140-02

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN HOWARD, JR.	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF EAST ORANGE, ESSEX	:	DECISION
COUNTY.	:	
_____	:	

SYNOPSIS

Board filed 12 tenure charges against respondent, Superintendent of Schools, alleging conduct unbecoming a chief school administrator for a multitude of acts, including use of school employees to perform work at his home and for his family, improper use of an annuity, relocating his office at a significant cost without Board approval and ordering the hiring of a friend as a special education teacher and improperly providing him a reduced work schedule to enable him to perform non-teaching functions. Respondent contested all charges.

The matter was transmitted to OAL and, after 14 days of hearing, the ALJ sustained seven of the 12 tenure charges, holding, *inter alia*, that petitioner improperly had school employees perform work at his house, engaged in deceptive acts with regard to his annuity, and failed to properly communicate with the Board. The ALJ recommended termination as the appropriate penalty.

The Commissioner initially affirmed the credibility determinations of the ALJ, noting that such determinations are entitled to deference, and that respondent failed to provide a valid basis to disturb the same. In addition, the Commissioner affirmed the Initial Decision on the specific tenure charges with modification, holding that, in addition to the charges the ALJ determined were proven by it, the Board had presented sufficient evidence to sustain charges V. However, the Commissioner found that the Board had not sustained its burden with respect to Charge XI.

The Commissioner concluded that termination was the proper penalty based on the charges proven by the Board and so ordered.

April 1, 2002

OAL DKT. NO. EDU 1528-01
AGENCY DKT. NO. 17-1/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. JOHN HOWARD, JR.,	:	
BOARD OF EDUCATION OF THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF EAST ORANGE,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both parties filed exception and reply arguments in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.6.[1]

RESPONDENT'S EXCEPTIONS AND PETITIONER'S REPLY

Respondent excepts to the Administrative Law Judge's (ALJ) recommendation to sustain Charges I, VI, VII, VIII, IX, X and XI.

Exceptions to Sustaining of Charge I: *In this charge, the Board alleges, in pertinent part, that respondent either "orchestrated, directed, intimated, condoned, permitted, and/or countenanced" work done at his home by Wallace White during White's regular work days as a Board employee, which was compensated with Board funds through the normal payroll process.* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge I at 2)

Here, respondent challenges the credibility determinations rendered by the ALJ with respect to Wallace White, Dr. Howard, John Howard III, and James Scott, and disputes some of the ALJ's "findings" on this charge,[2] as well as the ALJ's ultimate conclusion that it was

[1] Respondent submitted 42 exceptions (erroneously numbered as 40) encompassing 133 pages of text. Due to the extraordinary volume of these arguments, they are not all summarized in this decision.

[2] A number of respondent's exceptions challenge a specific "finding and/or conclusion" of the ALJ. However, the Commissioner notes that most were statements made by the ALJ in the course of her discussion and were *not* designated in her Initial Decision as "findings."

more likely than not that Wallace White worked at respondent's home during Board time. (Respondent's Exceptions at 8-42)

The Board contends that the ALJ correctly determined that Wallace White was a credible witness who performed extensive electrical installations in respondent's home, on Board time, which respondent condoned. (Board's Reply at 1) In so holding, the ALJ properly found that respondent, James Scott, and Dr. Howard's son were not credible. (*Id.* at 2-4)

Exceptions to Sustaining of Charges VI, VII, VIII and IX: *In these charges, the Board alleges that respondent's actions with respect to changing the address on the annuity, supra, constitute "a course of willful misrepresentation, deception, deceit and/or false swearing"* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charges VI, VII, VIII and IX at 6-8); *that respondent's actions with respect to his unilateral withdrawal of $50,000 from the annuity on May 6, 1998 constitute "a course of willful misrepresentation, deception, deceit, false swearing, attempted theft and/or theft" (id.* at 7); *that respondent's actions with respect to his unilateral withdrawal of $32,000 from the annuity constitute "a course of willful misrepresentation, deception, deceit, false swearing, forgery, attempted theft and/or theft" (id.* at 8); *and that respondent's endorsement of the $32,000 check issued by The Lincoln National Life Insurance Company, although not payable to him, and his depositing of same in his personal bank account constituted "a course of willful misrepresentation, deception, deceit, false swearing, forgery, attempted theft and/or theft" (Id.* at 8).

