ALJ] from making a different determination as it would be *res judicata*."³ (Exceptions at 5) The Commissioner finds the Board's *res judicata* argument entirely without merit. Transmittal of tenure charges to the OAL for hearing under the provisions of *N.J.S.A.* 18A:6-16 is *not* tantamount to a legal conclusion.

Returning to the ALJ's finding that, as a matter of law, the vice principals were not responsible for holding fire drills, the Board reiterates its argument that according to their certificate, training and job description, vice principals are required to implement Board policy, including fire drills and, therefore, should be held accountable for their inaction in the face of a school safety hazard. The Board also urges that the ALJ erred in finding that the vice principals' refusal to do anything in the face of their knowledge that fire drills were not being conducted in their school did not constitute unbecoming conduct. It reiterates its position that the vice principals have a duty to implement Board policy based on their job description and, therefore, have a duty to ensure that fire drills were being held in their school when they became aware that the drills were not being held because they plainly had a duty that arises from their status as administrators in a school to ensure the safety of students. Of this, the Board states:

The Respondents were assigned to School No. 17 for over two (2) years, never heard the fire bells ring, never witnessed a fire drill and ignored the situation. The Respondents knew that the law was being violated and failed to act. (Initial decision at 6). The response from respondents that they assumed [the principal] was reporting to the Board that no fire drills were being conducted is irrelevant. The Respondents are charged with the care and instruction of the students of Elizabeth. Their principal responsibility is to ensure the safety and well-being of those students. Carried to its logical conclusion, based upon the "its [sic] not my job" defense of the respondents, if the Respondents became aware of abuse of a child, they could assume that the counselors knew about it because it was not their job. Or, in the alternative, if a dangerous condition was created in the School, that they did not have responsibility to see it was fixed because that was the Head Custodians (sic) job. (*Id.* at 8)

The Board next argues that a determination as to whether an action constitutes unbecoming conduct is discretionary and must be decided on a case-by-case basis. In support of this contention and its position that respondents are guilty of unbecoming conduct, the Board relies upon *In the Matter of the Tenure Hearing of Charles Motley, State-operated School*

District of the City of Newark, Essex County, issued by the Commissioner August 4, 1999, *aff'd*

State Board of Education December 1, 1999, wherein the ALJ stated:

“Unbecoming conduct” is an elastic term broadly defined to include any conduct “which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services.” *Karins v. City of Atlantic City*, 152 *N.J.*, 532, 554 (1998). Behavior rising to the level of unbecoming conduct “need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct. [citation omitted] Despite the apparent vagueness of this standard, “it fairly and adequately conveys its meaning to all concerned.” *Laba v. Newark Bd. of Educ.*, 23 *N.J.* 364, 384 (1957). In the context of a school tenure case, “the touchstone is fitness to discharge the duties and functions of one’s office and position.” *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974), *certif. den.* 65 *N.J.* 292 (1974). (Slip op. at 15-16)

Lastly, the Board argues that the ALJ erred in finding that (1) requiring a vice principal to address the failure of the school to hold fire drills would place an undue burden on subordinates to report illegal acts of superiors or risk facing tenure charges and that (2) the inaction of respondents would not likely affect morale or efficiency by destroying public respect for, or confidence in, school operations or services. With respect to this, the Board argues, *inter alia*, that the Conscientious Employee Protection Act (CEPA) protects employees who report unsafe conditions and protects such employees from retaliation for their whistle-blowing. It further urges that the ALJ minimized the conduct in this case when referring to the failure of the school to hold fire drills as “questionable acts or omissions.” (Initial Decision at 11) Of this, the Board states, “It is more than that. It is illegal conduct that violates *N.J.S.A.* 18A:41-1 and jeopardized the children’s safety.” (Board’s Exceptions at 10) Consequently, the Board requests that the Commissioner find that respondents have a duty to implement Board policies regarding the safety of students and their failure to do so warrants discipline.

Initially, Respondent Jackus' reply exceptions⁴ aver, *inter alia*, that it is clear that the motives for bringing tenure charges against respondents had nothing to do with the Board's desire for safety in the schools, but rather was a vendetta and retaliatory action against him for his political association outside of school. He next argues that the ALJ's decision correctly states the principle of law for consideration of a motion for summary judgment and urges that it is clear from all submissions by the Board and *N.J.S.A.* 18A:41-1 that the duty to conduct fire drills is placed squarely upon the principal. Of this, Respondent Jackus reiterates that, "[n]owhere in either the statute or the school district's fire drill regulations is there any mention of Vice Principal's duty either to conduct fire drills, report fire drills or report the lack of fire drills to the administration." (Jackus' Reply Exceptions at 3) Jackus further argues that the ALJ is correct in finding that "[e]ven by the most general standards of good conduct, the inaction of the vice principals would not likely affect morale or efficiency by destroying public respect for or confidence in school operations or services." (Initial Decision at 11) Jackus also contends that the only factual assertion for evidence presented by the Board as to the effect of morale and efficiency was the Board's own assertions.

