#493-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu00590-06_1.html)

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. DAVID L. WITMER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF MIDDLETOWN,	:	
MONMOUTH COUNTY.	:	

SYNOPSIS

Petitioning school district certified five tenure charges of unbecoming conduct against respondent, Superintendent of Schools Dr. David L. Witmer, and seeks termination of his tenured employment. Petitioner alleged that respondent failed to report vacation days, misdirected vacation and personal leave time, misused personnel and office staff, abused his authority, and intentionally deceived the Board of Education. Respondent sought dismissal of the tenure charges, arguing, *inter alia*, that they were simply technical violations of his employment contract based on differing interpretations of the document.

The ALJ found, *inter alia*, that: the respondent is guilty of unbecoming conduct on three of the five tenure charges, involving misdirection of vacation and personal leave time, and intentional deception of the Board of Education; with respect to the other two charges, the petitioning Board failed to sustain its burden of establishing unbecoming conduct; the nature and gravity of respondent's offenses does not support his removal nor establish his unfitness to discharge the duties of superintendent. The ALJ concluded that the appropriate penalty for respondent is a six-month suspension from duty without pay.

Upon a comprehensive and independent review of the record in this matter – including transcripts and exception arguments advanced by the parties – the Commissioner adopted the Initial Decision with modification, finding that the respondent is guilty of unbecoming conduct on three charges as found by the ALJ, and also on the fourth charge of abusing the authority of his position as Superintendent by directing his subordinates to take actions regarding the carryover of vacation days and the rollover of personal days into sick leave days for respondent's own financial benefit; the Commissioner concurred with the ALJ that the respondent's conduct – although extremely serious, and evidencing significantly impaired judgment and lack of professionalism – does not warrant his dismissal from his position. Accordingly, the Commissioner ordered that respondent be suspended prospectively from his contractually tenured position – without pay – for six months commencing on the date of this decision.

December 24, 2007

OAL DKT. NO. EDU 590-06
AGENCY DKT NO. 62-2/06

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions and reply exceptions of both parties – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

The parties' exception and reply submissions – in large measure – recast and reiterate arguments advanced below. To the extent that these raise issues left unaddressed and/or unresolved in the Administrative Law Judge's (ALJ) extensive decision, they are presented below.

Charge #1 – <u>Failure to Report Vacation Days</u>

<u>Board's Exceptions</u>

The Board states that the essence of its charge here is that respondent engaged in unbecoming conduct when he intentionally failed to report two vacation days he took in December 2005. Although the ALJ found that respondent failed to advise the Board President of such planned absences – as required by his contract – he refused to find this unbecoming conduct because, subsequently, on January 10, 2006, respondent submitted a Request to Be Absent Form

and his leave account was charged for these days. The Board charges that the ALJ's analysis of the facts underlying this charge failed to take into consideration what it avers was the all important *sequence of events.* Specifically: 1) Respondent violated his contract by taking two vacation days without providing the requisite notice and was not charged for those days; 2) On January 10, 2006, some two weeks later, he was served with tenure charges which accused him, *inter alia*, of failing to comply with his contractual responsibility in the reporting of these days; 3) It was on this very date, after receiving the charges, that respondent submitted the Request to Be Absent Form. The Board maintains that the ALJ's conclusion that respondent's "after the fact" submission of this form somehow "mitigated" his culpability on the Board's charge is illogical, in that this submission – post-dating the tenure charges – does not invalidate or negate the claim made in the charges, which was true and accurate when the charges were served on respondent. More importantly, it submits, acceptance of the ALJ's analysis in this regard is patently unreasonable and its extension could lead to absurd results. If respondent had sent a communication to the Personnel Office on January 10, 2006 – after he had been served with these tenure charges – "undoing" his actions that formed the basis of Charges 2 and 3, and another letter to the Board of Education "clarifying" his prior misrepresentations, thereby "undoing" his Charge 5 behavior, he could then claim that he could not possibly be guilty of any of these charges because the matter had been "fixed." (Board's Exceptions at 7) Consequently, the Board argues, the ALJ's finding that respondent's submission "after the initiation of this litigation can somehow remediate or excuse his admitted conduct" as presented in the tenure charges must be rejected. (Board's Exceptions at 6-8, quote at 8)