In addition to his objections to statements made by the ALJ in support of her findings and conclusions on these charges, respondent contends that the ALJ erroneously failed to address the issue of whether the annuity was properly established and whether, as a matter of law, the Board could properly own the annuity. In this regard, respondent insists the ALJ improperly failed to consider: the provision in his employment contract for such an annuity; that the Board was informed of the status of the annuity by Business Administrator Mark Kramer; that respondent relied upon Kramer and Dante Liberti regarding the establishment of the annuity and changing the address; and that Board members testified the annuity was established for respondent's benefit. Additionally, respondent reasons he could not be found guilty of forgery

because he signed his own name to the checks and could not be found guilty of theft where the annuity legally and properly belonged to him. (Respondent's Exceptions at 47-60)

In reply, the Board argues that, even assuming, *arguendo*, the annuity was established in derogation of State and Federal law, this does not excuse respondent's conduct relative to this charge. (Board's Reply at 20) The Board continues, asserting that there was no proof offered at the hearing that it ever received notification of the first address change and respondent should not use Mr. Kramer and Mr. Lamberti "as scapegoats for his transgressions." (*Id*. at 22) Further, respondent's acknowledged $50,000 withdrawal was carried out "without so much as informing the Board of the activity." (*Id*. at 23) Finally, the Board underscores that Jamie Bassin, the risk control coordinator of Summit Bank, characterized respondent's attempt to deposit the $32,000 check in his personal account, although the check was payable to the Board, as "fraud." (*Id.* at 26)

Exceptions to Sustaining of Charge X: *The Board asserts in Charge X that respondent "unilaterally and without Board knowledge or authorization, caused his office to be relocated to a different building *** at an approximate cost of $30,000***."* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge X at 8) *Such conduct constituted "an unauthorized expenditure of public funds, abuse of authority, patent disregard for proper procedures and protocol, and a complete disregard for the negative consequences of his act upon the proper administrative and educational operation of the school district *** ."* (*Id.* at 9)

Respondent argues that the ALJ erred, as a matter of law, when she failed to recognize his legal and contractual authority to undertake such a move, when she barred respondent from presenting evidence of prior moves undertaken by him, and when she permitted the Board's expert witness to express his opinion that respondent's actions constituted unbecoming conduct. Respondent similarly attests that the ALJ failed to consider that the Business Administrator and purchasing agent agreed that no funds had been improperly spent in connection with the move. Furthermore, respondent disputes that the within record supports the

conclusion that he expended Board funds without notice to the Board. However, if he did fail to notify the Board in June 2000, respondent claims that such inaction would, at worst, constitute inefficiency rather than unbecoming conduct. The ALJ erred, respondent maintains, in concluding that he failed to deal honestly with the Board. (Respondent's Exceptions at 60-73)

The Board points out respondent's acknowledgement that although the Board was notified of the possibility of a move in October or November 1999, *that* Board was a different legal entity from the one sitting in June 2000. (Board's Reply at 27) Indeed, Board President Ms. Cool testified "that the Board never received a written plan, proposed resolution, or proposed budget from Dr. Howard relative to the office move *** [and] she was not aware of the actual move until the day in question. ***" (*Ibid*.) As to the costs involved, even if the money is budgeted, the Board contends that only with its authority may there be an actual expenditure. (*Ibid.*) Moreover, respondent's actions in this regard should not be viewed as "inefficiency," which the Board considers an inability to perform the job. Instead, the allegations in this charge involve, "*inter alia*, issues of dishonesty, misrepresentation and abuse of public office[,which] go right to the heart of Dr. Howard's fitness to discharge the duties of Superintendent." (*Id*. at 29)

Exceptions to Sustaining of Charge XI: *In Charge XI, the Board alleges that Howard urged Mark Kramer, Business Administrator, to deny that Kramer was not familiar with respondent's contract. "By demanding urging, suggesting, cajoling and/or representing that Kramer provide false testimony, Howard, among other things, suborned perjury, solicited false swearing, [and] attempted to obstruct an ongoing Board investigation ***."* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge XI at 9)

Respondent challenges the ALJ's credibility determination with respect to Mark Kramer, and adds that her finding that Kramer felt intimated and uncomfortable is not supported by this record. However, even assuming the record fairly shows that Kramer felt intimidated by respondent's words, respondent contends that a staff member's subjective feeling of intimidation, absent proof of witness tampering, is insufficient to support a finding of

unbecoming conduct. Moreover, respondent argues that, in reviewing this charge, the ALJ failed to consider the testimonial and documentary evidence affirming that Mark Kramer *did* have knowledge of respondent's contract. (Respondent's Exceptions at 73-82)