Upon review of the record in this matter, the Commissioner agrees with the ALJ's determination that, notwithstanding the Board's demonstration that there are genuine disputes as to some of the numerous facts asserted by respondents, there exists, nonetheless, a core of essential facts over which there is no dispute; thus, respondents' Motion for Summary Decision can be decided to the extent of ascertaining whether or not respondents are guilty of unbecoming conduct. Further, the Commissioner is in agreement with the ALJ's recitation of the law on what constitutes unbecoming conduct, found on pages 9-10 of the Initial Decision, and as set forth

⁴ A review of the record indicates that respondent Jackus' reply exceptions address exhibits which were not part of the record before the Administrative Law Judge. Those exhibits will not, pursuant to *N.J.A.C.* 1:1-18.4(c), be considered herein.

above in the Board's recitation from *Motley, supra*. Moreover, the Commissioner fully concurs with the ALJ that unbecoming conduct may be based on a failure to act where there is a duty to do so and that "a duty to act is the touchstone for unbecoming conduct based upon failure to act." (Initial Decision at 10)

However, upon careful and thorough consideration of the record, the Commissioner does not agree with the conclusions of law reached by the ALJ that the charge of unbecoming conduct levied against each respondent should be dismissed because, pursuant to *N.J.S.A.* 18A:41-1 and the Board's regulations, the duty to conduct fire drills is placed squarely on the principal and because neither the law, nor Board regulations, nor the job description for vice principals assign any responsibilities for fire drills on vice principals; thus, under the circumstances of this matter, respondents were not under a specific duty to conduct fire drills or to report the principal's failure to do so. Moreover, the Commissioner does not agree with either of the ALJ's conclusions that "[e]ven by the most general standards of good conduct, the inaction of the vice principals would not likely affect morale or efficiency by destroying public respect for or confidence in school operations and services," and that an undue burden would be placed on subordinates to report questionable acts or omissions of superiors or risk facing tenure charges. (*Id.* at 11)

In so holding, the Commissioner fully concurs with the Board that the crux of the unbecoming conduct charge, under the facts of this matter, rests upon the inaction of the vice principals who have a professional duty to ensure the health, safety and well-being of the students and staff under their care and supervision. The very fact that the law requires fire drills in schools to be conducted *at least two times each month* underscores the grave importance of such safety drills for ensuring the emergency preparedness of students and staff. Of paramount importance to the core of undisputed facts in this matter is that (1) respondents had knowledge

that statute and Board regulations require that two fire drills be conducted each month in their school; (2) respondents had knowledge that the law and Board regulations for the conduct of fire drills were violated continuously for at least two years at School 17; and (3) respondents failed to act on that knowledge. To have such knowledge and not act upon it in the face of the duty of care for student and staff safety, which they bear as administrators of School 17, constitutes, in the Commissioner's judgment, unbecoming conduct, even if one accepts *arguendo* that respondents did not know if the principal was reporting noncompliance with the fire drill law and Board regulations. In other words, respondents, by virtue of their status as vice principals, have a duty to protect the health, safety and well-being of students and staff in School 17. Moreover, this duty of care in turn gave rise to a duty on respondents' part to act on/report the continuous, long-term violations of law in that the vice principals' failure to report such violations was no less serious than the failure of the principal to hold fire drills, given that the health, safety and well-being of students and staff were seriously jeopardized.

Next, the Commissioner finds and determines that, under the factual circumstances of this matter, wherein the health, safety and well-being of students and staff were seriously jeopardized, an undue burden would not have been placed on the respondent vice principals to act on their knowledge of the long-term, continuous violations of law and Board regulation with respect to fire drills in School 17.

Having sustained the charge of unbecoming conduct against respondents, it is necessary to make a determination as to the appropriate penalty in this matter. However, because the ALJ dismissed the tenure charges, the record is insufficiently developed to determine either the assignment or mitigation of penalty; therefore, the Commissioner is compelled to remand this matter to the OAL solely for proceedings as necessary to develop a full and factual record in order to make recommendations, as appropriate, with respect to penalty.

Accordingly, respondents' Motion for Summary Decision is denied and the charge of unbecoming conduct certified by the Board against each respondent is sustained for the reasons set forth above. The matter is, therefore, remanded to the OAL for further proceedings, as necessary, on the question of appropriate penalty.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: AUGUST 24, 2001

Date of Mailing: AUGUST 24, 2001

⁵ This decision 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.