

#297-12 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE HEARING :
OF WAYNE CALANDRIELLO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF : DECISION
SOUTH ORANGE-MAPLEWOOD, :
ESSEX COUNTY. :

SYNOPSIS

The petitioning school district certified thirteen tenure charges of unbecoming conduct and other just cause against respondent – a tenured physical education teacher – alleging, *inter alia*: inappropriate communication and/or contact with students; failure to supervise students during class time; failure to report a student fight incident; failure to report for work; failure to notify the substitute service; shoplifting of magazines; and failure to disclose a dismissal from previous employment with Monmouth County. The majority of the thirteen charges stem from two incidents: respondent’s behavior during a study hall which he supervised on January 7, 2010, and the circumstances and aftermath of respondent’s failure to report to work on April 15, 2011. In the latter incident, respondent was arrested for shoplifting at a 7-Eleven on his way to work; the criminal charges were later dismissed. The Board contended that respondent’s misconduct warrants dismissal from his tenured position. The first of the thirteen charges was voluntarily withdrawn by the Board, and the ALJ dismissed charge 11 as redundant with charge 10.

The ALJ found, *inter alia*, that: respondent engaged in conduct unbecoming when he failed to appropriately supervise his students during a study hall on January 7, 2010, leading to misuse of instructional time and the use of forbidden electronic devices by students; the evidence does not, however, support the Board’s contention of failure to respond to or report a student fight because the nature of the 2010 incident shown on videotape can best be characterized as teasing rather than fighting; at the time of the 2010 incident, respondent received only a written reprimand and the conduct is no more egregious two years later; respondent misrepresented the reason for his April 15, 2011 absence from school as well as his efforts to contact the substitution service, and this behavior constituted conduct unbecoming; respondent’s failure to report for duty on that day – and failure to give timely notice that he would be absent – also constitute conduct unbecoming a teacher; the credibility of the only witness presented by the Board in support of the shoplifting charge was profoundly deficient, and his testimony was irrational and lacked internal consistency; accordingly, the Board failed to prove that respondent committed a shoplifting offense. The ALJ concluded that respondent was guilty of conduct unbecoming, but that the circumstances of the case do not warrant dismissal from his tenured position. Accordingly, the ALJ recommended that the appropriate penalty in this matter is the forfeiture of the 120 days of salary withheld pursuant to *N.J.S.A.* 18A:6-14.

Upon careful and independent review of the record, the Commissioner concurred with the ALJ’s findings and conclusions regarding respondent’s unbecoming conduct. However, the Commissioner modified the penalty recommended by the ALJ and ordered that the respondent forfeit one year of salary increment and the 120 days of salary withheld pursuant to *N.J.S.A.* 18A:6-14, plus an additional four months suspension without pay. Accordingly, the Commissioner adopted the Initial Decision of the OAL, as modified with respect to the penalty, 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.

July 30, 2012

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SOUTH ORANGE-MAPLEWOOD, :
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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, Wayne Calandriello, and the Board of Education (Board), as well as the respondent's and the Board's respective replies thereto.

This case involves tenure charges brought by the Board against the respondent, a tenured teacher in the South Orange-Maplewood School District. The Board charged the respondent with 13 counts of unbecoming conduct and other just cause stemming from four separate incidents.¹ Following the presentation of the Board's case, the Board voluntarily withdrew charge 1 and the Administrative Law Judge ("ALJ") dismissed charge 11. In his Initial Decision

¹ The following is a summary of the tenure charges:

- Charge 1: Inappropriate communication and/or contact with a student;
- Charge 2: Failure to properly supervise his students during a third period study hall on January 7, 2010;
- Charge 3: Failure to take any action in response to a fight between students during a third period study hall on January 7, 2010;
- Charge 4: Failure to report a student fight that occurred during a third period study hall on January 7, 2010;
- Charge 5: Misuse of instructional time during a third period study hall on January 7, 2010;
- Charge 6: Failure to report for duty on April 15, 2011;
- Charge 7: Failure to notify the substitute service on April 15, 2011;
- Charge 8: Misrepresentation regarding reason for April 15, 2011 absence;
- Charge 9: Misrepresentation regarding notification of substitute service for April 15, 2011 absence;
- Charge 10: Arrest for shoplifting on April 15, 2011;
- Charge 11: Arrest for shoplifting adult magazines on April 15, 2011;
- Charge 12: Failure to disclose dismissal from employment with Monmouth County Youth Service; and
- Charge 13: Other just cause.