In reply, the Board underscores Kramer's testimony wherein he affirmed that he understood respondent's words "to mean that Dr. Howard wanted him to say that he *was* privy to his contract, even though he knew this to be false,***" and Kramer felt intimated by this repeated statement. (emphasis in text) (Board's Reply at 31) The Board asserts that the ALJ properly credited Kramer's testimony and found that the Board sustained its burden of proving that respondent abused his position and authority in a manner which warrants serious disciplinary action. (*Id.* at 32, citing to page 23 of Initial Decision)

PETITIONER'S EXCEPTIONS AND RESPONDENT'S REPLY

The Board excepts to the ALJ's recommendation to dismiss Charges II, III and V.[3]

Exceptions to Dismissal of Charge II: *The Board alleges in Charge II that Wallace White observed numerous lighting fixtures and other lighting supplies from the School Services Building in James Scott's car, which Scott directed White to unload and bring to Howard's home for his use. This conduct, the Board avers, was either "orchestrated, directed, intimated, condoned, permitted and/or countenanced by Dr. John Howard, Jr.***"* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge II at 3)

The Board contends that it has established by a preponderance of the credible evidence that respondent knew the electrical supplies were stolen from the Board and used in his home. In this connection, the Board argues that Wallace White, who was determined to be a credible witness, described in detail how and what items were stolen from the Services building for use in respondent's residence. Given the number of items "and the fact that Dr. Howard

[3]The Board does not except to the ALJ's recommendation to dismiss Charge IV, wherein the Board alleged that Paul Woodard was rewarded with excessive overtime payments, using Board funds, in return for providing cleaning services to respondent at his home. (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge IV at 4)

obviously did not pay for them," leads to one conclusion, according to the Board, that respondent was aware of the source of the supplies and countenanced the theft. (Board's Exceptions at 2) Moreover, although Dr. Howard testified that the conduit line installed in his home contains a bar code from Home Depot, rebuttal witness, Mark Boehm, a store manager from Home Depot, testified that the conduit did not contain a Home Depot bar code, but, rather a manufacturer's bar code. Home Depot, Boehm explained, did not produce its own bar codes for its inventory. (*Ibid*.)

In reply, respondent contends that the Board's exception is falsely premised on the notion that the ALJ found, in fact, that a theft had occurred. However, she did not make such a finding with respect to either Wallace White or James Scott. Neither did the ALJ determine that stolen materials were used in respondent's home. (Respondent's Reply at 3) Respondent further argues that the Board "intentionally omits" other evidence demonstrating that he paid for the items that White claims were stolen. (*Id*. at 5) As to respondent's misunderstanding about the source of the bar code on the conduit, respondent affirms that he "believed the bar code came from Home Depot because it was purchased from Home Depot and he went back to the store to confirm that the numbers matched up." (*Ibid*.) Lastly, respondent finds that the Board is attempting to shift the burden of proof on this charge. In this connection, he underscores that it is not his burden to show that the theft did not occur; rather, the Board must show that it *did* occur. However, the Board has failed to produce any purchase orders, invoices, vouchers, receipts or bill lists to verify that any of the allegedly stolen items was once in its inventory and has failed to bring forth any physical evidence of a theft. (*Id*. at 6)

Exceptions to Dismissal of Charge III: *In this charge, the Board alleges that respondent directed Wallace White, on more than one occasion, to move his daughter in and out of her dormitory at the College of New Jersey in Trenton, using a Board vehicle, on Board time and for which White was compensated with Board funds through the normal payroll process.* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge III at 3)

The Board asserts that Wallace White's testimony proves this charge and contends that respondent's daughter "is a biased witness whose testimony should be subject to intense scrutiny.***" (citation omitted) (Board's Exceptions at 4) Further, the Board contends that the documentary evidence which the ALJ credits establishes only that students had to be checked out of the dormitory by 8:00 p.m., but does not substantiate when Ms. Howard actually commenced check-out. The Board also argues that the ALJ failed to address whether Dr. Howard abused his discretionary authority by asking one or more Board employees to move his daughter out of her college dormitory as a personal favor to him since he testified that, in addition to Mr. White, Mr. Scott, and perhaps other Board employees, also assisted in transporting his daughter. (*Id.* at 3-5)

Respondent counters that Charge III contains no allegation that anyone other than White was improperly involved in moving his daughter from her dorm and, therefore, the Board cannot, at this point, expand the charges. (Respondent's Reply at 6) Rather, regulations require that charges be stated with specificity so that respondents are aware of the precise allegations against them. (*Id*. at 6, 7) Neither, respondent continues, is there any proof that any other Board employee helped to moved his daughter on anything but his own personal time. (*Id*. at 7) Furthermore, respondent contends that the Board's implication that staff members should not perform personal favors for one another on their own time is absurd. (*Ibid*.) To the extent Wallace White was merely performing such a personal favor, respondent claims that Charge III should not have been included, because a personal favor connotes a voluntary decision. (*Id*. at 8)

