

#350-13 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE HEARING :
OF BRIGITTE GEIGER, SCHOOL DISTRICT :
OF THE TOWNSHIP OF MOUNT OLIVE, :
MORRIS COUNTY. : COMMISSIONER OF EDUCATION
AND : DECISION
IN THE MATTER OF THE TENURE HEARING :
OF SHARON JONES, SCHOOL DISTRICT :
OF THE TOWNSHIP OF MOUNT OLIVE, :
MORRIS COUNTY. :

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against Brigitte Geiger and Sharon Jones – tenured physical education teachers employed at Mount Olive High School – for allegedly engaging in a verbal exchange that was racially derogatory and overheard by students. Respondents denied making the alleged comments, and contended that the students had fabricated their story based on biases against the respondents. The Board argued that the respondents’ conversation in the girl’s locker room, during school hours, amounted to conduct unbecoming of teachers, and sought removal of respondents from their tenured positions.

The ALJ found, *inter alia*, that: teachers are required to exercise a high degree of self-restraint and controlled behavior as they are entrusted with the custody and care of children; based on examination of the evidence and the demeanor of the witnesses at hearing, the students who overheard the respondents’ conversation were credible witnesses, while the respondents were not; respondents’ admissions of frustration with certain African-American students at the school lends credibility to the student witnesses; respondents exhibited a lack of professional judgment when they engaged in a racially derogatory verbal exchange on March 2, 2012 that was witnessed by students; they thereby compromised confidence in the educational environment; each teacher was equally culpable for acting in an unbecoming manner, and – as experienced teachers – should have known that their remarks fell well below the acceptable standard of conduct for an educational institution; the respondents failed to take responsibility for their actions, denied making the statements and attempted to shift the blame to the student accusers. Accordingly, the ALJ concluded that the respondents’ conduct warrants dismissal from their tenured positions.

Upon full consideration and review of the record, the Initial Decision of the OAL, the respondents’ exceptions and petitioner’s reply thereto, the Assistant Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-34* – adopted the Initial Decision as the final decision in this matter. In so deciding, the Assistant Commissioner found that the respondents’ racially derogatory remarks create ongoing concerns about negative impacts on the educational environment, and necessitates termination of respondents’ employment. Accordingly, the respondents were dismissed from their tenured positions and a copy of this decision was forwarded to the State Board of Examiners for action as that body may deem appropriate.

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.
--

October 7, 2013

OAL DKT. NOS. EDU 5974-12 and EDU 6047-12 (consolidated)
AGENCY DKT NOS. 106-4/12 and 107-4/12

IN THE MATTER OF THE TENURE HEARING :
OF BRIGITTE GEIGER, SCHOOL DISTRICT :
OF THE TOWNSHIP OF MOUNT OLIVE, :
MORRIS COUNTY. : COMMISSIONER OF EDUCATION
AND : DECISION
IN THE MATTER OF THE TENURE HEARING :
OF SHARON JONES, SCHOOL DISTRICT :
OF THE TOWNSHIP OF MOUNT OLIVE, :
MORRIS 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 respondents and the Board of Education (Board) as well as the respective replies thereto.

This consolidated case involves tenure charges brought by the Board against respondents, Brigitte Geiger and Sharon Jones, two teachers in the Mount Olive School District. The Board charged the respondents with unbecoming conduct based on a conversation that they had in the locker room that was overheard by two students, G.H. and Z.C., during which the respondents both used a racially derogatory comment in reference to a group of students. Specifically, it is alleged that respondent Jones said something to the effect of “these Negroes think they are tough shit” to which respondent Geiger replied “yeah, that is what they are a bunch of Negroes, Negroes, Negroes.” The Administrative Law Judge (“ALJ”) found that the

respondents were guilty of unbecoming conduct, and recommended that they be dismissed from their tenured positions with the Mount Olive School District.

