#321-12 (OAL Decision: http://lawlibrary.rutgers.edu/collections/oal/html/initial/edu10976-11_1.html)

IN THE MATTER OF THE TENURE	:	
HEARING OF CORY FORMAN,	:	COMMISSIONER OF EDUCATION
CLEARVIEW REGIONAL SCHOOL	:	DECISION
DISTRICT, GLOUCESTER COUNTY.	:	

SYNOPSIS

The petitioning school district certified tenure charges of unbecoming conduct against respondent – a tenured physical education and special education teacher – for allegedly pushing a student, T.E., into a trophy case in the gym hallway, slapping the same student in the stomach with the back of his hand, and telling the student that if he deleted the cell-phone photograph taken of the red mark on his stomach, respondent would give him grades of 100 for the rest of the year. Respondent contended that his actions, all of which occurred in a single school day, were not what the Board alleged. The Board asserted that respondent's alleged misconduct warranted dismissal from his tenured position.

The ALJ found, *inter alia*, that: based on a security video and the testimony of witnesses, T.E.'s assertion that the respondent actively shoved him into a trophy case is not credible; rather, T.E. was shoving and grabbing at respondent and the overall momentum of the horseplay sent T.E. backward into the trophy case; based on the testimony of respondent's expert witness regarding the photograph of the alleged handprint on T.E.'s stomach, together with the testimony of students who witnessed the classroom episode that followed the trophy incident, respondent's contact with T.E. amounted to a "light slap"; respondent's joking offer to give T.E. "100s" for the rest of the year – while not serious – was inappropriate, as was respondent's tolerance of student provocation and horseplay; respondent's responses to his students' misbehaviors were improper for a teacher and in fact encouraged other students to misbehave; and respondent cared deeply about his students and had no malicious intent, but simply failed to appreciate the inappropriateness of the horseplay at issue in this matter. The ALJ concluded nonetheless that – given current precedents and ongoing efforts through the anti-bullying laws to change how students conduct themselves in relation to each other – the loss of respondent's tenure was the appropriate penalty.

Upon independent review of the record, the Commissioner[1] – while concurring with the ALJ that the Board has established that respondent is guilty of unbecoming conduct – rejected the ALJ's penalty recommendation as he found, *inter alia*, that the ALJ failed to conduct the requisite analysis of the factors to be taken into account in determining the appropriate penalty in a tenure case (*In re Fulcomer*, 93 *N.J. Super*. 404 (App. Div. 1967)), and instead determined that the respondent should be removed from his tenured position in light of the anti-bullying legislation. The Commissioner determined that removal is an unduly harsh penalty given all of the circumstances existing in this matter, and is not justified because the proven conduct does not establish respondent's unfitness to discharge the duties of his position, nor was respondent's behavior "premeditated, cruel or vicious, or done with the intent to punish." (*In re Fulcomer*, *supra*, at 421) The Commissioner concluded that the loss of respondent's increment for one year, along with the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14 following the certification of tenure charges, is a sufficient penalty to impress upon respondent the seriousness of his errors in judgment displayed in this matter. Accordingly, the Initial Decision of the OAL – as modified with respect to the penalty – was adopted as the final decision in this matter.

August 8, 2012

[1] This matter was delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

OAL DKT. NO. EDU 10976-11
AGENCY DKT NO. 250-8/11

IN THE MATTER OF THE TENURE	:	
HEARING OF CORY FORMAN,	:	COMMISSIONER OF EDUCATION
CLEARVIEW REGIONAL SCHOOL	:	DECISION
DISTRICT, GLOUCESTER COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the respondent, Cory Forman, and the Board of Education's (Board) reply thereto.

This case involves tenure charges brought by the Board against the respondent, a special education and gym teacher in the Clearview Regional School District. The Board charged the respondent with unbecoming conduct based on three episodes that occurred throughout the course of a school day, including two incidents of physical contact with a student, T.E.[2] The Administrative Law Judge (ALJ) found that the respondent was guilty of unbecoming conduct, and recommended that the respondent be removed from his tenured position.

In his exceptions, the respondent maintains that the ALJ correctly determined that each of the tenure charges was without merit. The respondent cites to the ALJ's discussion of the three incidents in the Initial Decision in an effort to argue that she effectively found that the charges were not sustained. The respondent points out that the ALJ did not find that he pushed

[2] The specific tenure charges are as follows:

> Charge One – respondent intentionally and forcefully pushed a student, T.E., into the trophy case in Pioneer Hall, in view of other students and staff members;
> Charge Two – respondent intentionally and forcefully slapped the same student, T.E., in the stomach with the back of his right hand, in view of other students in the class; and
> Charge Three – respondent told T.E. that if he deleted the photograph T.E. took of his injury, respondent would give him "100s" for the rest of the school year.

T.E. into the trophy case, that he forcefully and intentionally slapped T.E. in the stomach or that he promised to give T.E. 100s for the rest of the school year if he would delete the cell phone photograph.

Respondent also takes exception to the ALJ's determination that the mutual camaraderie that existed between the respondent and the students merited the harsh and severe penalty of termination. Respondent maintains that the penalty recommended by the ALJ is excessive and that a lesser penalty is appropriate in light of the relevant case law and the analysis required under *In re Fulcomer*, 93 *N.J. Super*. 404 (App. Div. 1967). Specifically, the respondent contends that he jokes around with the students, and he was joking around with T.E. on the day of the incidents that led to the tenure charges. Further, the respondent stresses in his exceptions that he had no malicious intent in connection with the joking. The respondent also points out that he has no disciplinary history, he is remorseful for his conduct, and he recognizes that the joking improperly blurred the student-teacher relationship.