Exceptions to Dismissal of Charge V: *The Board alleges in Charge V, in pertinent part, that Dr. Howard directed Deloris Trimble, Director of Special Education Services, to hire Peter Andrews, "an 'old personal friend,'" notwithstanding that Andrews lacked any formal preparation or certification for the position, and Howard told Trimble that Andrews' primary responsibility would be to assist the writing of a screenplay entitled Dragon Fly. Howard recommended, and the Board approved, Andrews' hiring. Andrews was given a reduced teaching schedule to work on the screenplay. Later, for reasons apart from his teaching performance, Dr. Howard directed Trimble "to get rid" of Andrews.* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge V at 5)

The Board avers that the totality of the evidence demonstrates that respondent was dishonest with the Board when he recommended the hiring of Peter Andrews and subsequently directed that Andrews be fired for reasons unrelated to his teaching performance. Specifically, the Board argues that Trimble testified that she was directed by respondent to hire Andrews and respondent told her that Andrews' role would be largely to help with the writing of the script for *Dragon Fly*. Thus, at respondent's direction, Trimble interviewed Andrews and recommended his hiring. Trimble further testified they discussed a reduced schedule for Andrews. According to the Board, Trimble's testimony, supported by that of Principal Morgan, was credited by the ALJ who noted, "'[t]he reason given to both Trimble and Morgan for these instructions was that Andrews would be involved in the writing of *Dragon Fly*.'" (Board's Exceptions at 7, citing to Initial Decision at 17)

Furthermore, the Board reasons that Andrews could not have admitted to working on the script during the school day, since he could not, then, lawfully claim the script as his own, as he has, in fact, done. (*Id.* at 9) However, even assuming that Andrews was hired because there was a shortage of special education teachers in the District, the Board contends that the ALJ should not have disregarded the fact that respondent never informed the Board that Andrews would have a reduced teaching schedule, although he was hired as a full-time teacher. Neither,

the Board adds, did the ALJ address whether respondent's recommended firing of Andrews for reasons unrelated to his teaching performance constituted unbecoming conduct. (*Id.* at 10)

In reply, respondent maintains that he did not surreptitiously hire Andrews to write *Dragon Fly* and asserts that the Board did not produce a single witness to show that Andrews wrote his version of the play during the school day. (Respondent's Reply at 12, 13) As to his alleged order to Ms. Trimble to hire Andrews, respondent reiterates that Trimble, who interviewed Andrews, found him to be a "superior candidate." (*Id*. at 14, 15) Similarly, another district administrator, Lois Perkins, interviewed Andrews and also recommended that he be hired. (*Id*. at 16) Respondent avers that he had no role in setting a reduced schedule for Andrews. (*Id*. at 16, 17) Furthermore, respondent's reasons for wanting Andrews, a nontenured teacher, terminated were legitimate. (*Id*. at 14, 20) As to the Board's lack of knowledge of Andrews' reduced schedule, respondent contends, "it was not the Board's practice or role to get involved with the minutia of teacher's [sic] schedules or their specific duties." (*Id.* at 21)

COMMISSIONER'S DETERMINATION

Upon careful and independent review of the complete record in this matter, which included transcripts from 14 days of hearing, together with exhibits, post-hearing briefs, exception and reply arguments, the Commissioner determines to affirm the Initial Decision with modifications as set forth below.

The Commissioner initially notes that despite respondent's urging to the contrary, he finds no cause to disturb the credibility determinations of the ALJ. Rather, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough,[4] and that she

[4] To the extent respondent alleges that the ALJ failed to consider what he deems to be crucial documentary or testimonial evidence, the Commissioner determines that the ALJ's findings, as well as her articulated bases for such findings, are sufficient "to enable a reviewing court to conduct an intelligent review of the administrative decision and determine of the facts upon which the order is grounded afford a reasonable basis therefor." *State, Dept. of*

carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit. *See In the Matter of the Tenure Hearing of Frank Roberts*, *School District of the City of Trenton, Mercer County*, 94 *N.J.A.R.*2d (EDU) 284, 294, *aff'd* 95 *N.J.A.R.*2d (EDU) 349, *aff'd* App. Div. 96 *N.J.A.R.*2d (EDU) 549.

