498-01

IN THE MATTER OF THE TENURE	:	
HEARING OF RUTH MEGARGEE,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF	:	DECISION
HUMAN SERVICES,	:	
AND	:	
RUTH MEGARGEE,	:	
APPELLANT,	:	
v.	:	
NEW JERSEY DEPARTMENT OF HUMAN SERVICES,	:	
RESPONDENT.	:	

SYNOPSIS

The New Jersey Department of Human Services (DHS) filed tenure charges against Ruth Megargee for conduct unbecoming a tenured teaching staff member based on her refusal to perform her assigned teaching duties. Megargee had previously filed an appeal to the Merit System Board seeking a reasonable accommodation for her physical disability. The matters were consolidated and the Department of Education was found to have the predominant interest in a joint decision of the Commissioner and Merit System Board.

After conducting a hearing, the ALJ determined that, while Megargee is disabled, the DHS offered a reasonable accommodation by assigning her to a teaching position that did not require lifting or physical strain. In this regard, the ALJ determined that the proffered position had no lifting requirement because the pupils Megargee would teach were ambulatory. In addition, the ALJ specifically rejected Magargee's contention that she should be accommodated by including the use of equipment to assist with lifting in her assignment, having her work with an aide, allowing her to work with younger children or assignment to a position providing homebound instruction. Therefore, the ALJ determined that Magargee was absent from her position without permission, which constituted conduct unbecoming a teaching staff member, and that the appropriate penalty was removal from her position.

The Commissioner affirmed the decision of the ALJ for the reasons stated therein, specifically holding that Megargee was guilty of unbecoming conduct when she refused to return to work despite forewarning by her superiors that tenure proceedings would ensure if she failed to do so. The Commissioner also affirmed the penalty of termination, finding disingenuous Megargee's argument that the dismissal rested on only three days absence, holding instead that the record reveals that Megargee had no intention of accepting the reasonable accommodation offered by the DHS and returning to work.

December 31, 2001

OAL DKT. NOS. EDU 4693-00 and CSV 8265-00 (CONSOLIDATED)
AGENCY DKT. NO. 196-6/00

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The record and Initial Decision issued in this consolidated matter[1] by the Office of Administrative Law (OAL) have been reviewed. Respondent-Appellant Megargee's (Respondent) exceptions and the Department of Human Services' (DHS) reply exceptions were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4 and are briefly summarized below.[2]

[1] The instant tenure charge matter was consolidated with the above-captioned Merit System Board appeal by virtue of a joint order issued by the Merit System Board and Commissioner of Education on April 10, 2001 and April 25, 2001, respectively. Predominant interest was found to rest with the Commissioner of Education.

[2] The exceptions and reply exceptions essentially reiterate arguments previously presented to, and considered by, the Administrative Law Judge (ALJ) during the proceedings of this matter.

In her exceptions, most arguments of which are summarized at pages 43-65 of the Initial Decision, respondent avers that the matter has been complicated by the fact that the DHS has changed its arguments several times in the course of the proceedings; *i.e.*, the DHS first argued that reasonable accommodation of respondent's handicap was not possible because she failed to meet the essential functions of the job (heavy lifting), then, during the course of the hearing argued that accommodation was possible by having her work with an ambulatory juvenile population that did not require heavy lifting.

As to this, respondent reiterates that, it is, and always has been, her position that accommodation is possible because heavy lifting is not an essential function of the job and a number of reasonable accommodations were always available to the DHS, including the use of equipment such as the hoyer lift, having an aid, allowing work with younger children or continuation of her prior job of homebound instruction. Respondent further reiterates that the DHS would not explore any of these options and flatly refused to engage in the "interactive process" required by the LAD to accommodate handicapped employees, (*see Jones, supra*), insisting, instead, that its proposed accommodation was the only one possible. As to this, respondent avers that the accommodation in this case was a position working with violent ambulatory juveniles under a DYFS program, similar to a position she had been considered for in 1993, which she had been told required physical restraint of students, something which she clearly is unable to do. According to respondent, it was only in the middle of the hearing that the DHS yet again changed its position and maintained for the first time with a rebuttal witness that respondent would not be required to work with DYFS students, a position respondent contends is directly contrary to what she had been told when she was offered the accommodation. (Respondent's Exceptions at 2-3)

Respondent next reiterates that there was no good faith effort to assist her in seeking an accommodation and contends that the Initial Decision of the ALJ only considered one of several options that would have allowed respondent to retain her current position. Of this, she avows that the Initial Decision does not even mention, much less discuss, several other viable accommodation options and states, *inter alia,* that:

> For the one accommodation it does discuss, the Initial Decision "dismisses" this accommodation, without citing any record evidence that would support a finding of undue burden. Finally, and most egregiously, the Initial Decision simply ignores the undisputed fact that DHS changed its position, and re-fabricated its proposed accommodation in the middle of the hearing.
>
> In sum, this is not a case that turns on conflicting evidence and credibility determinations. Rather, in this case the Administrative Law Judge just ignored the relevant evidence, and made a decision simply bereft of factual support in the record. (*Id.* at 4-5)

Lastly, respondent reiterates that the tenure charges against her should be dismissed because the DHS failed to provide any meritorious basis for the tenure charges against her, emphasizing that the charges of unbecoming conduct are based on only three days of absence, "not three or more months or years, not violence, not drugs, not gross sexual misconduct" and she was absent because the DHS refused to reasonably accommodate her handicap. (*Id*. at 37) *See, also,* respondent's arguments set forth on pages 62-65 of the Initial Decision.