the ALJ found that the respondent engaged in unbecoming conduct by failing to appropriately supervise his students during study hall on January 7, 2010; by failing to provide the Board with timely notice that he would be absent on April 15, 2011; and by misrepresenting his reason for the April 15, 2011 absence and his efforts to contact the substitute service. The ALJ also found that the Board failed to sustain its burden of proving misconduct arising out of the allegation that the respondent engaged in shoplifting on April 15, 2011, and for failing to disclose his dismissal from employment at the Monmouth County Youth Detention Center (“Detention Center”) when he was hired in 2001. The ALJ recommended the imposition of a 120 day suspension as a result of the respondent’s unbecoming conduct.

The Board submitted exceptions to support the contention that the ALJ erroneously found that the Board did not prove certain charges against the respondent, and seeking to have the Commissioner modify the recommended penalty. Initially, the Board takes exception to the ALJ’s summaries of the witness testimony, noting that these do not reflect complete summaries of each and every witness’s relevant direct and cross-examination testimony. The Board provided numerous examples in which it takes exception to the ALJ’s summary of witness testimony, reiterating the factual findings suggested in its post hearing submission.

With respect to charges 6 and 7, the Board maintains that the ALJ incorrectly placed greater responsibility for the unsupervised students on the pool deck on the custodian and the night school teacher than on the respondent. The Board contends that the fact that other individuals before him did not secure the area does not diminish respondent’s responsibilities as it was his duty to supervise the students in the pool area. Since the respondent did not report to work and failed to notify school officials, his morning swim class entered the pool area without any supervision.

The Board also claims that the ALJ erred in concluding that the Board did not prove charges 10 and 11, involving the shoplifting of pornographic magazines. In connection with charge

10, the Board takes issue with the ALJ's credibility determination, arguing that the Board's witness, Habes Al-Fwaier – who worked at the 7-Eleven store where the alleged shoplifting incident occurred – was more credible than the respondent. The Board stressed that Al-Fwaier had no stake in the proceeding, and he was forthright in his answers – particularly in view of his language difficulties and his reluctance about testifying. On the other hand, the respondent was incredible throughout his testimony. The Board cites numerous examples of the respondent's testimony and argues that because the ALJ found the respondent to be lacking credibility when it involved other aspects of his testimony, it only follows that his whole testimony should be deemed incredible. The Board maintains that selective credibility determinations deserve no deference. With respect to charge 11, the Board contends that the ALJ's conclusion that it was irrelevant whether the magazines the respondent allegedly shoplifted were pornographic is inconceivable. The Board maintains that fact that the respondent felt compelled to obtain pornographic materials on his way to work – where he supervises students in a pool – is very disconcerting.

Finally, the Board asserts that the ALJ erred in concluding that the Board did not prove charge 12. The Board argues that the ALJ incorrectly found that the employment information that respondent submitted to the Board at the time of his hire was accurate. The Board maintains that in light of the Final Decision of the Merit System Board removing him from his position at the Detention Center, the recommendation letter from the Assistant Superintendent of the Detention Center that the respondent submitted with his employment application was inherently false. As a result, the Board argues that the Commissioner should reject a portion of the Initial Decision and dismiss the respondent from his tenured position.

In his exceptions, the respondent urges the adoption of the Initial Decision with respect to the specific charges that were either dismissed by the ALJ or which the ALJ determined the Board failed to prove. Respondent takes exception to the following factual conclusions

contained in the Initial Decision, which he alleges are not supported by the record. The respondent notes that the charges stemming from the incident during study hall on January 7, 2010 arose out of a short video taken with a student's cell phone. Respondent contends that the ALJ should have included the fact that the school had surveillance video of the cafeteria at the time, and that the principal never looked at the video to determine the context of the incident and the respondent's subsequent actions.