In reply, respondent submits that the Board and the ALJ ignore the fact that his uncontroverted testimony established that he did give notice that he would be taking vacation on

December 27 and 28, 2005 at the December 12, 2005 Board meeting. Respondent further contends that elicited testimony also established that "there were other occasions when people gave notice of their taking time after the fact and that the purpose of the notice was to document the time before the end of the school year which occurred on June 30th." (Respondent's Reply Exceptions at 4-5)

Respondent's Exceptions

Respondent maintains that, contrary to the finding of the ALJ, his contract does not specifically require that he provide **advanced** notice of planned vacations less than five days in duration and, nonetheless, again presents that his testimony confirms that he notified the board of this planned time off on December 12. He additionally cites to testimony of petitioner's witness, Ms. Shopp, which he claims establishes that there were other instances where individuals submitted absence forms after they returned. Although conceding this circumstance usually involved sick days, he nonetheless takes the position that as long as notice was provided before the end of the school year so that accurate leave time tabulations could be made there was no problem. Respondent further takes the position that testimony of petitioner's witnesses also evidences that it was "obvious" that the two work days of the last week of December would be vacation days for respondent as such had been his custom every year since arriving in the District. Finally, respondent argues, "the most interesting omission of evidence in this matter is the fact that there was no documentation, which was submitted by Petitioner, which demonstrated that these two days were not recorded as vacation days." (Respondent's Exceptions at 2-4, quotation at 3-4)

Responding, the Board avers that respondent's claim that he provided notice of his planned absence to the Board at its December 12, 2005 meeting is directly contrary to the evidential record, most particularly his own testimony. "Respondent testified on October 18 that as to his December 2005 absences, he did not provide notice to the Board. (citation omitted). In fact, he acknowledged that he did not provide any notice of those absences until January 10, 2006, when he submitted Exhibit R-10 [Request to Be Absent Form] *hours after the within Tenure Charges were filed*." (citation omitted) (Board's Reply Exceptions at 2) As to his charge that there is no documentation that the two days were not charged to vacation time, the Board cites to testimony of Rosie Shopp, stating "that as of the filing of the Charges, Respondent had not submitted documentation, nor had he been charged with vacation time, for December 27 or 28." (citation omitted.) (*Id*. at 3)

Charge #2 – <u>Misdirection of Vacation Time</u>

<u>Respondent's Exceptions</u>

Citing *Dunn v. Elizabeth Board of Education*, 96 *N.J.A.R. 2d* (EDU) 279 and *New Jersey Education Association v. Trenton Board of Education*, 92 *N.J.A.R. 2d* (EDU) 481, respondent maintains that, because resolution of charges 1, 2, and 3 necessitates the interpretation of contractual provisions, such resolution is outside the jurisdictional purview of the Commissioner. This is the case, he argues, because the courts have found that "there is no need to defer to administrative expertise since the only question properly presented to the Court in Contract disputes is one of contract interpretation." (*N.J. Education Association* at 489). (Respondent's Exceptions at 4-6, quote at 6) In this case, the issues surrounding tenure charges 1, 2, and 3 and, indeed, the ALJ's factual findings with respect to these charges, are based on

disputed interpretations of the language of the contract between respondent and the Board and, therefore, he submits, are outside of the Commissioner's jurisdiction. (*Id.* at 6)

Respondent further excepts to certain of the ALJ's factual findings which conflict with respondent's contentions that: 1) his contract does not address or prohibit maximization of days in his vacation bank; 2) that the personnel department misinterpreted his memo requesting the transfer of vacation days; and 3) that he could have 40 vacation days banked and still use his current 20 day allotment. (*Id.* at 7-10)

