

IN THE MATTER OF THE TENURE :
HEARING OF ANTONIO LEWIS, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ASBURY PARK, : DECISION
MONMOUTH COUNTY. :

SYNOPSIS

The Board brought “Disciplinary Charges” of unbecoming conduct, incapacity and conduct detrimental to a thorough and efficient education against respondent superintendent.

The ALJ determined that the Board’s Count One was a charge of “inefficiency” as the Legislature uses the word in *N.J.S.A.* 18A:17-20.2. The ALJ found, however, that there was no record that the Board complied with legislatively required procedures requiring notice and an opportunity for improvement before a board may prosecute a charge of inefficiency. The ALJ dismissed Count One.

The Commissioner concurred with the ALJ that the charges comprising Count One were properly categorized as ones of inefficiency and had to be dismissed for the Board’s failure to comply with the requirements of *N.J.S.A.* 18A:6-11. With respect to Count Two, the Commissioner determined that the charge, even if true, standing alone was insufficient to warrant respondent’s dismissal or reduction in salary. The Commissioner, therefore, dismissed Count Two. The Commissioner directed that the Board immediately reinstate respondent to his position of superintendent with full pay from the first day of his suspension.

<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>

OAL DKT. NO. EDU 921-04
AGENCY DKT. NO. 42-2/04

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board were submitted in accordance with *N.J.A.C.* 1:1-18.4 and fully considered by the Commissioner in his determination herein.

The Board's exceptions charge that the Administrative Law Judge (ALJ) erroneously concluded that the charges against respondent contained in Count One were ones of inefficiency within the intendment of *N.J.S.A.* 18A:17-20.2. In so finding, it avers, he relied solely on the dictionary definitions of the terms "inefficiency" and "unbecoming," wholly failing to take into consideration any other factors in interpreting the meaning of these terms. The Board professes that a statute should be accorded such "plain meaning" only when it is clear and unambiguous which, it contends, is not the case here. In situations such as this, where terms can be subject to more than one interpretation, recourse must be made to the statute's "purpose, legislative intent, and prior precedent" to resolve interpretation differences. (Board's Exceptions at 1-2) In this regard, the Board proposes that the overall purpose of *N.J.S.A.* 18A:17-20.2, which the ALJ failed to recognize or take into account,

is to prevent the arbitrary dismissal of superintendents without cause. ***[T]here is no dispute that the Board filed the present charges against the respondent for cause and has therefore *not*

violated the legislative intent and purpose of the statute.
(emphasis in text) (*Id.* at 3)

The Board next contends that by confining the parameters of unbecoming conduct to its dictionary definition the ALJ failed to consider prior case law. Referencing *In re Howard*, decided by the Commissioner April 1, 2002, *aff'd with modification* by the State Board March 3, 2004, it claims that unbecoming conduct has been defined as “a lack of fitness to discharge the duties and functions of one’s office or position,” which, it contends, exemplifies the behavior at issue here. (*Id.* at 4) Citing *In re Vitacco*, 347 *N.J.Super.* 337 (App. Div. 2002); *In re Howard*; and *In re Romanoli*, decided by the Commissioner 93 *N.J.A.R.* 2d. (EDU) 82, *aff'd* State Board 87, *aff'd* Appellate Division April 13, 1994, No. A-2346-92T3, the Board professes that the ALJ additionally “failed to take into account past practices which demonstrates (sic) that tenure charges filed against superintendents are *commonly* based on ‘unbecoming conduct’ while tenure charges for ‘inefficiency’ are reserved for cases involving teaching staff members.” (emphasis in text) (*Ibid.*) More particularly, it charges, “[i]n the present case, the Board has provided a long line of cases upholding tenure charges against superintendents based on unbecoming conduct while [the ALJ] and the respondent have both failed to cite to *any case* in which tenure charges were filed against a superintendent based on inefficiency.” (emphasis in text) (*Ibid.*)

Next, the Board continues to argue, as it did below, that *N.J.S.A* 18A:17-20.2 does not contain a procedural process for bringing charges of inefficiency against a superintendent and compliance with all sections of the regulatory provisions which provide such a process is technically impossible when the charged individual is a superintendent. Therefore, it postulates:

[d]ue to the fact that there is *no statute or regulation which sets forth the procedure* for a board of education to follow to file tenure charges based upon inefficiency against a superintendent and since *there is* (sic) *has not been a single case in New Jersey in which tenure charges have been initiated or sustained against a*

superintendent based upon inefficiency, it is more than evident that the present tenure charges against Dr. Lewis were properly based on unbecoming conduct. The petitioner should not be burdened with defending an issue of first impression, especially since the respondent himself did not raise the issue. The result of having to respond to something that heretofore has been omitted from consideration by our courts is unfair and contrary to the legislative intent of the statute. (emphasis in text) (Board's Exceptions at 6)