In its exceptions, the Board contends that the ALJ wrongfully determined that it was only necessary to adjudicate Charge One because the remaining charges were also based on the same incident. Although the Board agrees with the ALJ's determination with regard to Charge One, it requests that if the Commissioner finds the conduct as alleged in Charge One is insufficient to warrant the respondents' dismissal from employment, the Commissioner also finds that Charges Two through Six were also substantiated for the reasons outlined in the Board's post-hearing submission. In reply, the respondents maintain that the Board sets forth no legal or factual authority for its position, and that the Commissioner should not replicate the error committed by the ALJ by penalizing the respondents repeatedly for the same conduct.

In their exceptions the respondents provided a summary of the hearing testimony and exhibits, and substantially reiterated the substance of their post-hearing submission at the OAL – recasting the arguments therein to support the contention that the ALJ erroneously sustained the Board's charges.¹ First, the respondents contend that despite acknowledging Aml Alhiyek's testimony in her opinion, the ALJ improperly and unreasonably disregarded it by ignoring the inherent credibility of Alhiyek's testimony and characterizing it in a fashion unsupported by the record. The respondents claim that Alhiyek, who was a friend of G.H., testified that G.H. told her she thought she heard the teachers say something during the locker room conversation but wasn't sure. The respondents further state that Alhiyek recalled G.H. saying, "I don't know why we did that, it's not true." Additionally, the respondents state that the only reason the ALJ offers to disbelieve Alhiyek is that "she was not an eyewitness to the alleged

¹ Most of the arguments made by the respondents in their exceptions were considered by the ALJ and addressed in the Initial Decision. Additionally, the respondents' exceptions were 94 pages and will not be summarized at length herein.

statements [in the locker room].” (Initial Decision at page 22) The respondents contend that this statement reflects the ALJ’s improper shifting of the burden of proof to the respondents. The respondents also stress that the record is devoid of any reason whatsoever to doubt Alhiyek’s testimony, and in fact, Alhiyek was reluctant to testify because it was inconvenient in light of her college classes and because her friend G.H. told her things in confidence. The respondents further contend that without explanation, the ALJ wrongfully concluded that G.H. credibly and consistently rebutted Alhiyek’s claim.

The respondents also argue that the ALJ erred because the credibility findings as to G.H. and Z.C. were not supported by the record. Specifically, the respondents contend that the ALJ made the following unsupported conclusions: that G.H.’s story “closely matched Z.C.’s;” that Z.C.’s version of the events was also consistent with G.H.’s; and that the record does not support the respondents’ assertion that the students’ stories were rife with inconsistencies. (Initial Decision at page 21) The respondents maintain that the case law directs that student testimony against a teacher must be viewed with great caution and scrutiny, and that the ALJ was required to view the students with suspicion – especially because the Board’s case is entirely dependent upon their testimony.

Further, the respondents contend that the ALJ disregarded the prior inconsistent statements of both G.H. and Z.C. that were made by the students when they were interviewed by Kevin Stansberry, the principal of Mount Olive High School and the vice principal, James Kramer. For example, the respondents allege that the students made inconsistent statements regarding whether the students actually saw the respondents in the locker room; whether respondents saw the students in the locker room; whether they reacted in shock upon seeing the students; and whether either of the respondents also used the f-word. The respondents

assert that the inconsistencies in both G.H. and Z.C.'s accounts of the event, and their communications after the incident, calls into question their credibility. Additionally, the respondents contend that the ALJ's reliance on the administrators' endorsements of G.H. and Z.C.'s credibility, which themselves were not based on evidence in the record, was improper.

The respondents also contend that the ALJ erred by repeatedly permitting and ignoring the violation of the respondents' rights to due process. The respondents assert that the ALJ ignored the Board's attempt to coerce admissions from the respondents in violation of their civil rights; the Board's admitted violation of the investigatory procedures required by its own Harassment, Intimidation, and Bullying (HIB) policy; the Board's failure to review evidence produced by its investigation prior to certifying tenure charges; and the fact that the Board's defective investigation resulted in the contamination of evidence. The respondents assert that the Board's failure to abide by its own investigatory procedures and the formal requirements of HIB resulted in the absence of scrutiny of G.H. and Z.C.'s allegations, and impeded their ability to cross-examine and impeach the witnesses because reports were not generated, statements were not memorialized and the witnesses were never separated. The prejudice to the respondents was further exacerbated by the Board's dilatory behavior in discovery and the ALJ's refusal to do anything about it.