Furthermore, the ALJ's credibility determination is entitled to the Commissioner's deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super*. 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989)." (sic) *In the Matter of the Tenure Hearing of Frank Roberts*, *supra,* at 550. The Appellate Division recently affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), Slip Op. at 14. The Court also noted *then* pending legislation providing that '"the agency head may not reject or modify any findings of fact on the issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record."' (*Ibid. citing* A-1484, 209th Leg., §10(b), later enacted as *P.L.* 2001, *c.* 5, now codified at *N.J.S.A.* 52:14B-10(c))

Health v. Tegnazian, 194 *N.J. Super.* 435, 443 (App. Div. 1984) In this regard, the Commissioner has held that an initial decision satisfies the necessary requirements of section *N.J.S.A.* 52:14B-10(d) of the Administrative Procedures Act, if it presents, "a detailed and accurate summary and analysis of all *relevant*, credible testimonial and documentary evidence adduced at hearing, which amply supports the ALJ's ultimate conclusion***." (Emphasis in text) *In The Matter of the Tenure Hearing of Margaret Sidberry, School District of Township of Willingboro*, *Burlington County*, Commissioner Decision No. 272-00, August 18, 2000, Slip Op. at 52-53

Additionally, with the exception of the findings specifically addressed below, the Commissioner further determines that, contrary to respondent's contentions, the ALJ's factual findings are each supported by sufficient, credible evidence in the record.

Turning to the specific charges, the Commissioner concurs with the ALJ that the Board has demonstrated it is more likely than not that Wallace White performed work at respondent's home during Board time, for which he was compensated with Board funds through the normal payroll process.[5] The Commissioner further determines that the Board has sufficiently demonstrated that respondent either condoned or countenanced this conduct. Charge I, therefore, is sustained. Similarly, the Commissioner affirms the ALJ's findings and conclusions with respect to Charges VI, VII, VIII, IX and X. These charges are, therefore, sustained.

Additionally, for the reasons set forth in the Initial Decision, the Commissioner agrees that Charges II, III and IV are properly dismissed.

However, the Commissioner determines to set aside the ALJ's conclusions with respect to Charges V and XI. In so doing, the Commissioner first notes the full allegation raised by the Board in Charge V:

> In or about September of 1998, Dr. John Howard, Jr. directed Deloris Trimble, petitioner's director of special education services, to hire Peter Andrews. Howard described Andrews to Trimble as an "old personal friend." Andrews lacked any formal preparation or certification for the position in question, and in fact had been trained and educated in the field of television and theatrical production. Howard told Trimble that Andrews' primary responsibility would be to assist in the writing of a screenplay entitled, "Dragon Fly."

[5] The Commissioner acknowledges the apparent dispute in the record as to whether any of White's work was performed on the weekends, but ultimately determines that resolution of this dispute is not necessary, since the ALJ found, and the Commissioner has affirmed, that White performed work at respondent's home during Board time.

> Trimble and her assistant director interviewed Andrews and, as directed, recommended that he be hired, subject to emergency certification, as a teacher of special education. In turn, Howard recommended, and the Board approved, a resolution hiring Andrews as Teacher of the Handicapped, effective October 7, 1998, at the annual prorated salary of $34,003.
>
> In order to permit Andrews to work on the screenplay, he was given a reduced teaching load of only two classes, instead of the five normally assigned. Andrews worked in this capacity for some eight months. When his performance, apart from his teaching duties, failed to live up to Howard's expectations. Howard directed that Andrews' teaching load be increased to five daily [classes] and [later] directed Trimble "to get rid of Andrews."
>
> When Trimble expressed concern about firing Andrews instead of less senior teachers, Howard told Trimble to "get rid of the [m***** f*****]." Howard also indicated to Trimble that he did not care what effect the action might have on special education. Andrews was not renewed for the next school year.
>
> The foregoing conduct which either was orchestrated, directed, intimated, condoned, permitted and/or countenanced by Dr. John Howard, Jr. constitutes, among other things, a pattern of patent disregard for the education of special education students, misrepresentation, complicity, collusion, intimidation, and/or abuse of public office by Howard that constitutes conduct unbecoming a teaching staff member and/or just cause for dismissal. (Sworn Charges Against Dr. John Howard, Jr., Superintendent at 4-5)

As the Board notes in its exceptions, Ms. Trimble credibly testified that, at the end of September 1998, she was called to respondent's office, where he introduced Peter Andrews to her as "an old friend." (Tr. 7/23/01 at 44) Respondent told Ms. Trimble "that Mr. Andrews was interested in becoming an emergency certified teacher of the handicapped but that his role would largely be to help with the writing of the script '*Dragon Fly*.'" (*Ibid.*) Further, Ms. Trimble testified that it was her impression that respondent did not want Mr. Andrews to teach, but Trimble "indicated to Dr. Howard that to have someone hired under emergency certification, the person had to teach and then a reduced schedule was discussed." (*Id*. at 45) It

was also Trimble's impression that "the majority of [Mr. Andrews'] time would be spent in the activity of writing the script." (*Ibid*.)

