

#293-11R (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu06213-08_1.html;
Commissioner's Decision 4/2009 : <http://lawlibrary.rutgers.edu/oal/final/edu06213-08.pdf>)

IN THE MATTER OF THE TENURE :
HEARING OF WILLIAM TRACY, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION ON REMAND
OF TRENTON, MERCER COUNTY :
_____ :

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and other just cause against respondent William Tracy – a tenured principal assigned to the Board's Daylight/Twilight High School – for failure, *inter alia*, to enforce the Board's attendance policy. The Board sought dismissal of respondent from his tenured employment.

The Commissioner decided this matter in April 2009, adopting the Initial Decision of the OAL which found that the District had sustained the charge of unbecoming conduct against respondent for failing to properly administer the attendance policy of the District. In so deciding, the Commissioner concurred with the ALJ that the appropriate penalty in this matter was a six-month suspension without pay, to be served prospectively.

On appeal, the Appellate Division affirmed the Commissioner's finding that respondent was guilty of unbecoming conduct, but remanded the matter solely for reconsideration of the penalty imposed, finding that the Commissioner acted in an arbitrary, capricious and unreasonable manner in directing that the six-month suspension would be in addition to respondent's prior period of suspension.

Upon review of the Appellate Division's reasoning in remanding this matter, the Commissioner found that: the court was not familiar with the statutory prescriptions attendant to the bringing and prosecution of tenure charges against individuals; and the respondent's argument on appeal – that the ALJ intended that the 120-day unpaid suspension, imposed when tenure charges were certified, be credited against the recommended penalty of a six-month unpaid suspension – was without merit. Accordingly, the Commissioner concluded that a six-month suspension, to be served prospectively, is the appropriate penalty in this matter.

<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>

July 21, 2011

OAL DKT. NO. EDU 6213-08
AGENCY DKT NO. 183-6/08
APPELLATE DIVISION DKT. NO. A-4569-08T3

IN THE MATTER OF THE TENURE :
HEARING OF WILLIAM TRACY, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION ON REMAND
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_____ :

For the Petitioner: Rocky L. Peterson, Esq.
Hill Wallack, LLP

For the Respondent: Robert M. Schwartz, Esq.

The Commissioner decided this matter on April 8, 2009, adopting the Administrative Law Judge’s (ALJ) Initial Decision which found that the District had sustained its charge of unbecoming conduct against respondent, principal of Daylight/Twilight High School, for failing to properly administer the attendance policy of the District. The Commissioner found, as did the ALJ, that central to the establishment of this charge were the dual issues of “authority” and “accountability”. Specifically, the Commissioner was in complete accord with the ALJ that:

In order to receive State aid, school districts are required to comply with the rules and standards for equalizing opportunity, including implementing the Core Curriculum Content Standards and providing public school facilities for at least 180 days per year. *N.J.S.A.* 18A:7F-9. The authority to make, amend, and repeal rules for the supervision of district schools rests with the board. *N.J.S.A.* 18A:11-1. *N.J.A.C.* 6A:16-7.8(a)(2) and (3) require boards of education to implement policies and procedures on attendance, including “[t]he expectations and consequences regarding attendance at school and classes,” and “[a] definition of

unexcused absence...that, at a minimum, shall be based on the definition of a school day...and the following considerations: i. Family illness or death; ii. Educational opportunities; iii. Written parental permission; iv. Excused religious observances...” The regulation goes on to list a detailed required process for addressing four or more absences. The regulations require the average daily attendance rate for each school district to average 90 percent or higher as calculated for the three years prior to the school year being monitored. *N.J.A.C. 6A:32-13.1(a)*. Each school with a three-year average below 90 percent is required to develop performance objectives for improving student attendance. *N.J.A.C. 6A:32-13(b)*.