Additionally, the respondents assert that the ALJ erred by shifting the burden of proof to the respondents. In deciding to substantiate the Board's allegations, the ALJ ultimately determined that "the lack of motive to lie renders G.H. and Z.C. more credible than Jones and Geiger." (Initial Decision at 23) The respondents maintain that by rendering her decision on this basis, the ALJ effectively shifted the burden of proof to the respondents by requiring them to prove that the students had a motive to lie. Moreover, the respondents argue that the ALJ

punished them for attempting to present evidence as to why the students would fabricate the allegations by declaring that the respondents' "attempts to shift the blame to the students only further demonstrates their insensitivity to preserving the learning environment." (Initial Decision at 29-30). The respondents contend that because of the ALJ's reasoning, the only way they could have escaped the penalty of tenure revocation was by not challenging the tenure charges filed against them, which is a violation of their due process rights.

Finally, the respondents argue that even if the Commissioner finds that they engaged in unbecoming conduct, such conduct does not merit suspension or the revocation of their tenure. The respondents stress that the ALJ's imposition of an excessive penalty due to the respondents' challenge to the tenure charges constitutes a violation of their due process rights. The respondents argue that the case law relied on by the ALJ to support her recommendation of removal involved more severe conduct by teachers and have an absence of mitigating factors that make them distinguishable from the circumstances in this case. The respondents also cited to various cases in support of their argument that a penalty of suspension is more appropriate based on the conduct and mitigating circumstances. The respondents further emphasize that they made no attempt to justify the nature of the alleged comments and there was no deliberate exposure of the comments to students, parents, and the public at large. Even if true, the alleged offensive comments were uttered between two teachers who believed no students were present – not in the midst of an academic lesson. Additionally, both of the respondents have unblemished records of approximately 30 years with strong teaching and coaching evaluations and no disciplinary records. Therefore, the respondents contend that the severe anguish concomitant with being subject to this tenure proceeding is sufficient to impress upon the respondents the seriousness of the alleged conduct and no further penalty should be imposed on them.

In reply the Board urges the adoption of the Initial Decision as the final decision in this matter, arguing that the respondents' exceptions merely reiterate arguments which were previously raised before the ALJ and fully taken into account and properly dismissed.² The Board maintains that in their exceptions, the respondents generally mischaracterize the testimony presented at hearing in an overt attempt to draw baseless suspicion onto the ALJ's findings. Moreover, after a reasoned review of the hearing transcripts and evidence in the record, it is clear that the ALJ's determinations concerning witness credibility had ample support. Further, contrary to the respondents' assertions, at no time did the ALJ shift the burden of proof to the respondents and, in fact, the ALJ specifically referenced the Board's burden of proof in the Initial Decision. The Board also argues that the additional exhibits attached to the Certification of Terel Klein – which was submitted with the respondents' exceptions – should not be considered because certain attachments were never made part of the record or introduced as evidence at the hearing. Finally, the Board provided a specific response to each exception submitted by the respondents.

