

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Kathleen Valencia, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, March 7, 2022

For the Respondent-Appellant, Joshua Nahum, Esq.

For the Petitioner-Respondent State Board of Examiners, Sydney Finkelstein,
Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Kathleen Valencia's appeal of the Order of the State Board of Examiners (Board), dated March 7, 2022, suspending her Teacher of Social Studies Certificate of Eligibility with Advanced Standing, Teacher of Elementary Grades K-8 Certificate of Eligibility with Advanced Standing, and Teacher of Social Studies Certificate for two years.

Appellant is a tenured teacher in the Union City School District (Union City or the district). Union City filed tenure charges against appellant and, following an arbitration, the Arbitrator determined that appellant had engaged in conduct unbecoming a teacher when she made derogatory comments about students and their housing.¹ The charges stemmed from a videotaped recording of appellant with an undercover operative of Project Veritas who posed

¹ Several other charges against appellant were not substantiated.

as the concerned sister of a fictitious Union City teacher in order to obtain damaging statements from appellant. The video was later published on YouTube. In the video, appellant is seen calling students in the district “dirtbags” and “scumbags” and referring to student homes that she had visited as a home instructor as “shitholes.” The Arbitrator found that, given the mitigating circumstances, including appellant’s “long and blemish-free record, her exemplary service as a Union City teacher, and her expressed remorse,” termination was too harsh a penalty. Instead, the Arbitrator ordered that appellant would not receive any back pay for the period she was on leave and would forfeit her salary increment for the 2018-19 school year.

Thereafter, the Board issued an Order to Show Cause as to why appellant’s certificates should not be revoked and transmitted the matter to the Office of Administrative Law. The Administrative Law Judge (ALJ) found that appellant had engaged in conduct unbecoming a teacher but concluded that the conduct was “not sufficiently flagrant” to warrant action against her teaching certificates. The Board agreed with the ALJ that the conduct was unbecoming but disagreed as to the penalty and determined instead that the conduct warranted a two-year suspension of her teaching certificates. The within appeal followed.

On appeal, appellant argues that the *Fulcomer* factors weigh against suspension or revocation. *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967). According to appellant, the comments were said in a private conversation that was secretly recorded and she never meant for students to hear them. Further, she argues that she made the statements in an effort to comfort a visibly distraught woman and did not intend to cause harm by her actions. She maintains that she had never used this language previously. Considering the mitigating factors,

appellant contends that she has had a stellar teaching record for fifteen years with high performance evaluations, even after the tenure proceeding. Appellant also argues that, given that she was returned to work more than two years ago, action against her certificates now would cause a disruption to the students and the district.

Appellant contends that suspension of her certificates is unprecedented under the law. To the extent that teachers have been suspended for making disparaging comments, appellant argues that they have been suspended for not more than 120 days, citing two tenure matters. *See, In the matter of the Tenure Hearing of Adelpia Poston*, Commissioner's Decision No. 362-06, dated October 19, 2006 (120-day suspension for referring to a student's mother as a "dyke"); *In the Matter of the Tenure Hearing of Lauren Cooke*, Commissioner's Decision No. 503-10, dated November 22, 2010 (120-day suspension for referring to a teacher using racial epithets). Additionally, appellant argues that the Board of Examiners should not be permitted to act against a teacher's certificate when the teacher retained his or her job following a tenure proceeding. Appellant maintains that there is no case law to support a teacher retaining tenure and then having his or her certificates revoked for the same conduct. Accordingly, appellant asks the Commissioner to vacate the Order of Suspension.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C. 6A:4-4.1(a)*.

After a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct. At the outset, the Commissioner notes that the Board – whose statutory authority is derived separately from that of the panel of Arbitrators – can act against a teacher's certificates regardless of the penalty imposed by an Arbitrator in a tenure proceeding, and the Board is not constrained by the Arbitrator's penalty determination. *See, In the Matter of the Certificates of Nicholas Cilento*, Commissioner's Decision No. 131-22, dated June 23, 2022 (issuing a two-year suspension of the appellant's certificates after an Arbitrator issued a three-month suspension in a tenure proceeding). In this matter, it is undisputed that appellant used derogatory language about students, referring to them as "dirtbags" and "scumbags" and their homes as "shitholes." While appellant contends that the comments were secretly recorded, not meant to be heard by students, and made in an effort to calm a distraught woman, such arguments do not negate the lack of judgment she demonstrated in making the comments about her students. Regardless of whether Project Veritas made respondent's derogatory language public, a private exchange that included the same comments would be no less unbecoming conduct.