The statutes and regulations make clear that Tracy, as a school principal, had no authority to act separately with regard to attendance policy. The Board, not the school principal, is vested with the power to make policy, which is fundamental to the academic mission. Districts are barred from granting diplomas to students who do not meet core curriculum requirements and attendance policy. *N.J.A.C. 6A:8-5.2(b)*.

The fact that Tracy was apparently operating a school without any written policy that would meet the standards of *N.J.A.C. 6A:16-7.8(a)(2)* and (3) demonstrates a dereliction of the principal’s duty as primary school administrator. It is the principal’s job to communicate a precise understanding of attendance through a written policy available to everyone. The lack of such a policy contributed to the misunderstanding with the Board and the lax documentation by the staff.

While it is true that *N.J.A.C. 6A:32-8.3(f)* states that daily roll call is taken by a teacher or other authorized person, *N.J.A.C. 6A:32-7.4(b)* requires that “[r]ecords for each individual student shall be maintained in a central file at the school attended by the student. When records are maintained in different locations, a notation in the central file as to where such other records may be found is required.” *N.J.A.C. 6A:32-7.3(a)(2)* states that mandated student records include a record of daily attendance. The principal is the school leader, responsible for administration and supervision of the school. *N.J.A.C. 6A:32-4.1(f)(1)*.

The absence of the school attendance documentation in the required centralized file speaks for itself. Tracy did not see to it that the school had an adequate central file, and he did nothing to ensure that teachers were moving the documentation into that file. There is also no evidence that he made any effort to ensure that

waivers were properly granted. Rather, he assumed that the lack of complaint meant that others outside the school understood what was being done inside the school and approved of it.

This was an abrogation of the principal's duty as a school leader and primary supervisor, as was the failure to disseminate enough written information about the attendance policy to ensure that the Board, the parents, the students, and the staff all understood it. Therefore, based on the fact that 33 of 91 graduates in the 2005-2006 school year had more than the fifteen absences allowed by Trenton Board of Education policy, the fact that no centralized attendance record-keeping system existed for the Daylight/Twilight High School as a whole, the fact that the Smith Avenue location had no actual waiver documentation system, and the fact that Tracy made no effort to create or monitor a proper attendance system, I CONCLUDE that the Board has proved the charge. (Initial Decision at 22-24), (Commissioner's Decision at 8-9)

After reviewing the factors which must be considered when fashioning a penalty (*In re Fulcomer*, 93 N.J. Super. 404, 421-22 (App. Div. 1967)), the Commissioner concurred with the ALJ that respondent's termination from his position was too harsh a penalty under the circumstances and agreed with the ALJ that a six-month suspension from his position was the appropriate penalty, stressing that such suspension must be served prospectively.

On appeal, the Appellate Division, fully rejecting all of respondent's arguments to the contrary, affirmed the Commissioner's finding of respondent's guilt on the unbecoming conduct charge against him. However, it determined to remand this matter solely for reconsideration of the penalty imposed. In so doing, the Court stated: "Tracy next argues that the Commissioner did not articulate a reason for directing that his six-month suspension should be served prospectively, that is, in addition to his prior period of suspension. He urges that the Commissioner thus acted in an arbitrary, capricious, and unreasonable manner. We agree." (Appellate Division Decision at 19) In making its determination, the court presented the following reasoning:

Tracy asserts that he had already received a four-month, unpaid suspension prior to the ALJ's decision, which "he had already done at the time in which the charges were initially certified." From the record before us, we have not been able to verify the exact length or timing of the prior suspension, but Tracy was apparently first suspended in December of 2007 for an indeterminate amount of time. The record does not reflect whether that suspension was with or without pay, but the Board acknowledges that Tracy was suspended for four months without pay sometime prior to the ALJ's initial decision.

Presuming that Tracy already served a four-month period of suspension prior to the Commissioner's imposition of the prospective six-month suspension, we cannot on the record before us say that a suspension of ten months would be shocking to our sense of fairness in light of the circumstances, although it seems harsh and we may well ourselves have concluded that a total of six months loss of salary was quite sufficient. Tracy has offered no comparison to discipline imposed on other principals in analogous situations to lead us to the conclusion that the suspension here was a sharp departure from prior practice.

