#458-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu05908-07_1.html)

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM THOMAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF PLAINFIELD, UNION COUNTY.	:	
_____:		

SYNOPSIS

Petitioning District filed tenure charges of conduct unbecoming, incompetence, and other just cause against William Thomas, a vice principal at the Washington Community School, and sought his removal from tenured employment following his arrest and indictment on criminal charges alleging possession of cocaine and drug paraphernalia, and subsequent completion of a pre-trial intervention program (PTI). A hearing was held at the OAL, but no testimony or evidence was entered into the record aside from the contents of the sworn statement of evidence which accompanied the tenure charges; the facts before the Commissioner were those jointly stipulated by the parties.

The ALJ found that the type of criminal conduct that respondent was alleged to have engaged in is clearly conduct unbecoming, and respondent's completion of a PTI is tantamount to an admission of the allegations against him. The ALJ concluded that the petitioner has sustained its burden of proof, and ordered that respondent's appeal of the tenure charges against him be dismissed with prejudice.

Upon careful review and consideration, the Commissioner rejected the ALJ's conclusion that the respondent's agreement to participate in a PTI was an admission of the allegations against him, and found that the tenure charges in this matter have not been adjudicated. Consequently, the Commissioner remanded the matter to the OAL for a hearing on the facts underlying the tenure charges.

November 26, 2007

OAL DKT. NO. EDU 5908-07
AGENCY DKT. NO. 133-5/07

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The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the respondent's exceptions have been reviewed.

The facts before the Commissioner are exclusively those included in the stipulation jointly submitted by the parties, which stipulation is set forth in the Initial Decision at 2-3. There were no witnesses or evidence before the Administrative Law Judge (ALJ) at the OAL, other than the contents of the sworn statement of evidence which is required to accompany the tenure charges. *N.J.S.A.* 18A:6-11. That sworn statement itemized the criminal court pleadings served upon respondent and described the terms of the order that memorialized the pretrial intervention agreement between respondent and the prosecutor.

No testamentary or documentary evidence was provided – in the course of the OAL hearing – containing facts in support of the allegations in the tenure charges of unbecoming conduct, incompetence and other just cause. Nor was evidence, if any, presented during the criminal court proceedings, offered by petitioner in the OAL.

The ALJ correctly determined – based upon school law precedent – that the type of conduct alleged in the criminal pleadings filed against respondent easily falls under the rubric

of 'conduct unbecoming.' On the other hand, the ALJ concluded that respondent's agreement to participate in the pre-trial intervention program (PTI) was an admission of the allegations in the criminal complaint and indictment, or that it created an inference that respondent was guilty as charged. The Commissioner rejects this conclusion.

While the language of *N.J.S.A.* 2C:43-12 and the Guidelines to *R.* 3:28 might, at first blush, seem to create an inference that participants in PTI are conceding guilt, the statute and rules in their entirety – along with the relevant case law – hold otherwise.[1] As the ALJ himself stated: "Enrollment in PTI is not conditioned upon either an informal admission or entry of a plea of guilty." (Initial Decision at 6-7) *See, also N.J.S.A.* 2C:43-12(g); Guideline 4 to *R. 3:28.* Rather, PTI is an avenue for an individual "to earn a dismissal of the charges for social reasons and reasons of present and future behavior, legal guilt or innocence notwithstanding." *Ibid.*

Nor do the two cases upon which the ALJ relies support his position. In *Lindes v. Sutter, et al.,* 621 *F. Supp.* 1197 (1985), the plaintiff successfully completed a PTI program and then sued the defendants for malicious prosecution. The suit was dismissed because plaintiff's successful completion of a PTI was found not to be the equivalent of a verdict of not guilty. The ALJ cites to Federal District Court Judge Rodriguez' view, *Lindes, supra,* at 1200-1201, that the guidelines to *R.* 3:28 are more suggestive of guilt with amenability to rehabilitation, than of innocence. However, Judge Rodriguez' observation was not a holding. It was dictum designed to buttress his ruling that PTI completion does not constitute a disposition (of the original charges) in favor of the PTI participant.