In reply, as to respondent's challenge to the Commissioner's jurisdictional authority to decide charges 1, 2, and 3, the Board submits that the Commissioner is vested with primary jurisdiction of all controversies under the school laws. Adjudication of tenure charges, pursuant to the Tenure Employees Hearing Law – *N.J.S.A.* 18A:6-10 *et seq.* and its implementing regulations, *N.J.A.C.* 6A:3-5.1 *et seq.* – is clearly a controversy arising under the school laws. (Board's Reply Exceptions at 5-6) Moreover, the cases cited by petitioner denying the Commissioner jurisdiction over purely contractual claims so hold because the "only" question presented to the court in contractual disputes is one of contract interpretation. Such is not the case here. Rather, the Board urges:

> Tenure Charges 1, 2 and 3 allege that Respondent committed unbecoming conduct when he knowingly violated his contract, abused his position, and conferred upon himself various unauthorized benefits. The analysis of those claims clearly entails a review of the parties' contractual relationship and their contractual duties to each other. However, the question before the Commissioner is whether the actions taken by Respondent constitute conduct unbecoming a Superintendent of Schools. In fact, the determination of a breach of contract – as Judge Martone made with regard to Tenure Charge #1 – is not necessarily determinative of the ultimate issue of conduct unbecoming. Thus, as in *Dunn*, contract issues are implicated in this litigation, but unlike *Dunn* neither party here is asking the Commissioner to determine a pure breach of contract claim, nor to

> award contract damages. The question here is an evaluation of a Superintendent's conduct, and the determination of what penalty is appropriate based upon the totality of that conduct.
> (*Id.* at 6)

With respect to respondent's objection to certain of the ALJ's factual findings, the Board contends his exceptions in this connection are wholly belied by the evidentiary record and logic. Moreover, these factual findings are based on the ALJ's credibility assessments which are unassailable unless they are arbitrary, capricious or unreasonable. (*N.J.S.A.* 52:14B-10) (*Id*. at 9)

Charge #3 – <u>Misdirection of Personal Leave Time</u>

<u>Respondent's Exceptions</u>

Respondent essentially renews his arguments advanced below in excepting to the ALJ factual findings and conclusion on this charge. He additionally attributes the ALJ's misguided analysis to incorrect credibility determinations. (Respondent's Exceptions at 11-16)

Charge #4 – <u>Misuse of Personnel Office Staff/Abuse of Authority</u>

<u>Board's Exceptions</u>

The Board avers that the ALJ erred in concluding that respondent did not engage in unbecoming conduct by abusing his position when he directed staff members of the Personnel Office to confer unauthorized benefits upon him. Although not disagreeing with the ALJ's factual findings with respect to this charge, the Board contests his conclusion that – absent an element of intimidation, coercion or improper influence, which he did not find on this record – respondent was not guilty of unbecoming conduct, notwithstanding these factual findings. The Board contends such a conclusion is misguided for two reasons. First of all, it ignores the obvious impact respondent has over employees in the District by virtue of his position.

As Superintendent of Schools, all staff members – including those in the Personnel Department – report to him. Further, pursuant to *N.J.S.A.* 18A:27-4.1, the Superintendent possesses the exclusive power to recommend the hiring, termination, transfer, and other employment actions of all staff members. (Board's Exceptions at 10) The Board additionally cites to specific hearing testimony of Laurie Allocco and Rosie Shopp – Personnel Department staff members with whom respondent dealt – which confirms that these individuals were unwilling, and felt unable, to voice objection to or refuse to comply with directives of the Superintendent. Therefore, the Board contends that the intimidation, undue influence or coercion which the ALJ finds requisite to establish unbecoming conduct is clearly present in the instant record. (*Id.* at 10-13)

Finally, the Board argues – to the extent that this tenure charge can be viewed as a claim of official misconduct against respondent – the ALJ's decision imposes an enhanced burden of proof in these administrative tenure proceedings over and above that under the New Jersey Criminal Code. Specifically,