Additionally, respondent contends that the ALJ wrongfully concluded that he was able but failed to call the school to report his absence on April 15, 2011. The respondent contends that the circumstances surrounding his dispute with Al-Fwaier at the 7-Eleven regarding magazines and the subsequent police presence prevented him from being able to make a phone call. Further, the respondent contends that the ALJ's conclusion that he improperly failed to disclose the reason for his absence on the day of his arrest and the following days is at odds with *N.J.A.C. 6A:9-17.1*. Under *N.J.A.C. 6A:9-17.1*, the respondent was required to report his arrest within 14 days and, in fact, the respondent sent a memorandum to the Superintendent on April 29, 2011. Finally, the respondent contends that a 120 day suspension is too harsh based on the totality of the circumstances in this case and the Board's limited and unsubstantiated proofs.

In reply to the respondent's exceptions, the Board contends that no negative inference should be drawn from the lack of the surveillance video because the footage from the student's cell phone was enough to establish the respondent's failure to properly supervise his students, and at the time it was not foreseeable that there would be a need for the evidence in a future tenure case. Additionally, the Board contends that no negative inferences can be drawn from the fact that the 7-Eleven surveillance video was never presented at the hearing. The Board also states that the respondent incorrectly asserted that the ALJ made a finding that his failure to disclose the reason for his absence on April 15, 2011 breached a duty under *N.J.A.C. 6A:9-17.1*. The Board

stresses that the ALJ found that it was the false information that the respondent provided to multiple Board employees and his misrepresentations regarding contacting the substitute service that constituted the unbecoming conduct. Finally, the Board reiterates its request to have the respondent dismissed from his tenured position.

In reply to the Board, the respondent contends that the Board exceptions should be rejected because the factual assertions suggested by the Board were previously argued below, and the ALJ's credibility findings should not be rejected because they are supported by the evidence in the record. In his reply, the petitioner essentially provided a lengthy verbatim recitation of the facts that were outlined in his post-hearing submission. With respect to the petitioner's exceptions regarding the shoplifting charge (charge 10), the petitioner emphasizes the clear credibility findings made by the ALJ. The petitioner also contends that charge 11 is related to charge 10 and was therefore properly dismissed by the ALJ because there is no nexus between the nature of the magazines that were allegedly shoplifted and the respondent's work responsibilities. The petitioner points out that there was no allegation that petitioner shared or intended to share any such magazine with a student or co-worker. Finally, in reply to the Board's exceptions regarding charge 12, the petitioner argues that the Board's arguments concerning the recommendation letter from the Assistant Superintendent of the Detention Center are unfounded by the record and distort the scope of the letter. Lastly, the petitioner again argues that dismissal from his tenured employment is not warranted in this case.

Upon a comprehensive review of the record in this matter, which included the transcripts of the hearing dates conducted at the OAL on March 6, 2012, March 16, 2012, March 23, 2012 and March 26, 2012, the Commissioner 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 January 2010 incident (charges 2-5), the Commissioner is in accord with the ALJ's determination that the respondent engaged in unbecoming conduct by failing to properly supervise his students during study hall, leading to a misuse of instructional time and the use of forbidden electronic devices by the students. Although the surveillance video from the school's cafeteria was not provided by the Board at the hearing, it is readily apparent from the student's cell phone video that the students were not behaving appropriately and that the respondent did not do enough to properly quell the situation. On the charges related to the employment application (charge 12), the Commissioner also agrees with the ALJ – for the reasons discussed on pages 19-21 of the Initial Decision – that the Board failed to prove that the respondent provided erroneous information at the time of his hire in August 2001. There was no indication that the recommendation letter provided by the respondent was fraudulent, and the Board had authorization to check all of respondent's references. Further, the application did not require the respondent to state why he left his position at the Detention Center.

The Commissioner is also in accord with the ALJ's determination concerning the shoplifting charges and the aftermath of the incident (charges 6-11). Although the respondent was arrested, the charges were eventually dismissed and he claimed that the whole incident with the magazines was simply a misunderstanding. Notably all of the facts related to the alleged shoplifting incident were in dispute; as such, witness testimony and ultimate credibility is the only means available to make a determination as to the veracity of the charges. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before him and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

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)].