Finally, the respondent claims that the ALJ erred in applying the anti-bullying legislation to this case. The respondent contends that the tenure charges do not allege any violations of *N.J.S.A.* 18A:37-13 *et seq*. and that the statute was not in existence at the time of the alleged incidents. Further, the respondent maintains that there was no evidence presented suggesting that he ever bullied any students. As a result the respondent contends that an appropriate penalty in this case would be the loss of 120 days salary.

In reply, the Board urges the Commissioner to adopt the ALJ's determination that the respondent engaged in conduct unbecoming a teaching staff member and the penalty recommended. The Board maintains that the ALJ correctly determined that the respondent's unbecoming conduct warrants the dismissal of respondent from his tenured teaching position,

emphasizing the fact that the respondent twice laid hands on a student. In its reply, the Board further cited to the Initial Decision to support the assertion that the ALJ correctly concluded that the inappropriate, bullying-type behavior that took place significantly outweighed any mitigating factors.

Upon a comprehensive review of the record in this matter, which included the transcripts of the hearing conducted at the OAL on January 19 and 20, 2012, the Commissioner [3] concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct. The ALJ's finding in connection with the characterization of respondent's behavior as unbecoming conduct is fully supported by the record and consistent with applicable law.

With respect to the three incidents outlined in the tenure charges, the ALJ found that: while T.E. was shoving and grabbing at the respondent, their feet touched and the overall momentum sent T.E. backward into the trophy case; the respondent lightly slapped T.E. in the stomach; and there was a discussion of grades in relation to the posting of a photograph of T.E.'s stomach on Facebook. Despite the assertion made by the respondent in his exceptions, the ALJ did not determine that each of these charges was without merit, but rather she made findings related to the severity of each incident. The term "unbecoming conduct" is elastic and 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." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 554 (1988). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." *Hartman v. Police*

[3] This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

Dep't of Ridgewood, 258 *N.J. Super.* 22, 40 (App. Div. 1992) (citing *Asbury Park v. Dep't of Civil Serv.*, 17 *N.J.* 419, 429 (1955)). The record demonstrates that the totality of the respondent's behavior amounted to conduct unbecoming a teaching staff member.[4]

Turning to the appropriate penalty, the Commissioner recognizes that the factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *Fulcomer, supra*, 93 *N.J. Super*. at 422. In the case at bar, the ALJ did not recommend termination based on the *Fulcomer* factors, but instead determined that the respondent should be removed from his tenured position in light of the anti-bullying legislation. It is without question that the anti-bullying legislation is extremely important and the effective implementation of the statute is paramount; however, the existence of the statute alone does not serve as an avenue to automatically remove a teacher from a tenured position without conducting the requisite *Fulcomer* analysis.

The Commissioner finds that based on all of the circumstances and considerations existing in this matter, the removal of respondent from his tenured position is an unduly harsh penalty. The dismissal of the respondent from his teaching position is not justified

[4] The ALJ specifically concluded,

> Physical wrestling with a student in a hallway was unbecoming conduct. Students should not be stomping each other's feet, or grabbing each other's arms in a hallway between classes, and a teacher that signals that such engagement is appropriate by wrestling himself or by allowing a passing student to stomp on his feet is neglecting his duty. Laughing and joking about the fact that a student went tumbling into a trophy case was inappropriate, and invading that young man's physical person a second time, minutes later, now in a classroom, was misconduct. Finally, the joking references to "100s" in an atmosphere where the students easily could have linked it to a form of blackmail were completely inappropriate, also constituting conduct unbecoming.
> (Initial Decision at 16).

in this case because the proven conduct does not establish his unfitness to discharge the duties and functions of his position as a teacher. Nor is there is any indication that the respondent's behavior will have any long term effects on the maintenance of discipline among the students and staff in the Clearview Regional School District. Additional mitigating factors include the fact that T.E. and the respondent were joking around when the light slap occurred, T.E. initiated the contact and was grabbing the respondent during the trophy case incident and there was no evidence to suggest that the respondent seriously offered T.E. 100s if he deleted the cell phone photograph. Importantly, the respondent's behavior was not "premeditated, cruel or vicious, or done with the intent to punish." See, *In re Fulcomer, supra,* 93 *N.J. Super*. at 421. Finally, the respondent has acknowledged that he did not handle the situations properly and that it is inappropriate for him to maintain such relaxed relationships with his students.[5]

Although dismissal in this case is not warranted for the reasons discussed above, the Commissioner recognizes that the charges in this matter are serious in nature. It is without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill,* 1980 *S.L.D.* 987, 1003. Respondent himself admitted that he did not conduct himself properly by cultivating relationships with the students that did not convey proper boundaries. Moreover respondent's unprofessional conduct led to two incidents where there was unnecessary physical contact with a student, which is never condoned even if it is characterized as horseplay. Although there was no evidence that respondent bullied the students, his demeanor and approach resulted in an overall environment that is not appropriate to a school setting.

[5] The ALJ determined that the "respondent testified compellingly as to his remorse about the conduct, and to his understanding that the joking was inappropriate, and that what he intended as a means of building a spirit of camaraderie blurred the student-teacher relationship unacceptably." (Initial Decision at 18-19).

Therefore, the Commissioner finds and concludes that the loss of respondent's increment for one year, along with the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14 following the certification of tenure charges, is a sufficient penalty to impress upon respondent the seriousness of his errors in judgment displayed in this matter. Accordingly, the Initial Decision of the OAL, as modified with respect to the penalty, is adopted as final decision in this matter.

IT IS SO ORDERED.[6]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: August 8, 2012

Date of Mailing: August 9, 2012

[6] 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)