> [t]he New Jersey Supreme Court has held that to prove a case of official misconduct under the criminal standard of "beyond a reasonable doubt," the State must establish that 1) the Defendant is a public servant; 2) who committed an act relating to his office; 3) with the purpose to benefit himself or deprive another of a benefit. *State v. Bullock*, 136 *N.J.* 149, 153 (1994). The statute further specifies that a Defendant must commit such acts "knowing that such act is unauthorized or he is committing such act in an unauthorized manner." *N.J.S.A.* 2C:30-2(a). There is no requirement of intimidation.
>
> [The ALJ] has specifically found as a matter of fact that Respondent is a public servant (Initial Decision at pp. 1 and 65); that he took actions in his capacity as Superintendent with regard to his Contract with the Board of Education (*Id*. at 65); and that he acted to knowingly and intentionally violate his Contract and seek the unauthorized conferral of benefits upon himself via written directives to subordinate employees (*Id*. at 65) That is, the Court has found that Dr. Witmer has engaged in conduct meeting each element of Official Misconduct as defined by New Jersey law.

> Can the standard for conduct unbecoming in an administrative hearing possibly be higher than the criminal standard when all elements have been found present by the finder of fact? No intimidation, undue influence or coercion is required, and to the extent that such influence may buttress a claim of misconduct in this regard, the record requires an acknowledgement that written directives from the Superintendent of Schools inherently carry with them an influence which behooves the recipients of such directives to comply with them.
> (Board's Exceptions at 13-14)

For these reasons, the Board urges the Commissioner to modify the Initial Decision, finding respondent guilty of conduct unbecoming on this charge.

Charge #5 – <u>Deception of the Board of Education</u>

<u>Board's Exceptions</u>

Although specifically finding that respondent made knowing misrepresentations to the Board, the ALJ concluded that "the subject-matter of the untruthfulness *was simply not that important*." Such a conclusion, the Board maintains, wholly disregards the extreme importance of truthful communications between a superintendent and his board. The Board initially cites to hearing testimony of Board members Minnuies and Dorio, which – it avers – evidences the negative effect that respondent's dishonesty had on the pivotal relationship between himself and the Board, *i.e.,* they felt they could no longer trust him. (Board's Exceptions at 15-16) Moreover, it posits, although honesty and truthfulness are expected and demanded of all teaching staff members at all times, the importance of this expectation is exponentially heightened for the chief district administrator who, in addition to all his other managerial duties, is charged with communicating with the public via their elected representatives on the Board of Education. Indeed, it offers, this Board's requirements of its

superintendent in this regard are unmistakably delineated in Exhibit P-22 (Middletown Board of Education Policy No. 2131.2, paragraph 6), which explicitly directs that "**[t]he Superintendent must be frank, honest, concise and complete in reporting to the Board**." (*Ibid.*) For all of these reasons it urges the ALJ's conclusion downplaying the significance of respondent's lies to the Board cannot be allowed to stand, as untruthfulness and misrepresentations by a Superintendent are *always* important and such conduct should be punished by no less than termination. (Board's Exceptions at 18)

Respondent's Exceptions

Respondent charges that the ALJ's finding that he did not respond truthfully when questioned by the Board is not supported by any competent or credible evidence in the record. Rather, he contends, the Board's witnesses provided contradictory testimony as to even what the questions respondent was asked were. (Respondent's Exceptions at 17) Additionally, as observed by the judge:

> ***I am puzzled as to Dr. Witmer's motivation in responding the way he did and why he did not respond truthfully. He certainly gained no benefit from his untruthful response. There is also no indication in the record that the Board was accusing Dr. Witmer of any wrong doing in connection with the investigation of the matter. In addition by the time Dr. Witmer was questioned about the investigation, the termination matter had been or was about to be resolved. (Initial Decision at p. 91)

Respondent takes the position that the ALJ's "puzzlement" is a clear indication "that the pieces with regard to this alleged violation do not fit and therefore one cannot conclude that Dr. Witmer was untruthful." (Respondent's Exceptions at 17-18)

Citing extensively to his own testimony, respondent presents his version of the sequence of events surrounding this charge, and points to certain testimony of the Board's own witnesses which – he avers – serves to corroborate his rendition of the details. (*Id.* at 18-28)