In reply to the respondents' assertion regarding the testimony of Alhiyek, the Board contends that the respondents contradict themselves because on one hand they argue that the ALJ disregarded the testimony and on the other hand they argue that the ALJ improperly found that she was not credible. Additionally, the Board pointed out several inconsistencies with Alhiyek's testimony and cited to the transcripts in support of its argument that G.H. offered testimony that rebutted nearly every aspect of Alhiyek's testimony. The Board also stresses that Alhiyek was not present in the locker room and the hearsay nature of her testimony, in light of the rebuttal testimony by G.H. – an actual eyewitness to the incident – lends further credence to the ALJ's credibility determinations. In response to the respondents claim that the ALJ erred by

² The Board's reply was 55 pages and also will not be summarized at length here.

not striking the rebuttal testimony of G.H., the Board contends that there was no evidence that the Board violated the sequestration order or that G.H.'s rebuttal testimony was in any way tainted by her conversation with the Board attorney. The Board also notes that G.H.'s testimony on rebuttal was consistent with her testimony given six months prior, particularly with respect to her allegations that the respondents used racially offensive language.

The Board also contends that the respondents' argument that the testimony of G.H. and Z.C. was neither credible nor supported by the record is misplaced. A review of the testimony and documents in evidence reveals that G.H. and Z.C.'s testimony was consistent with each other and with their prior written statements. If there were any differences or discrepancies in their testimony, they were minor and of no consequence, as they had no bearing on the ultimate question of whether the respondents engaged in the conversation. The Board cited to the transcript to support its assertion that the students did not waiver in their recollection of the facts and that their written statements, prepared shortly after the incident, contained substantially similar information. The Board also stresses that each Board administrator testified that G.H. and Z.C.'s recollection of the event remained consistent and credible, despite having been interviewed several times. Therefore, the Board contends that the ALJ did not ignore any discrepancies or any other testimony presented by G.H. and Z.C., but rather the record reveals the neither G.H. nor Z.C. provided any contradictory statements or testimony on the salient facts regarding the conversation at issue.

The Board also maintains that the respondents were granted full due process throughout the investigation and subsequent tenure proceedings. The Board further argues that the respondents' allegation that the Board's investigation was flawed has no bearing on the true crux of this matter which is whether the respondents actually engaged in the conduct at issue.

Further the respondents offer no support for their contention that the Board's presumption of guilt for the respondents constitutes a due process violation. The respondents refused to answer questions about the incident, and as a result the Board filed tenure charges and complied with the requirements outlined in *N.J.S.A. 18A:6-10, et seq.*

Finally, the Board asserts that the ALJ properly found that, due to their conduct and the attendant consequence of same, the respondents should be dismissed from their tenured positions. The Board maintains that the ALJ's consideration of the fact that the respondents did not take responsibility for their actions is not unfair but simply one factor that plays into the ALJ's penalty determination. Additionally, the Board argues that the case law not only supports a penalty of dismissal, but also supports the fact that the use of a racial slur by a tenured teacher constitutes a single incident of misconduct sufficient to warrant dismissal. Conversely, the cases cited by the respondents in support of their claim that they should not be dismissed from their position are inapplicable to the current matter. The Board stresses that the respondents engaged in a racially inflammatory conversation – overheard by two students – during which the teachers used derogatory terms to refer to an entire subset of district students. As a result, the Board requests that the Initial Decision be adopted as the final decision in this matter.

Upon a comprehensive review of the entire record in this matter – which included the transcripts from the nine days of hearings conducted at the OAL between October 3, 2012 and March 7, 2013 – the Commissioner³ concurs with the ALJ that the Board has established that the respondents are guilty of unbecoming conduct.⁴ The Commissioner finds respondents'

³ This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A. 18A:4-34*.

⁴ The Commissioner acknowledges the argument advanced in the Board's exceptions concerning the fact that the ALJ did not rule on Charges Two through Six. The Commissioner agrees with the ALJ that since the Board proved the respondents engaged in unbecoming conduct, it is not necessary to evaluate whether the other charges that allege violations of Board policy and are based on the same conversation serve as an alternate ground for a finding of unbecoming conduct.

exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and in concluding that the record supported the Board's charges. The Commissioner also finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her 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)].

In this case all of the facts related to the alleged unbecoming conduct were in dispute; the teachers denied using the racial slur and the students who were present in the locker room during the alleged conversation testified that the teachers did in fact use the racial slur. As a result, witness testimony and ultimate credibility is the only means available to make a determination as to the veracity of the charges. For the reasons thoroughly outlined on pages 21 to 24, the ALJ found that the students were more credible than the teachers.

