

BAYONNE TEACHERS' ASSOCIATION, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION
OF BAYONNE, HUDSON COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioning Association sought a determination that the Board's Regulation #3218, which prescribes the procedures to be followed when an employee is suspected of being under the influence of a substance during working hours, violated *N.J.S.A. 18A:16-2 et seq.* and *N.J.A.C. 6:3-4A.1 et seq.*, particularly as applied to the events of September 24, 2002 involving a staff member who was asked to submit to a breathalyzer test.

The ALJ upheld the Board's policy. The ALJ found that neither the statute nor regulation prohibited the Board either from adopting Regulation # 3218 or taking the action it did in this instance. In this case, two persons had observed the teacher and reasonably determined based upon the strong odor of alcohol that she was probably under the influence. Under the circumstances, prompt testing was appropriate. It would have been impractical to notify the employee, provide a statement of reasons, schedule and hold a meeting.

Citing Fair Lawn Ed. Assoc., the Commissioner adopted the Initial Decision, finding that *N.J.S.A. 18A:16-2 et seq.* and *N.J.A.C. 6:3-4A.1* do not preempt the Board's authority to assure the safety of its students and faculty by adopting and applying regulations requiring an immediate medical examination of an employee who is reasonably suspected of being under the influence of drugs or alcohol at work.

<p>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.</p>

January 8, 2004

OAL DKT. NO. EDU 1409-03
AGENCY DKT. NO. 389-11/02

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The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination.

Petitioner's exceptions and the Board's reply essentially recast and reiterate their arguments advanced below which the Commissioner determines were considered and addressed by the Administrative Law Judge in his Initial Decision and, therefore, these will not be revisited herein.

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply, the Commissioner determines to adopt the Initial Decision for reasons set forth therein. The Commissioner finds that the Board's authority to adopt and administer its Regulation #3218 arises from a fair implication of the powers set out in *N.J.S.A.* 18A:11-1c, which authorizes the Board to make rules "for the employment, regulation of conduct and discharge of its employees***." See *Fair Lawn Ed. Assoc. v. Fair Lawn Bd. of Ed.*, 79 N.J. 574

(1979). In so determining, the Commissioner concludes that *N.J.S.A. 18A:16-2 et seq.* and *N.J.A.C. 6:3-4A.1 et seq.* do not preempt the Board's authority to assure the safety of its students and faculty by adopting regulations requiring an immediate medical examination¹ of a school employee who is reasonably suspected of being under the influence of drugs or alcohol at work.

Accordingly, the Commissioner adopts the Initial Decision for the reasons set forth therein and grants summary decision to the Board in this matter.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: January 8, 2004

Date of Mailing: January 9, 2004

¹ The Commissioner notes that Regulation #3218, C(2)b requires that an employee suspected of being under the influence of a substance during working hours is to be immediately examined by the school doctor or a doctor selected by the employee, or if such a doctor is not immediately available, then the employee is to be taken to the local hospital. In the instant matter, it is unclear whether the employee was examined by a physician and whether the breathalyzer test that was administered was ordered by and administered under the supervision of that physician. The certification by Carol Cruden, the District's Director of School Nurses, states that: "Two breathalyzer tests of the teacher were performed at a certified laboratory. Both breathalyzer tests read .042%, confirming the presence of alcohol in the teacher's system." (Certification of Carol Cruden at 2, #5) As the Commissioner found in *In the Matter of the Tenure Hearing of Joseph Graceffo, School District of the Township of Wayne, Passaic County*, Commissioner Decision, September 21, 2000, Slip Op. at 66, administration of a drug (or alcohol) test does not equate to a medical examination.

² 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.*