There is no question that Mr. Andrews' background and experience is as described by the Board in its charges. (Exhibit P-2). Also, the Board duly notes documents on record where Andrews proposes "services as a film production consultant to the East Orange Board of Education," (Exhibit P-4, dated September 28, 1998), where Andrews refers to himself as the "production consultant" to *Dragon Fly* (Exhibit P-57, dated April 14, 1999), and where Andrews' agent affirms "that Mr. Andrews was, indeed, engaged to write a screenplay, subsequently entitled 'Dragon Fly.'" (P-8, dated May 18, 1999) (Board's Exceptions at 9)

On October 6, 1998, the Board appointed Andrews as a Teacher of the Handicapped upon the recommendation of respondent (Initial Decision at 6) and he was given a reduced teaching schedule, initially, of two classes. However, Trimble affirmed that it would not have been proper for him to have such a reduced schedule simply because he was getting acclimated to the school. (Tr. 7/23/01 at 75) Nonetheless, Andrews maintained the schedule of two classes until the second quarter, when he was assigned three classes. In the third quarter, he was assigned the full five classes. (*Id*. at 120)

There is no dispute that the District was in need of special education teachers (Initial Decision at 6) and that Mr. Andrews, even in his limited role as a teacher, performed satisfactorily (Tr. 7/23/01 at 128). However, there is also no question that Mr. Andrews was hired *as a full-time teacher*. Board President Mary Ann Cool testified that neither respondent nor anyone acting on his behalf ever apprised the Board that Andrews was to be teaching on a reduced schedule. (Tr. 7/24/01 at 22) Later, respondent directed Ms. Trimble to fire Andrews because respondent felt Andrews "was pilfering the *Dragon Fly* script ***" from the District's

version. (Tr. 8/6/01 at 47; Tr. 8/7/01 at 35) However, the Board never took action to non-renew Andrew's employment contract. (Initial Decision at 7) Andrews resigned in late May or early June of that year. (Tr. 8/6/01 at 49)

The Commissioner cannot agree, therefore, that the parties' evidence is at equipoise, but, rather, finds that the Board has proven it is more likely than not that Andrews was hired for a purpose *other than*, or in addition to, serving as a Teacher of the Handicapped, without the Board's knowledge or approval.[6] This, the Commissioner finds, is the fundamental aspect of Charge V, in that respondent's failure to fully disclose to the Board the true purpose for hiring Andrews was a misrepresentation, a breach of the Board's trust, and showed a lack of regard for the special education programs and students in the District.[7]

Turning to Charge XI, the Commissioner states, for clarity, the full text of the charge:

> In or about the Spring of 2000, the Board retained the services of special legal counsel to assist it with the investigation and, if warranted, preparation of the present charges against Dr. John Howard, Jr. Subsequently, the Board's business administrator, Mark Kramer, was approached by Howard concerning Howard's employment contract. Although Howard had always personally administered his own contract and Kramer did not maintain a copy of the document, Howard, knowing that he was being investigated, urged Kramer, if asked, to deny that Kramer was not familiar with the contract, by saying: "I can't have you say that you were not privy to my contract." By demanding, urging, suggesting, cajoling and/or requesting that Kramer provide false testimony, Howard, among other things, suborned perjury, solicited false swearing, attempted to obstruct an ongoing Board investigation and engaged in behavior that constitutes conduct unbecoming a teaching staff

[6] Indeed, even respondent's expert witness, Dr. Galinsky, affirmed that if he was hiring someone as a part-time teacher, that teacher's salary would be appropriately reduced and the Board would be approving a part-time appointment. (Tr. 8/7/01 at 114)

[7] The Commissioner draws no conclusions, on this record, about respondent's directive to terminate Andrews, rather than less senior teachers, as noted in Charge V.

member***. (Sworn Charges Against Dr. John Howard, Jr., Superintendent at 9)

The ALJ noted, and the record so reflects, that "Kramer never said he did not have some knowledge of Dr. Howard's [employment] contract; he said he did not have a copy of it and had knowledge of only those aspects of it that he administered." (Initial Decision at 23) The ALJ also found, and the record substantiates, that "the testimony of Mark Kramer that he was uncomfortable and felt intimidated by Dr. Howard's repeated statement is credible." (*Ibid.*) However, the Commissioner notes that on cross-examination, Kramer also provided the following testimony:

BY MR. BABIAK:

Q Now, the first time that Dr. Howard had the conversation with you about saying, that you were not privy to this contract, how did that come about? How did the conversation begin?