In their exceptions the respondents assert that the students made several inconsistent statements in connection with the alleged conversation that were improperly ignored by the ALJ. It should be noted that the ALJ did acknowledge the respondents' argument in the Initial Decision, but she found that the respondents' assertion that the students' stories were rife with inconsistencies was not supported by the record. Additionally, a review of the record reveals that the respondents never wavered on the fact that they heard both the teachers use the word "Negro" during their conversation. Therefore, the Commissioner finds that the ALJ's fact-

finding analysis and conclusions as to the truth of the Board's allegations and the characterization of respondents' behavior as unbecoming conduct to be fully supported by the record and consistent with applicable law.

The Commissioner is mindful that 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 Ostergren, Franklin School District*, 1966 S.L.D. 185; *In re Hearing of Kittell, Little Silver School District*, 1972 S.L.D. 535, 541; *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967). It is also well recognized that by virtue of the unique position they occupy educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 S.L.D. 302, 321

[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.*

Despite the fact that the respondents have been teachers for approximately 30 years, the Commissioner finds that the respondents' inexcusable use of racially derogatory remarks to refer to students in the district necessitates the termination of their employment. It is well established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *Fulcomer, supra*, 93 N.J. Super. at 421 (citations omitted). The use of such an inappropriate expression to refer to a group of students is completely unprofessional and reveals a total lack of self restraint on the part of the teachers. Further, the fact that the

respondents did not use the more egregious form of the racial slur does not negate the severity of the conduct and undoubtedly elicits the same type of outrage and offense.⁵

Unlike the circumstances *In the Matter of the Tenure Hearing of Lauren Cooke, School District of the Township of Egg Harbor*, Commissioner Decision No. 503-10, decided November 22, 2010, the respondents use of the racial slur was not only heard by the students but it was specifically directed at students in the school.⁶ Notwithstanding the respondents' assertion that there was no deliberate exposure to the students or the public at large, the reality is that students did in fact hear the respondents using the inflammatory term. As a result there was a direct impact to the school environment. Moreover, the ALJ found that respondent Geiger's demeanor during parts of her testimony revealed evidence of disdain and contempt for a group of African-American students, and similarly respondent Jones' emotionally testified about her frustration with several African-American students. Therefore, the ALJ found that a potential negative impact on the school community remains an ongoing concern. As a result, the Commissioner finds that the respondents are unfit to discharge the duties and functions of their positions as teachers in the Mount Olive School District.

⁵ There was discussion in the post-trial submissions and the exceptions as to whether G.H. testified on rebuttal that the "N" word was in fact used by the respondents. Apparently the parties used different companies to transcribe the hearing testimony and there was confusion because one of the transcribers mistakenly heard the word wrong. A review of the record reveals that the students consistently testified that the word used by the respondents was "Negro".

⁶ The respondents cite to *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County*, Commissioner Decision No. 371-02, decided October 12, 2002, to support their argument that the removal of their tenure is not warranted on this case. That case is routinely cited by respondents on tenure matters to support their assertion that the conduct in their case was not as egregious as in *Emri, supra*, where the teacher only received a suspension. It should be noted that the Commissioner does not consider the decision in *Emri, supra*, to be controlling precedent and in fact if the same unbecoming conduct was proven today, the penalty imposed would most likely be significantly different. The adherence to precedents in administrative proceedings is "subject to the basic notion that experience is a teacher and not a jailer." *In re Masiello*, 25 N.J. 590, 598-599 (1958) (citations omitted).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The respondents are hereby dismissed from their tenured positions with the Mount Olive School District. This matter will be transmitted to the State Board of Examiners for action against respondents' certificates as that body deems appropriate.

IT IS SO ORDERED.⁷

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2013

Date of Mailing: October 8, 2013

⁷ 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)