In that the ALJ's conclusion that respondent made a misrepresentation to the Board is not based on the logical, competent testimony of the witnesses nor documentary evidence, respondent submits that this conclusion must be set aside. (*Id.* at 28-29)

In reply, the Board proposes that respondent's criticism of the ALJ's factual finding on an issue where there is conflicting testimony is unfounded. It advances that the ALJ has not only the authority but the obligation to make factual findings on issues where there is conflicting testimony based on credibility determinations – which it avers he did here – and these findings may not be reversed unless they are arbitrary, capricious or unreasonable. (*N.J.S.A.* 52:14B-10; *N.J.A.C.* 1:1-18.6(c)) (Board's Reply Exceptions at 14)

Penalty

Board's Exceptions

The respondent in this case, the Board submits, is the Superintendent of Schools – the highest administrative position and the educational leader in a large school district. "Inherent in the position, and implicit in his Job Description, Contract and Board Policy is the duty to lead by example not only the 1,000 employees of the District, but at least as importantly, its 10,500 pupils." The nature and importance of public education are such, it argues, that the standard of conduct demanded from an individual in such a position is extraordinary – his conduct must be beyond reproach. The Board finds incongruous the fact that although the ALJ found respondent guilty of unbecoming conduct – by virtue of his self-dealing and dishonesty with the Board – and acknowledged the negative impact on the essential trust relationship between a board and its superintendent as a result of this behavior, his Initial Decision – nonetheless – proposes to return respondent to his position. The Board queries what message is being conveyed to the teaching

staff, the students and the public when an individual who has been found guilty of misdirecting benefits to himself, breaching his contract and lying to the Board is returned to his position as leader of the District. (Board's Exceptions at 19-20, quote at 19)

Citing to a number of prior superintendent tenure cases (*IMO Tenure Hearing of Louis Cirangle; IMO Tenure Hearing of Guma; IMO Tenure Hearing of Horowitz; IMO Tenure Hearing of Pitch* – citations omitted), it avers the Commissioner and the Court upon review have held that the breach of trust involved and its effect on the District – whose whole reason for existence is for the benefit of students and the community – cannot be adequately dealt with by a penalty less than dismissal. The Board offers that the *Cirangle*[1] decision specifically "stands for the proposition that 1) dishonesty and self-dealing, regardless of the amount of money involved,[2] are sufficient cause for the dismissal of a tenured Superintendent of Schools; and 2) the defense of 'mere' negligence, poor judgment, or mistake is insufficient to avoid the result of dismissal where that conduct touches upon the high standards implicit in the position." (Board's Exceptions at 21-23, quote at 22)

In closing, the Board submits that although the ALJ "found as a matter of fact that Dr. Witmer attempted to confer unauthorized benefits upon himself, knowingly exceeded his contractual authority, knowingly attempted to increase his benefits beyond his contractual authority via written directives to subordinate employees, lied to the Board of Education in

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[1] *In the Matter of the Tenure Hearing of Louis Cirangle*, 1980 *S.L.D.* 82, *aff'd* State Board at 97, *aff'd App. Div.* 1981 *S.L.D.* 1405 (October 22, 1981), *certif. den.* 87 *N.J. 347 (1981)*

[2] The Board observes that the instant respondent has repeatedly argued, and the ALJ apparently agrees, that misdirection of the small amount of money represented by the vacation and personal days at issue here dictates the imposition of a "minimal" punishment. To the contrary, it argues, "the misdirection of leave time valued at $19,845 (twenty vacation days and seven personal days times Respondent's per diem of $735) cannot be dismissed as *de minimus* here." (Board's Exceptions at 22, footnote 8) Moreover, also evidently contrary to the belief of the ALJ, the fact that respondent may not yet have been paid for the time he misdirected to himself – or that somehow, on his departure from the District, the Personnel Office may have discovered some kind of a discrepancy – doesn't serve to minimize the seriousness of his conduct. (Board's Exceptions at 28)

answering their inquiries in December 2005, and operated in a dishonest and untruthful manner"[,] he inexplicably concluded that respondent should only receive a penalty of six-months suspension without pay. (Board's Exceptions at 25) The Board submits that the facts and controlling law dictate that respondent be terminated from his position.