Finally, the Board objects to the ALJ's "informational" analysis of Count Two of its tenure charges against respondent, as the Commissioner's transmittal of this matter to the OAL requested nothing more than a determination of whether the Board's charges were, in fact, ones of inefficiency. As such, it contends that the ALJ's analysis was "offered as a means to assist the Commissioner of Education in rendering a decision which would completely dismiss the charges against this petitioner without any discovery or an opportunity for the petitioner to be heard." (*Id.* at 3)

Upon his independent and comprehensive review of the record, the Commissioner concurs with the ALJ, that the charges comprising Count One are properly categorized as ones of inefficiency and must, therefore, be dismissed for the Board's failure to comply with the requirements of *N.J.S.A.* 18A:6-11. In so determining, the Commissioner finds the Board's exception arguments, both with respect to the nature of its charges and the propriety of bringing inefficiency charges against a superintendent, antithetic to both the governing statutes, *N.J.S.A.* 18A:17-20.2, *N.J.S.A.* 18A:6-11, and applicable case law. See *In the Matter of the Tenure Hearing of Richard P. Adams, School District of the Borough of Ocean Gate, Ocean County*, decided by the Commissioner September 19, 1997, a case virtually identical to the instant matter.¹ (See also *In the Matter of the Tenure Hearing of Dr. Frank J. Napoli, School District of*

¹ Charges against District superintendent were found to be ones of inefficiency as they related to the Board's dissatisfaction with the performance of its superintendent. Because the Board had not accorded the respondent the requisite 90-day period to improve his performance as mandated by *N.J.S.A.* 18A:6-11, the charges were dismissed.

the City of Salem, Salem County, 1988 S.L.D. 261, *aff'd with modification* by the State Board, 1988 S.L.D. 284.) Notwithstanding the categorization the Board attempts to ascribe to its charges, the Commissioner is in full agreement with the ALJ that charges of inefficiency are qualitatively different from charges of unbecoming conduct. (Initial Decision at 16-17) More particularly, as was found in *Adams, supra*:

Inefficiency amounts to the teaching staff member failing to effectively perform his or her duties. *Rowley v. Manalapan-Englishtown Board of Education*, 205 N.J. Super. 65, 70 (App. Div. 1985). In sustaining charges of inefficiency, the Commissioner noted conduct must amount to “inefficiencies and inadequacies” in a respondent’s performance of his duties. *In the Matter of the Tenure Hearing of Slovney*, 84 S.L.D. 1764, 1794. The charges which allege failure to perform duties are, by definition, another phrase for the term of “inefficiency.” (*Adams* Slip Opinion at 7)

Here, the Commissioner is in full accord with the ALJ that “the BOE’s ‘Count One,’ alleging that the respondent failed to properly and effectively lead, supervise and/or manage the Asbury Park school system constitutes a charge of ‘inefficiency’”***. (Initial Decision at 17) Consequently, inasmuch as the Board did not fulfill its obligation, pursuant to *N.J.S.A.* 18A:6-11, of providing respondent written notice of the inefficiency and according him 90 days to improve his performance, Count One of the Board’s charges must be dismissed.

With respect to Count Two of the Board’s charges, charging respondent with unbecoming conduct for knowingly entering into an invalid contract, the Commissioner, in fulfillment of his responsibility pursuant to *N.J.S.A.* 18A:6-16 and *N.J.A.C.* 6A:3-5.5, has reviewed this charge and upon such review, has determined that the charge, even if true, is,

standing alone, deemed insufficient to warrant respondent's dismissal or reduction in salary and, therefore, Charge Two must be dismissed.²

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. Therefore, tenure charges against respondent are dismissed and, pursuant to *N.J.S.A.* 18A:6-14, the Commissioner directs that the Asbury Park Board of Education immediately reinstate Antonio Lewis to his position of superintendent with full pay from the first day of his suspension. In so holding, the Commissioner notes that the above result is compelled by law and that nothing herein precludes the Board, in its discretion, from filing new tenure charges in compliance with the Tenure Employees Hearing Law.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: June 7, 2004

Date of Mailing: June 7, 2004

² Because the Commissioner's transmittal of this matter to the OAL requested that, subsequent to a determination on respondent's Motion to Dismiss for failure to comply with the procedural requirements of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6A:3-5.1(c), alleging charges were ones of inefficiency rather than unbecoming conduct, the matter be returned to the Commissioner for a sufficiency determination pursuant to *N.J.S.A.* 18A:6-16, the Commissioner does not reach to the ALJ's informational comments with regard to Charge Two.

³ 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.*