[1] *N.J.A.C.* 2C:43-12a lists the five purposes of PTI supervisory treatment in the disjunctive; subsection (4) articulates criminal calendar relief and allocation of criminal justice resources as a separate reason for utilization of PTI. Thus, the reason for PTI can be related more to the severity of the charges than to the particular facts in a given case.

In *Siciliano v. Board of Education of the Camden County Vocational-Technical School,* 93 *N.J.A.R.* 2d (EDU) 94 – the other case on which the ALJ in this matter relies – a successful PTI participant sought reinstatement to his employment, with back pay. The Commissioner of Education adopted the Initial Decision denying the former school employee's petition, stating: "the Commissioner concurs with the ALJ that petitioner is entitled to neither back pay nor a new contract as a result of the criminal indictment against him being dismissed through completion of a pre-trial intervention program." *Ibid.*

The ALJ in *Siciliano* had correctly cited to *R.* 3:28(c)1 for the principle that a post-PTI dismissal of a complaint or indictment signifies only that the matter has been "adjusted" – not that the participant was innocent of the charges brought against him or her. However, the *Siciliano* ALJ opined further – incorrectly – that PTI was "only applicable if the criminal defendant committed some illicit conduct, otherwise he or she would not need rehabilitation or correction." *Id.* at 5. Notwithstanding the fact that the Commissioner in *Siciliano* adopted the Initial Decision generally "for the reasons expressed therein," the Commissioner did not specifically endorse the ALJ's erroneous supposition that all PTI participants must necessarily have committed the conduct with which they are charged. Such an endorsement would have directly contradicted the mandate of *N.J.S.A.* 2C:43-12(g) and the fourth guideline to *R.* 3:28, *i.e.,* that PTI enrollment shall not be conditioned upon admissions or guilty pleas.

Respondent urges that the Commissioner should be guided by the decision of the Appellate Division in *In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak,* A-3298-87T7 (App. Div. 1989). While *Pawlak* appears to be an unpublished decision and, consequently, non-precedential, the Commissioner finds it apposite and persuasive.

Pawlak, a tenured teacher, was indicted in 1985 on charges of improper sexual behavior toward young students. He pled not guilty and then entered into a PTI agreement that did not require him to relinquish his teaching certificates,[2] which he wished to retain as a credential for employment involving children's books or textbooks. He successfully completed the PTI program and the charges against him were dismissed/adjusted.

The Board of Examiners of the New Jersey Department of Education petitioned to revoke Pawlak's certificates, arguing that the PTI agreement itself was just cause for revocation. The Appellate Division rejected this argument – as had the Administrative Law Judge who initially heard the case – because it required the assumption that the accusations in the indictment against Pawlak were true, despite the fact that admission to PTI does not require admissions of guilt, *Pawlak, supra,* at 10.[3]

The Appellate Division also addressed the fact that the conditions of Pawlak's PTI program did not include a requirement that his teaching certificates be revoked. This set his case apart from such prior cases as, for instance, *In the Matter of the Tenure Hearing of Michael Colucci, Board of Education of the Borough of Woodridge, Bergen County,* 96 *N.J.A.R.* 2d (EDU) 793 at 4-5, where mandatory resignations from the employing school districts were included as conditions of the PTI agreements. Thus, the Appellate Division determined that it would be unfair to revoke Pawlak's license unless a separate hearing were provided to examine the facts and law pertaining to such a revocation. Respondent points to the parallel between *Pawlak* and the present case, where no hearing took place to adjudicate the facts underlying respondent's alleged unbecoming conduct.

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[2] He did agree, however, to permanently refrain from teaching in New Jersey.