Respondent's Exceptions

Respondent maintains that the evidence in this matter amply demonstrates that there is no foundation for the finding of any misconduct on his part under any of these tenure charges. The totality of circumstances here, he argues, confirms that his behavior with respect to the issues raised in these charges was not based on an intent to defraud; rather, it was focused on purely technical violations of his employment contract – based on the parties' varying interpretations of this contract – which do not rise to the level of unbecoming conduct. However, in the event that the Commissioner should determine to uphold these violations, respondent proposes that the penalty he has already paid in defending himself against these charges has been devastating, both in terms of cost and damage to his reputation; he therefore urges that no further penalty be imposed. (Respondent's Exceptions at 36-39)

Commissioner's Determination

Upon a comprehensive review of the record of this matter – which included transcripts of the hearing conducted at the OAL on July 11, 12, 13, August 9, September 22, October 18, 2006 and January 26, 2007 – along with the parties' exception submissions, the Commissioner adopts the recommended decision of the OAL, as modified below.

Initially, the Commissioner observes that the ALJ appears to have labored to particularize the concept of "unbecoming conduct" in a universally acceptable way. Although this term may, at times, appear to be somewhat amorphous in nature, prior cases have provided

definitional clarification to assist in recognizing its applicability to specific behavior, as was noted in *In the Matter of the Tenure Hearing of Motley, State-Operated School District of Newark, Essex County,* decided by the Commissioner August 4, 1999:

> "[u]nbecoming 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. 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. Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." In the context of a school tenure case, "*the touchstone is fitness to discharge the duties and functions of one's office or position*." *Motley*, supra (citing *Karins v. City of Atlantic* City, 152 *N.J.* 532, 554 (1998); *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J. Super*. 22, 40 (App. Div. 1992); *Laba v. Newark Bd. of Educ.*, 23 *N.J.* 364, 384 (1957); *In re Tenure Hearing of Grossman*, 127 *N.J. Super*. 13, 29 (App. Div. 1974), *certif. den.* 65 *N.J.* 292 (1974)), *aff'd* State Board of Education December 1, 1999 (emphasis supplied)

Turning to an examination of the charges herein in light of the above definitional construct, after full consideration of all evidentiary proofs comprising the record and exercising the requisite deference to the ALJ's assessment of the credibility of the witnesses,[3] the Commissioner concurs, for the reasons detailed in the Initial Decision, that the Board has established – by a preponderance of the credible evidence – that respondent is guilty of unbecoming conduct on Charges 2, 3, and 5.

[3] The applicable standard of review in this regard is clear and unequivocal – the Commissioner "may not reject or modify any findings of fact as to 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." (*N.J.S.A.* 52:14B-10(c)) A reasoned review of the record, with this governing standard in mind, provides no basis for concluding that the ALJ's credibility assessments and resultant fact finding were without the requisite level of support. To the contrary, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough and that he carefully measured conflicts, inconsistencies and potential biases in deciding what testimony to credit.

However, with respect to Charge 4, the Commissioner rejects the ALJ's conclusion that the Board has not sustained its burden of establishing unbecoming conduct. In so doing, she notes that this charge accuses respondent of obtaining the unauthorized benefits of carryover of vacation days and rollover of personal days into sick leave days by providing written directives to subordinates ordering them to confer these benefits upon him, which they did. To the extent that intimidation, undue influence or coercion may be necessary for a finding of guilt on this charge, as concluded by the ALJ, the Commissioner agrees with the Board's exception advancement that – due to the disparate balance of power existing between respondent and the involved staff members – such a requirement is inherently satisfied here. As the District's Chief School Administrator and the individual vested with the authority to recommend the hiring, renewal or non-renewal, transfer or termination of every board employee, directives from the Superintendent are and must be received with recognition of the enormous power this individual possesses over district staff. Intrinsic in a directive made by this individual to a subordinate is the expectation, by both parties, that such an order will be obeyed without challenge. Indeed, proffered testimony elicited from the involved personnel establishes that they felt unwilling or unable to question or deny respondent's order, despite their personal opinions as to the legitimacy of what he was directing them to do. The Commissioner, consequently, concludes that respondent is guilty of unbecoming conduct for abusing the authority of his position as Superintendent by directing his subordinates to take actions for his financial benefit, to which he knew or should have known he did not possess entitlement.

