

#171-09 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :
HEARING OF LISA WEAVER, : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, :
PASSAIC COUNTY. :
_____ :

SYNOPSIS

Petitioner certified five tenure charges against respondent Lisa Weaver – a tenured secretary in the district – for alleged neglect, misbehavior, insubordination, conduct unbecoming, and other just cause relating to her handling of unemployment compensation matters after a stipend she had been paid for this work was eliminated. The respondent denied the allegations. Petitioner sought termination of respondent’s employment.

The ALJ found that: the Board failed to carry its burden of proving two of the tenure charges, but did prove that respondent exhibited unbecoming conduct by 1) disposing of unemployment documents, 2) exhibiting a lack of candor during the investigation, and 3) failing to answer the general counsel’s telephone as part of her work responsibilities; respondent further displayed neglect of duty by discarding documents, as well as insubordination and neglect of duty for failing to answer the telephone; respondent’s conduct in unilaterally adopting a practice of discarding unemployment compensation documents – without taking steps to confirm whether this action should be taken – constitutes unbecoming conduct, though her lack of training and supervision in this area are mitigating factors for penalty purposes; and dismissal from employment is an unduly harsh penalty under the circumstances presented. The ALJ concluded that forfeiture of the pay withheld during Weaver’s suspension period, and the loss of any salary increment to which she would have been entitled in the 2008-09 school year, constitutes appropriate discipline under the circumstances.

Upon independent review of the record, the Commissioner concurred with the ALJ’s findings and adopted the Initial Decision as the final decision in this matter.

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.

June 1, 2009

OAL DKT. NO. EDU 7558-08
AGENCY DKT NO. 159-6/08

IN THE MATTER OF THE TENURE :
HEARING OF LISA WEAVER, : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, :
PASSAIC COUNTY. :
_____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District sought and received an extension of time within which to file exceptions to the Initial Decision. Such exceptions were filed in accordance with the extended timeline and these – along with replies thereto on behalf of Ms. Weaver – were fully considered by the Commissioner in reaching her determination herein.

On exception, the District renews arguments advanced below in objection to certain of the Administrative Law Judge’s (ALJ) conclusions: 1) Citing to selected hearing testimony, it contends that the ALJ erred in concluding that respondent did not cease or reduce her work on unemployment compensation matters subsequent to the elimination of the stipend for this work (District’s Exceptions at 2-4); 2) It maintains the ALJ erroneously concluded that Judith Granick’s testimony was not credible while accepting that of respondent as credible (*Id.* at 5-7); 3) Presenting a number of prior school law decisions, it charges that the ALJ mistakenly found that respondent’s actions in this matter did not warrant her removal from her tenured position (*Id.* at 7-11). As it is determined that these issues were considered, and the

ALJ's conclusion on each of them was fully explained in her Initial Decision, the District's reiteration of its arguments will not be revisited here.

Upon a comprehensive review of the record of this matter – which included transcripts of the hearing conducted by the OAL on September 16, 17, 19 and October 28, 2008 – and finding the District's exceptions unpersuasive – the Commissioner determines to adopt the ALJ's recommended decision.

Initially, the Commissioner recognizes that in this, as in all tenure matters, the petitioner (District) bears the burden of proving each of its charges against respondent by a preponderance of the competent, relevant and credible evidence. The Commissioner has given full consideration to all evidentiary proofs which comprise the record and is cognizant of the fact that of particular importance was the ALJ's assessment of the credibility of the witnesses. This being the case – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her, and having made findings of fact based upon their testimony – the standard governing the Commissioner's review is clear and unequivocal:

The agency head 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)*).

The Commissioner finds that the ALJ's Initial Decision presents a recitation of the relevant testimony and a concomitant analysis of the evidence – which details her credibility determinations, the weight she ascribed to such evidence and her resultant factual findings – on each of the charges against respondent. The Commissioner finds these to be well-grounded in the record, thereby providing no cause whatsoever for alteration of her determinations.

The Commissioner, therefore, concurs with the ALJ – for the reasons clearly explicated in her decision – that the District’s allegations of neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause against respondent have been established on Charge Two – discarding documents concerning employees’ unemployment compensation claims; Charge Three – providing false information in connection with the investigation regarding her unemployment work; and Charge Four – failing to answer general counsel’s telephone. The Commissioner, however, further agrees that the District has failed to sustain its burden of proof on Charge One – which alleges that respondent substantially decreased her unemployment work after her stipend was eliminated and this charge is, therefore, dismissed. Similarly dismissed is Charge Five which is not a stand alone charge but rather simply a demand for respondent’s removal from her position based on the truthfulness of the other four certified charges.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that she is required to consider respondent’s prior record in the District, the nature and gravity of her offenses under all the circumstances involved, and any evidence as to provocation, extenuation or aggravation, and must consider any harm or injurious effect which her conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 N.J. Super. 421-22 (App. Div. 1967). Initially in this regard, the Commissioner finds and concludes that the proven charges against respondent are, without question, serious in nature. As aptly noted by the ALJ:

...as a confidential secretary, Weaver is held to a high standard of conduct, including upholding an image of utmost confidence and trust. *See Weisel v. Hooks*, 277 N.J. Super. 78, 86 (Ch. Div. 1994) (recognizing that a confidential secretary is “a position of trust” and one who serves in such position “is privy to the most critical policymaking decisions and has access and exposure to

policymakers as well”). Weaver engaged in conduct that was incompatible with the high degree of dependability expected of one who serves in that position. Weaver was insubordinate by failing to answer general counsel’s telephone after being directed to do so, and Weaver neglected her duties since she was one of the secretaries assigned to that task. This conduct, coupled with Weaver’s lack of candor during the investigation, further constitutes unbecoming conduct that deviated from the standard of proper conduct expected of public employees. The most serious infraction relates to Weaver’s handling of the unemployment documents. Weaver’s conduct in unilaterally adopting a practice of discarding the unemployment compensation documents, without taking any steps to confirm whether this action should be taken, fell significantly short of the conduct expected from a professional confidential secretary. Weaver’ conduct was inappropriate, irresponsible and misguided. Weaver failed to exercise good judgment and to act in a responsible manner. Based on Weaver’s education and vast experience as a secretary, Weaver reasonably should have known that original documents of this nature should not be simply discarded, and her failure to question Granick or her other supervisors concerning whether she should dispose of the documents rises to unbecoming conduct. Although I find that Weaver’s lack of training and supervision in this area are mitigating factors for penalty purposes, this does not serve to excuse Weaver’s dereliction. Indeed, according to her job description, Weaver’s duties included the responsibility to “[m]aintain an efficient and well organized electronic and paper data collection and filing systems, including confidential files.” P-2 By discarding the documents, Weaver violated one of the explicit responsibilities of her position. (Initial Decision at 38)

However, while not intending to diminish the seriousness and inappropriateness of respondent’s conduct, the Commissioner is nonetheless persuaded – as was the ALJ – that consideration of the totality of the circumstances presented in this matter leads to the conclusion that respondent’s removal from her tenured position would be an unduly harsh penalty here. Most particularly:

Weaver’s actions cannot be said to be premeditated, cruel or vicious. *Fulcomer, supra*, 93 N.J. Super. at 421. Rather, her actions bespeak of extremely poor judgment. Although Weaver’s conduct is inexcusable and unbecoming, the evidence does not support that she willfully destroyed documents that the District was required to retain or that she intended to cause the District

harm. The undisputed evidence discloses that the District did not train Weaver or provide her with any direction with regard to the unemployment work. No policy or protocol concerning how this work should be accomplished, including how the documents should be maintained, was ever given to Weaver. And, none of the witnesses who testified were apparently responsible for supervising her work in this area to ensure that it was properly done in accordance with some type of protocol. Weaver was not provided with notice of any deficiency with regard to this work so as to afford her the opportunity to correct any mistakes. Further, the record does not demonstrate that Weaver's actions had an injurious effect on the proper administration of the school system, and that the discarded documents could not have been obtained from the Unemployment Office or other sources if needed. In addition, Weaver has been employed as a confidential secretary for approximately seventeen years and, as far as the record reveals, has an unblemished and exemplary employment record during her career. She has received positive evaluations and glowing comments by her supervisors, who considered her a valuable employee. While the District emphasizes its lack of trust in Weaver stemming from her actions, the record supports that Weaver has demonstrated her capacity to be an effective confidential secretary in matters where appropriate supervision and direction were provided and the charged conduct represents an aberration in an otherwise successful career. (Initial Decision at 40)

In light of the above, the Commissioner finds that the ALJ's recommended penalty of forfeiture of the salary withheld during respondent's initial 120-day suspension subsequent to the certification of the instant tenure charges, along with the loss of any salary increment that she would have otherwise been entitled to during the 2008-09 school year, should be a sufficient penalty to impress upon respondent the impropriety of her actions and to adequately convey the message that such behavior will not be tolerated.

Accordingly, the recommended decision of the OAL is adopted – for the reasons well expressed therein – as the final decision in this matter. It is hereby ordered that respondent shall forfeit all salary and benefits which otherwise would have been due her during her initial

120-day suspension, and shall suffer the loss of any salary increment(s) to which she might have been entitled to during the 2008-09 school year.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: June 1, 2009

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* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.