[3] As in the present case, there had been no hearing on the facts of the substantive tenure charges against Pawlak. *Pawlak* at 8.

In point of fact, it is not necessary to hearken back to 1989 for guidance in this matter. The more recent case of *In the Matter of the Tenure Hearing of Thomas Wachendorf, New Jersey State Department of Corrections, Mountainview Correctional Facility,* decided by the Commissioner July 14, 2005, *aff'd* State Board February 1, 2006, *aff'd.* Appellate Division, A-3635-05T3, July 3, 2007, provides the principles necessary to resolve the controversy.

Wachendorf – a long-time teacher in a correctional facility, with a good employment record – was arrested, and charged with eluding and resisting arrest and obstruction of justice, when he ignored requests by the police to pull his vehicle over and then resisted arrest in the driveway of his home. He entered a PTI program which he completed on March 3, 2005, resulting in the dismissal of the charges. Tenure charges were filed against Wachendorf, alleging that the behavior he exhibited in the course of the incident – for which he was arrested and charged – constituted unbecoming conduct. A hearing on the facts was conducted in the OAL and the ALJ concluded that the charge of unbecoming conduct was sustainable.

The Commissioner, in adopting the Initial Decision of the OAL, found that the criminal justice system outcome of the criminal charges which formed the basis of Count 1 of the tenure charges against Wachendorf was wholly irrelevant:

> It is well settled that diversion or dismissal of criminal charges has no impact whatsoever on a finding of unbecoming conduct in a tenure matter as to the incident(s) underlying those charges or the imposition of an appropriate penalty. *In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville,* 1978 *S.L.D.* 526, supplemental decision 1979 *S.L.D.* 153, aff'd State Board of Education, 1979 *S.L.D.* 155; *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph,* 1980 *S.L.D.* 721, *aff'd* State Board, 1980 *S.L.D.* 728, *aff'd* App. Div., 1981 *S.L.D.* 1537; *In the Matter of the Tenure Hearing of R. Scott McIntyre, Hunterdon-Voorhees Regional School District,* 96 *N.J.A.R.* 2d (EDU) 726. Such is the case because of the fundamental differences in the purpose and scope of these adjudicating forums.

Wachendorf, supra, at 5.

As observed by the Commissioner in *Dusel, supra* at 531:

> The "interests" to be protected herein are not those associated with a possible indictment or conviction in a criminal matter, but those concerned with fitness to hold a position as an instructor of school pupils. The right of these pupils to be taught by teachers who are free from the taint of patently illegal or flagrantly unbecoming acts is also at issue. (Emphasis added.)

The touchstone of a charge of unbecoming conduct is fitness to discharge the duties and functions of one's office or position. *See Laba v. Newark Board of* Education, 23 *N.J.* 364 (1957); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (App. Div. 1974), *certif.* denied 65 *N.J.* 292 (1974). Thus, the focus of the inquiry in this tenure matter is not the disposition of the criminal charges but, rather, whether respondent exhibited behavior underlying those charges which amounts to unbecoming conduct. *Wachendorf* at 6.

As always, the district bears the burden of proving tenure charges by a preponderance of the competent, relevant and credible evidence. *In re Tenure Hearing of Grossman, supra* at 22-23. In the present case, by limiting its proofs in the OAL to presentation of the criminal pleadings and a description of the terms of respondent's PTI agreement, petitioner has omitted to offer competent evidence concerning the behavior that was alleged to have served as the basis for the tenure charges. Such evidence could have, for example, been adduced through witnesses to the arrest or the incident precipitating the arrest.

In light of the foregoing, the Commissioner finds that the tenure charges have not been adjudicated. This matter is consequently remanded to the OAL for a hearing on the facts underlying the tenure charges of unbecoming conduct, incompetence and other just cause.

Any decision on the tenure charges shall address the relief requested by respondent in his post-hearing brief.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: November 26, 2007

Date of Mailing: November 26, 2007 - Faxed

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*