A Which John Howard?

Q Yes

A I remember – I believe I was standing in the back of his office by the window looking out when – and I do not recall why I was down there – it was not specifically for this reason. It was regular business - you know – whatever we were discussing. And, I just remember the words saying that, "Mark, I cannot have you say that you were not privy to my contract."

Q So, you're saying that out of the blue he made this statement to you?

A Yeah, yeah, I was dumbfounded, I was shocked, yes, so it came out of the blue.

Q So there was no preface to his statement to you?

A I don't recall what was said prior. We could have been talking about his contract. We might not have. We could have been talking about any type of board business, I don't recall.

Q So, it's possible that you were talking about his contact before that happened?

A Yeah – I do not recall the conversation prior or leading up to that statement. When that statement was made this far in advance now – you know – I mean, that's so long ago, I don't recall what was being discussed.

Q But you do remember that statement?

A Oh, yes. (Tr. 7/26/01 at 50-52)

Even accepting that Kramer was a credible witness and that respondent, in fact, repeatedly spoke these words to Kramer, the record provides no context whatsoever for these otherwise vague statements so as to lend to them specific meaning or import. Furthermore, Kramer admitted he was never asked or told by respondent to lie under oath. (Tr. 7/26/01 at 40) Thus, the Commissioner cannot conclude that the Board has demonstrated by a preponderance of credible evidence that *with these words alone*, respondent suborned perjury, solicited false swearing or attempted to obstruct an ongoing investigation.

Charge XII incorporates all facts set forth in the prior 11 charges, as the Board avers that "by virtue of the conduct, acts and/or omissions attributable to Dr. John Howard, Jr. as therein described, the foregoing Charges, jointly and severally, constitute a pattern of conduct unbecoming a teaching staff member, and/or other just cause for dismissal." For the reasons stated by the ALJ on pages 24-27 of the Initial Decision with respect to her sustaining of Charges I, VI, VII, VIII, IX and X, and for the reasons set forth, *supra*, with respect to Charge V, the Commissioner concurs that respondent is guilty of unbecoming conduct.[8]

> In arguing for respondent's dismissal, the Board avers that:
>
> The Commissioner has repeatedly affirmed the importance of holding school district personnel to a high standard of honesty. For instance in *I/M/O Tenure Hearing of Horowitz*, 93 N.J.A.R.2d. (EDU) 232, the Commissioner adopted an ALJ's initial decision, holding that the Superintendent's lack of forthrightness with the board and public justified revoking his tenure. There the Board certified a series of charges related to Horowitz's conduct in connection with a board-sponsored construction project.
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> ***
>
> The ALJ emphasized that, "trust is paramount in the relationship of a school superintendent … and the Board of Education, which

[8] In so finding, the Commissioner does not rely on the testimony of Saul Cooperman, to which respondent objected. (Tr. 8/23/01 at 33) (Respondent's Exceptions at 60)

> generally consists of lay persons serving in part-time public service capacity, persons who thus must place extreme reliance upon the ability, the efficiency, the judgment and the faithfulness of the Superintendent" and that Horowitz breached that trust. *Id.* at 265. *See also, I/M/O Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County*, 97 N.J.A.R.2d (EDU) 449, *aff'd*. State Bd. of Ed., April 5, 2000, *aff'd.* App. Div. 2002. (The Superintendent "is one in whom the board and members of the community are required to place considerable reliance with respect to his *ability, honesty, integrity, efficiency, judgment an faithfulness in the performance of his duties.* As such, the professional conduct demanded of this individual is significant.") (emphasis supplied)*** (Board's Exceptions at 8-9)

For these reasons, as well as those articulated by the ALJ in her Initial Decision, the Commissioner finds that respondent's conduct warrants termination.