The reply exceptions submitted by the DHS aver that, contrary to respondent's assertions, the record reveals that its actions were supported by substantial credible evidence and were neither arbitrary, capricious nor unreasonable. It is the DHS's position that two issues were presented for consideration in this case, *i.e*., whether the accommodation offered on April 18, 2000 was a reasonable accommodation for respondent's handicap and, whether

respondent's actions constitute conduct unbecoming a tenured employee and warrant termination of her employment. (Reply Exceptions at 2) The DHS further urges that the record distinctly shows that the ALJ's conclusions were well-reasoned and in accordance with law. In addition, the DHS argues that this is not a complicated case, *i.e.*, respondent has a lifting restriction, and the accommodation offered provided that she did not have to lift. In support thereof, the DHS recites that portion of the Initial Decision at page 68 wherein the ALJ states:

> This "lifting" requirement does not apply to respondent-appellant in the position of HI teacher and the classroom assignment with the ACTS pupils. The ACT pupils are all ambulatory, therefore, no lifting is required. (*Id.* at 4, citing Initial Decision at 68)

Moreover, the DHS avers that respondent declined the reasonable accommodation it offered and failed to return to work after she was notified a number of times that tenure charges would be filed. In support of its position, the DHS urges that the ALJ was correct in concluding at page 70 of the Initial Decision that: (1) Respondent Megargee's failure to accept the reasonable accommodation and return to her assigned duty created conditions under which the proper operation of the school was adversely affected; (2) responsibility rested with respondent to resume her teaching duties; (3) she refused to resume her teaching duties on unfounded and unsubstantiated grounds; and, (4) consequently, she is not afforded the protection of tenure, which is forfeited. (*Id.* at 4)

The DHS next reiterates its argument that *heavy* lifting is not an essential function of the Teacher 1 position, *but lifting is*, and the reasonable accommodation offered respondent was a position that did not require lifting. (*Id.* at 5) The DHS further reiterates that, while the ACTS program and the DYFS program from the Vineland Residential Center share the Atlantic Campus facility, they are run as separate programs, and DHS teachers such as respondent are only responsible for teaching the ACTS students, not the DYFS students. (*Id.* at 6) Furthermore,

the DHS reiterates, the DYFS students who travel from the Vineland Residential Center are considered privileged among their peers and attendance at school on the Atlantic Campus is seen as a reward. (*Id* at 7) Moreover, it is the DHS's position that these students are taught only by DYFS staff. In support thereof, the DHS cites to the testimony of Ron Wybraniec, former supervisor of the Atlantic Campus, that there would be no occasion for a DHS teacher, such as respondent, to fill in as a substitute teacher and that since the inception of the ACTS program, there had only been five fights between students, and no teaching staff member had ever been injured by any of the students. (Reply Exceptions at 6-7)

Petitioner next argues that the entire point of respondent working with DYFS students is moot and her constant discussion of same is a "red herring" which should be completely disregarded, averring, *inter alia,* that when the accommodation was offered to her, respondent was advised in writing that, since the program's inception five years previously, no teacher has ever been required to restrain a student. (*Id.* at 7-8) Moreover, it is the DHS's contention that respondent's surreptitious taping of her conversation with Don Hepner in April 2000 clearly indicates that the Atlantic Campus has two separate populations, and that he was quite reassuring that respondent's contact with the DYFS students would be rare. The DHS further contends that if respondent had contacted Mr. Wybraniec, he would have told her unequivocally that she would have no contact with the DYFS students. (*Id.* at 9)

As to the issue of other viable options for reasonable accommodations as urged by respondent, the DHS references the arguments it presented in its Closing Brief at pages 28-35, which are also set forth on pages 24-28 of the Initial Decision, and states, *inter alia ,*that:

> To simplify the issue, there isn't any way to completely eliminate the possibility of reinjury. Again, the best DHS can do, and did, is [to] eliminate the factor that would most likely lead to reinjury --

> lifting. All of these "other" options respondent suggests put respondent and the day-training population she prefers at risk for injury, whereas the accommodation offered to respondent avoided the issue of lifting altogether.
>
> Respondent's preference to work with a day training population (who are profoundly and severely retarded and many of whom are totally immobile), the same population that led to her injury not once but twice, is *per se* unreasonable. The fact is, based on her history and her restriction, she is safer with the juvenile population who do not need lifting, than with the day training population who do need lifting. (*Id.* at 10-11)