Finally, in her consideration of Charge #1 – where the Board alleges that respondent "intentionally" failed to report vacation time taken December 27 and 28, 2005 – and its exception argument which belies the ALJ's acceptance of respondent's "after the fact" curing

of this behavior, the Commissioner agrees with the ALJ's conclusion that respondent is not guilty of unbecoming conduct on this charge. On this record, the Commissioner is unable to find purposeful intent on the part of respondent in failing to timely report planned leave time for these days. Witness testimony confirms that respondent made no secret of the fact that he was taking a vacation trip – as apparently was his custom – during this period. The Commissioner concludes that the record supports an inference that respondent's failure to report his two vacation day absences until some two weeks after his return was no more than inadvertent neglect. Absent evidentiary support of a deliberate attempt to deceive in this regard, the Commissioner is persuaded by the ALJ's analysis on this charge wherein he stated:

> it is significant that on January 10, 2006, Dr. Witmer submitted a Request To Be Absent form to the personnel office. The significance of this submission by Dr. Witmer, *no matter what his motivation may have been*, is that Dr. Witmer's vacation leave account was charged for these two vacation days. Thus, the Board's argument that by his actions Dr. Witmer accepted full payment for days upon which he was absent from his assigned duties must fail. The Board's additional argument that Dr. Witmer has conferred a benefit upon himself without authority, and at the expense of the taxpayers, must also fail because of the fact that he reported these vacation days and was charged for them.
>
> (Initial Decision at 88) (emphasis supplied)

Consequently, notwithstanding that respondent violated his contract by not providing advance notice of these vacation days to the Board President, the Commissioner concludes that to find unbecoming conduct on this charge is tantamount to placing form over substance.

In sum, the Commissioner finds and concludes that the Board has proven four charges of unbecoming conduct against respondent. Specifically, respondent knowingly violated his contract and attempted to secure for himself benefits to which he did not possess entitlement. The means by which he accomplished this was by abusing the authority of his position, providing written directives to subordinates instructing them – with the authority of the Office of

the Superintendent of Schools – to confer these benefits upon him, which they did believing that they did not have any viable alternative. The Commissioner rejects as disingenuous respondent's attempt to categorize these charges as mere technical violations of his employment contract based on the parties' differing interpretations of this document. As a 30-year seasoned school administrator, who routinely negotiated his own contracts without benefit of counsel, respondent must be presumed to know – or should have known – mandates and/or restrictions placed upon him by that document's provisions. Should interpretative clarification issues subsequently have appeared necessary to respondent, such clarification should have been sought from the Board, his employer and the other party to the contract. Instead, the Commissioner finds on this record that respondent felt he deserved benefits received by other District administrators or by Superintendents in other districts over and above those accorded him by the four corners of his employment contract. (See Exhibit P-19) That respondent has not yet realized immediate monetary gain from the benefits he impermissibly attempted to secure for himself is of no consequence here. The Commissioner finds it readily apparent that he possessed a reasoned expectation of realizing such gain at some future date. Finally, respondent failed to respond truthfully to his Board, which deserves no less than full and honest information from its superintendent, when questioned about the status of certain events occurring in the District.