Based on his overall assessment of the Board's only witness related to the alleged shoplifting, Mr. Al-Fwaier, the ALJ found that he was not credible, stating that he "was so profoundly deficient that it is impossible to make findings supported by his testimony." The ALJ went on to note that Al-Fwaier "described Calandriello as a nice and good person, a type of person he was proud to see. This assessment, however, is totally inconsistent with his claim that he watched Calandriello shoplift or had a suspicion that he was shoplifting ... without intervention." (Initial Decision at 15). Notwithstanding the Board's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility. Further, since the Board carries the burden of proof, without a credible witness or other evidence in the record, the charge must be dismissed.

Although the Board did not sustain its burden of proving that respondent was guilty of shoplifting, there is no doubt that respondent failed to report to duty that day and did not provide the school with notice before the start of his morning classes. The ALJ found the respondent's assertion that he was prevented from making a phone call after he was confronted at 7-Eleven by Al-Fwaier was not plausible. There is nothing in the record to contradict the ALJ's assessment of the respondent's credibility and his finding on this point. Moreover, it is undisputed that the respondent failed to notify the substitute service, which was a violation of Board policy. It is also undisputed that the respondent informed the Superintendent of his arrest within 14 days in accordance with *N.J.A.C.* 6A:9-17.1, yet the Commissioner agrees with the ALJ that the respondent's misrepresentations in the days following the arrest were problematic in that he gave false and conflicting information to three different Board employees on four separate occasions,

putting into question the respondent's professionalism. 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 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)). As a result, 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.

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.

While in no way minimizing the seriousness of respondent's infractions, the Commissioner is in accord with the ALJ that – under all of the circumstances and considerations existing in this matter – removal of respondent from his tenured position is an unduly harsh penalty. The dismissal of the respondent from his teaching position is not justified because the conduct that was proven 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 South Orange-

Maplewood School District. Moreover, the respondent has also received positive evaluations throughout his employment with the Board.

It is important to recognize that the appropriate penalty must be assessed based upon the conduct proven. Despite the list of charges, the Board effectively proved that the respondent failed to properly supervise his students during one incident in 2010², and that the respondent did not report for duty on April 15, 2011 – which situation was compounded by respondent’s failure to follow proper protocol and by his communication of conflicting information to Board employees. The Board deemed the fact that the respondent was picking up adult magazines on his way to school to be extremely significant, yet there is no indication that he ever had such materials in the school building or that he shared them with any students or coworkers. Without any additional evidence, the mere fact that the respondent admitted to possessing a Playboy magazine does not rise to the level of unbecoming conduct necessitating the removal of his tenure.³

Although dismissal in this case is not warranted, respondent’s unbecoming conduct necessitates an appropriate penalty. 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. Certainly the proper supervision of students is a paramount component of a teacher’s responsibilities. Although the respondent may not have intended to be absent from school on April 15, 2011 when he left his house, the situation he ended up in resulted in students being left unsupervised on a pool deck and caused confusion within the school as to his whereabouts, which is not conducive in a productive school setting. The respondent’s unfortunate actions were only further exacerbated by his subsequent communications with Board employees that did not convey

² The January 2010 study hall incident resulted in nothing more than a written reprimand by the Board at the time, and the incident was never referenced in the respondent’s subsequent evaluation.

³ Although it was alleged that the respondent shoplifted other types of pornographic magazines, the only thing proven at the hearing was the respondent’s own admission that he left the 7-Eleven with a Playboy magazine.

the requisite candor that is expected of a teaching staff member. Respondent's conduct in January 2010, coupled with the series of events on April 15, 2011, indicates that the respondent displayed questionable judgment that does not meet the implicit standard of good behavior required by teaching staff members.

Therefore, the Commissioner finds and concludes that the loss of respondent's increment for one year and the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14, following the certification of tenure charges plus an additional four months suspension without pay is a sufficient penalty to impress upon respondent the seriousness of her 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.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 30, 2012
Date of Mailing: July 31, 2012

⁴ Pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.