Lastly, the DHS characterizes as a "red herring" respondent's contention that the tenure charges are based upon only a three-day period of absence, and urges, *inter alia,* that the record is riddled with instances where respondent claimed medical restrictions that she could not substantiate, or that were substantiated with doctors' notes dated after the fact, failures to go where assigned and refusals to even come to work. (*Id*. at 11) Moreover, the DHS urges that such an argument by respondent is elevating form over substance because, it contends, this clearly was a situation that had been going on well before May 2000, and probably would have continued long after if tenure proceedings had not been initiated. (*Id*. at 14) Of this, the DHS states:

> The May 4th correspondence from [respondent's] attorney is quite significant, because it declines the accommodation and appeals the decision to the Department of Personnel. Respondent was not planning on returning to work on May 8th, 9th 10th or any other day, as long as the reasonable accommodation, the terms of which she did not like, were on the table. Indeed, she admitted the same at the hearing. (See Exhibit A, DHS Closing, 39-41]. (*Ibid*)[3]

Upon comprehensive review of the record, the Commissioner agrees with, and adopts, the Initial Decision of the ALJ for the reasons set forth therein. Contrary to respondent's arguments, the Commissioner finds sufficient support in the record to sustain the finding and

[3] See also Initial Decision at 30-32.

conclusion of the ALJ that respondent was guilty of unbecoming conduct when she refused to return to work despite ample forewarning by her superiors that tenure proceedings would ensue if she did not. Moreover, the Commissioner finds and determines that the record supports the determination that respondent knew, or should have known, no later than receipt of the May 12, 2000 letter from George Burgos (R-31), that she was *not* going to be required to restrain students at the Atlantic Campus and that, since the program's inception approximately five years before, no teacher had ever been required to restrain a student.

The Commissioner further finds no merit in respondent's arguments alleging that the DHS changed its position during the course of the proceedings in this matter. In this regard, the Commissioner agrees with the DHS that this particular argument of respondent is incorrect and that respondent confuses the issue. Notwithstanding the various legal arguments espoused by the parties during the lengthy proceedings in this matter, the fact is that the record demonstrates that the DHS never took the position that it was unable to accommodate respondent. Rather, it offered her a position that would require neither lifting nor restraining, even in the unlikely event she would have to interact with the DYFS population, a point which the DHS disputes would ever actually occur. (*See* pages 2-5 of the DHS's reply to respondent's post-hearing brief.) Consequently, the Commissioner finds and determines, as did the ALJ, that the accommodation offered by the DHS was reasonable and its refusal to accept respondent's other options for accommodation was not arbitrary, capricious or unreasonable.

Having so determined, the Commissioner, upon review of the record, concludes, as did the ALJ, that termination is warranted in this matter. In so holding, the Commissioner finds disingenuous respondent's arguments that the matter rests merely on a three-day absence. As correctly argued by the DHS, the record more than amply supports the conclusion that

respondent had no intention of accepting the reasonable accommodation offered by the DHS, despite assurance that contact with DYFS students would be rare, if at all, and, most importantly, that she would not have to lift or restrain any students at the Atlantic Campus. Further, the record supports the determination that, in addition to a history of extensive absences, there were problems related to respondent's acceptance of assignments and/or returning to work, which were antecedent to the filing of the tenure charges. (*See* Statement of Undisputed Material Facts, J-1)

Consequently, although respondent was not specifically charged with excessive absenteeism, her extensive absences since 1993, even those which were caused by legitimate reasons or were approved leave to which a teacher is entitled, *including those arising out of a work injury*, may be considered in weighing penalty in disciplinary matters. *See In the Matter of the Tenure Hearing of Grace Folger, School District of the City of Orange*, *Essex County,* decided by the Commissioner May 15, 2000, Slip Op. at pages 39-41 and 85-86 citing, *inter alia, In the Matter of the Tenure Hearing of Jerome Kacprowicz,* 93 *N.J.A.R.*2d (EDU) 147, 153, *aff'd,* State Board of Education, *N.J.A.R.*2d (EDU) 604, *aff'd* Appellate Division, 95 *N.J.A.R.*2d (EDU) 105; *Kochman v. Board of Education of Keansburg*, 94 *N.J.A.R.*2d (EDU) 141, State Board of Education, 154, *aff'd* Appellate Division, 95 *N.J.A.R.*2d (EDU) 212; and, *Board of Education of the Twp. of Irvington v. Pearson*, 97 *N.J.A.R.*2d (EDU) 329.

Accordingly, respondent is hereby terminated from her tenured teaching position in the Board's employ. Further, a copy of this decision shall be forwarded to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for review and action, if any, as it deems appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: December 31, 2001

Date of Mailing: January 3, 2002

[4] 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.