In assessing the appropriate penalty to be imposed in this matter, the Commissioner has made a careful and thoughtful weighing of the charges sustained against respondent, including consideration of the nature and gravity of these offenses under all the circumstances involved; any evidence as to provocation, extenuation or aggravation; and any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J Super.* 404, 421-22

(App. Div. 1967). She was also mindful that it is without question that – as a Superintendent of Schools – respondent is held to a standard of behavior unequaled by any other school employee, being required at all times to act with the utmost integrity, good judgment and self-restraint. Having considered the proven charges and all of the above factors, the Commissioner concludes, as did the ALJ, that respondent's unbecoming conduct – although undeniably extremely serious and evidencing significantly impaired judgment and a total lack of professionalism – does not warrant his dismissal from his position.

In so concluding, the Commissioner is cognizant that termination of employment is the ultimate sanction that she may impose in a tenure matter. Imposition of such a penalty on an individual, together with the possibility of the State Board of Examiners revoking the individual's certificate(s), would effectively end his or her New Jersey educational career. Additionally, such a discipline could have detrimental effects on such an individual's pension rights. As discussed by the ALJ, the Commissioner has not hesitated to order termination of the employment of superintendents whose egregious behavior has served to engender significant deleterious consequences on the proper administration and educational operation of the District's school system, thereby rendering these individuals unfit to discharge the duties and functions of their position. (*See In the Matter of the Tenure Hearing of Louis Cirangle,* 1980 *S.L.D.* 82, *aff'd* State Board at 97, *aff'd* App. Div. 1981 *S.L.D.* 1405, *cert. den.* 87 *N.J.* 347 (1981); *In the Matter of the Tenure Hearing of Horowitz, Bridgewater-Raritan Regional School District*, 93 *N.J.A.R.* 2d (EDU) 232; *In the Matter of the Tenure Hearing of Peter J. Romanoli, Board of Education of the Township of Willingboro*, 93 *N.J.A.R.* 2d (EDU) 82, *aff'd* App. Div., April 13, 1994; *In the Matter of the Tenure Hearing of Robert R. Vitacco*, 97 *N.J.A.R.* 2d (EDU) 449, *aff'd* State Board April 5, 2000, *aff'd* App. Div. 2002; *In the Matter of the Tenure Hearing of*

John J. Howard, decided by the Commissioner April 1, 2002, *aff'd* State Board March 3, 2004). The gravamen of the proven charges in this matter establish that respondent is guilty of attempting to recoup leave time granted to him which had been forfeited, pursuant to the terms of his employment contract, for failure to use such time within a specified period. As a seasoned administrator, respondent was fully aware of the use-it-or-lose-it parameters associated with leave time in his contract, and he was fully aware that – absent approval of his Board – he no longer had any legal or moral right to this leave time. Further exacerbating the gravity of respondent's proven behavior in this regard was the fact that it was accomplished through the issuance of directives to subordinate staff members, clearly an abuse of the power of his position. It is without question that such chicanery on the part of the chief executive officer of the District, who is charged with leading by example, is reprehensible and inexcusable. However, while by no means attempting to downplay the egregiousness of or the negative effect occasioned by respondent's behavior, the Commissioner is compelled to agree with the ALJ that the instant charges are not of the same magnitude as those in the above-cited matters so as to have the significantly detrimental consequences to the District that would demonstrate respondent's unfitness to discharge the duties and functions of his position. She, therefore, determines to reject the ultimate discipline of termination from employment – with all its attendant consequences – as too harsh under the totality of the circumstances in the instant case.

Notwithstanding that termination has been rejected as the appropriate penalty here, respondent's conduct cannot be lightly dismissed. The Commissioner would be abrogating her responsibility if she did not impose a penalty severe enough to impress upon respondent the seriousness of his infractions. She, therefore, concurs with the ALJ's recommendation that respondent should suffer a six-month suspension from his position without pay.

Accordingly, the recommended decision of the OAL is adopted – as modified above – for the reasons expressed therein. The Commissioner hereby directs that respondent be suspended prospectively from his contractually tenured position – without pay – for six-months commencing on the date of this decision.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: December 24, 2007

Date of Mailing: December 24, 2007

[4] Since most of the charges herein were sustained, respondent is not entitled to reimbursement for the salary withheld pursuant to *N.J.S.A.* 18A:6-14.

[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.*