Finally, the Commissioner acknowledges that respondent advances, in addition to his numerous substantive exceptions, many objections to the way the within proceedings were conducted at the OAL. Specifically, respondent objects to: the ALJ's decision, in prehearing discovery, to bar him from videotaping the school services building, the site where Wallace White alleges a theft of lighting occurred (Respondent's Exceptions at 19); the ALJ's ruling which barred him from presenting evidence of retaliation as part of his defense (*id.* at 42-46); and the ALJ's "bias manifested in disparate treatment" of him during the course of discovery, pre-hearing matters, and the within hearing (*id*. at 83) so as to compel the Commissioner to consider her findings "in a circumspect manner." (*Id*. at 132)

Initially, the Commissioner finds no infirmity in the ALJ's Order of May 25, 2001 denying respondent's request "to inspect and videotape the District's Social Services Building," (Babiak Letter, April 24, 2001)[9] a request that was strongly opposed by the Board for valid,

[9] Respondent states that his letter of April 24, 2001 "supplemented a request for additional discovery***." (Respondent's Exceptions at 3) It is noted that the ALJ's Prehearing Order, dated March 14, 2001, specifically determined, *inter alia*, that "[a]pplication for supplemental discovery shall be made no later than April 19, 2001. ***" (Prehearing Order at 3)

substantive reasons.[10] Additionally, the Board notes that respondent's counsel "glosses over the fact that he was permitted, and did in fact go to the Services Building to inspect the facility for approximately two (2) hours before the hearing." (Board's Reply at 15)

Neither does the Commissioner find that the ALJ's ruling with respect to respondent's retaliation defense was improper, under the circumstances of this case. As the Initial Decision indicates, respondent *was* provided the "right to test the credibility of witnesses by presenting evidence of improper motive." (Initial Decision at 2)[11]

As to respondent's claims of disparate treatment during proceedings at the OAL, which would render the ALJ's findings and conclusions suspect, the Commissioner is disinclined to credit such claims when the record as a whole fully supports the ALJ's findings and conclusions as affirmed herein, and where the ALJ ultimately recommended dismissing four of the twelve charges filed by the Board. In this connection, the Commissioner underscores that the proceedings before him are quasi-judicial, *City of Hackensack* 82 *NJ* 1, 28-29 (1980), and the ALJ has great latitude in presiding over the course of a hearing. *N.J.A.C.* 1:1-14.6, *N.J.S.A.* 52:14B-10. Further,

> [a]dministrative hearings in contested cases must "operate fairly and conform with due process principles." *Laba v. Newark Bd. of*

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[10] The Board argued, "[f]irst, there is nothing in the administrative rules which permits a party to videotape the land or building of an adversary. Second, it is entirely unclear [what] this viewing and inspection would accomplish. Whatever security measures may be in place at the location today is simply not relevant to whatever security measures may have been in place several years ago. Third, and most importantly, there are very serious security risks involved in allowing respondent to view and videotape [the site from which there are allegations that respondent has already stolen board-owned property.]" (Board's Letter Brief in Partial Opposition to Respondent's Motion for Supplemental Discovery and to Compel Discovery at 5)

[11] Indeed, the record shows that the ALJ determined "that testimony – or evidence of retaliation may be put in to show motive or bias *of a witness*." (emphasis added) (Tr. 7/24/01 at 55) In this connection, the ALJ distinguished between claims of retaliation against specific individuals versus claims against the board as an entity. Differentiating the latter as "institutional bias," which she did not see view as "an issue for retaliation," (*id*. at 56) the ALJ nevertheless cautioned, "[w]hat I'm saying is, we're gonna take it painstakingly step by step. But I'm going to limit, and I am going to want a proffer on every single one of these issues that comes up. ***" (*Id.* at 56)

> *Educ.*, 23 *N.J.* 364, 382 (1957). While the manner of conducting a hearing may vary, "[a]s long as principles of basic fairness are observed and adequate procedural protections are afforded, the requirements of administrative due process have been met." *Kelly v. Sterr,* 62 *N.J.* at 107. *** *In re Kallen*, 92 *N.J.* 14, 25-26 (1983)

The issue, then, is whether respondent "received a hearing conforming to principles of fundamental fairness." (*Id*. at 26) A complete review of this record persuades the Commissioner that he has.

Accordingly, the Initial Decision is affirmed with modification as set forth herein, and respondent is dismissed from his tenured position as Superintendent of the East Orange School District as of the date of this decision.[12] A copy of this decision shall be forwarded to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.[13]

COMMISSIONER OF EDUCATION

Date of Decision: 4/1/02

Date of Mailing: 4/2/02

[12] In accordance with *N.J.A.C.* 1:1-14.10(j), the ALJ's Interlocutory Orders are affirmed.

[13] 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.