However, we do have difficulty with the Commissioner's imposition of a six-month suspension "prospectively" because it is not clear that she really intended to (sic) Tracy to suffer a ten-month suspension. Nothing in the Commissioner's written opinion expressly acknowledges any awareness that Tracy had already been suspended for at least four months during some unspecified period, although she noted that Tracy sought reinstatement to his principal position with back pay. The ALJ noted that Tracy was suspended in December 2007 but, in her final decision, did not indicate whether her recommended penalty of suspension was prospective or retroactive.

In addition to these ambiguities, if the Commissioner intended that Tracy suffer a suspension in excess of six months, she provided no explanation for why his conduct justified a longer suspension than that imposed by the ALJ.... (Appellate Division Decision at 22, 23, 24)

¹In reviewing the court's above-stated reasoning surrounding its remand in this matter, it is readily apparent that the court was unfamiliar with the statutory prescriptions attendant to the

¹ It is noted that upon receipt of the Appellate Division's remand in this matter, the parties were provided an opportunity to submit briefs with respect to the issue on remand. Such submissions were fully considered here.

bringing and prosecution of tenure charges against individuals and the parties' submissions obviously did not serve to enlighten the panel in this regard. The suspension of a tenured employee without pay is governed by *N.J.S.A. 18A:6-14* which specifies:

Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

Pursuant to this statute, the Board has the authority to suspend a tenured employee without pay when it certifies tenure charges against that employee, which the Board admittedly did here. Once the charges are certified, this statute allows the suspension to continue without pay for 120 calendar days after certification of the charges. The statute further mandates that resumption of the suspended employee's full salary must begin on the 121st day after the certification of charges and this payment of full salary must continue until the date of determination of the charges by the Commissioner.² Such is the case irrespective of the fact that *the individual provides no services whatsoever to the Board during this time.*³

Turning to respondent's argument on appeal – that the ALJ obviously intended, in recommending a six-month period of suspension for respondent, that the 120-day suspension imposed at certification of tenure charges be credited against her recommended penalty and therefore the Commissioner increased the recommended penalty without explanation, an argument which the Appellate Division inexplicably seems to have accepted – such a

² Upon the *sustaining* of tenure charges at the end of the case – unless specifically discussed or directed otherwise in the Commissioner's decision – payment for this suspension period is deemed forfeited.

³ There is no claim here that respondent suffered any interruption of this statutorily mandated full pay status during the full course of this case.

contention finds absolutely no support in the record. The ALJ's decision offers no substantiation at all – either implicitly or explicitly – that she ever contemplated crediting respondent's statutorily-mandated suspension against her recommended penalty in this matter. To the contrary, the ALJ's recommended Order clearly states: "I further ORDER that respondent *shall be* suspended for six months[.]" (emphasis added) unquestionably phrased in prospective rather than retroactive language. Irrespective of the fact that the Commissioner finds no ambiguity whatsoever as to the ALJ's recommended penalty, there can be no doubt as to the Commissioner's ruling in this matter. Stating that the Commissioner did not view respondent's dereliction of his duties as a principal in connection with the charge established against him is a *de minimis* infraction; recognizing that such dereliction clearly had a detrimental effect on the Board in that respondent impermissibly usurped the Board's authority in the establishment of uniform standards in its schools and seriously compromised its ability to conform to its regulatory obligations with respect to the attendance component of graduation requirements at the Daylight/Twilight High School; and also, seeking to impress upon respondent the seriousness of the abdication of his responsibilities in this regard, the Commissioner imposed a six-month prospective suspension – which remains unaltered here.

Accordingly, the Acting Commissioner concludes that a penalty of a six-month suspension from respondent's position, to be served prospectively, is the appropriate penalty for the proven unbecoming conduct charge against him.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 21, 2011

Date of Mailing: July 22, 2011

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)