With respect to the appropriate penalty, the Commissioner disagrees with the Board that a two-year suspension of appellant's certificates is warranted. The Commissioner notes that the Board's Order of Suspension did not provide reasoning for why appellant's conduct warranted a two-year suspension rather than an alternate length of time. Nor does counsel for the Board explain why two years is the appropriate amount of time for appellant's suspension. Upon review of relevant case law, the Commissioner finds this matter analogous to *In the Matter of the Certificates of Brett Holeman*, Commissioner's Decision No. 130-22, dated

June 23, 2022. In that case, the appellant was found to have engaged in unbecoming conduct when he made disparaging comments about his superiors and colleagues, accepted counseling fees from parents, sent emails that contained profanity and advised his supervisor against referring cases to him. Noting that appellant had no record of previous discipline or inappropriate conduct, the Board found that a six-month suspension of appellant's certificate was the appropriate penalty. In this matter, appellant used derogatory language about students, similar to Holeman's disparaging comments about superiors and colleagues and his use of profanity. Holeman also had an additional charge for accepting counseling fees, which does not exist in appellant's case. Both appellant and Holeman had the mitigating factor of no previous discipline, and appellant has an unblemished teaching record. Accordingly, the Commissioner finds a six-month suspension to be the appropriate penalty in this matter.

Accordingly, the decision of the State Board of Examiners suspending appellant's teaching certificates is modified with respect to the duration of the penalty, for the reasons stated herein.²


ANGELINA ALLEN McMILLAN, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2022
Date of Mailing: October 19, 2022

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF : NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF : STATE BOARD OF EXAMINERS
KATHLEEN VALENCIA : ORDER OF SUSPENSION
_____ : DOCKET NO: 1819-194

At its meeting of May 17, 2019, the State Board of Examiners (Board) reviewed information it received regarding Kathleen Valencia. The Union City Township School District (Union City) certified tenure charges of unbecoming conduct and other just cause against Valencia, after an undercover video (which is incorporated herein by reference) was published on YouTube depicting Valencia, the district's Union president, encouraging the cover up of an alleged assault on a student; encouraging the non-reporting of an alleged assault on a student; recommending that the teacher lie about the student and making disparaging comments about students.

Pursuant to *N.J.S.A.* 18A:6-16, the Arbitrator assigned by the Department of Education to hear the case, referred to the State Board of Examiners (Board) the tenure matter captioned *In the Matter of the Tenure Charges Against Kathleen Valencia*, Dkt. No. 160-7/18 (Arbitrator's Decision, November 20, 2018). Union City alleged that, Valencia had: encouraged the cover-up of an alleged assault on a student by creating a false scenario of the incident; encouraged the non-reporting of an alleged assault on a student and instead recommended that the teacher lie about the incident if ever questioned; promoted the idea of the teacher giving the student a passing grade to get the student out of the class; made false and misleading statements about the facts/discipline incurred by a teacher "who had sex with a student;" referred to students in the district as "dirtbags" and "scumbags" and referred to homes she had visited as a home instructor for the district as "shitholes."

In her Decision (which is incorporated herein by reference), the Arbitrator found that Union City had proven only the charges related to Valencia's comments referring to students as "scumbags" and "dirtbags" and their homes as "shitholes." The Arbitrator ruled that Valencia's actions in making derogatory comments about Union City students and their housing constituted unbecoming conduct, but that mitigating factors, including Valencia's prior long and unblemished record, militated against termination. The Arbitrator ordered that Valencia should forfeit her 2018-2019 salary increment and was not entitled to any backpay for the period of time she was on leave of absence from Union City.

Valencia currently holds a Teacher of Social Studies and Teacher of Elementary School in Grades K-8 Certificates of Eligibility with Advanced Standing and a Teacher of Social Studies certificate. After reviewing the above information, at its June 28, 2019 meeting, the Board voted to issue an Order to Show Cause to Valencia as to why her certificates should not be revoked.

The Board sent Valencia the Order to Show Cause by regular and certified mail. The Order provided that Valencia must file an Answer within 30 days. Valencia responded on September 6, 2019. In her Answer, Valencia admitted that the tenure charges were certified but denies that she engaged in any unbecoming conduct or other just cause for the tenure charges. *See Answer at* ¶ 2, 3, 4, 5. She further denies that just cause exists for consideration of the revocation of her certificates. *Id.* at ¶ 7. She also included five (5) affirmative defenses.

Given the nature of the affirmative defenses, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. On August 26, 2020, ALJ Margaret M. Monaco issued an order granting the Board's partial summary decision. ALJ Monaco applied the doctrine of collateral estoppel which barred the re-litigation of the facts. The hearing regarding the penalty in this matter was held via Zoom on February 17, 2021. The record closed on July 30,

2021 and ALJ Monaco issued an Initial Decision on October 28, 2021. *In the Matter of the Certificates of Kathleen Valencia*, Dkt. No. EDE 13241-19 (Initial Decision, October 28, 2021).

During the hearing, Valencia testified on her own behalf and offered testimony by two (2) coworkers. The Board did not offer witnesses. The ALJ found Valencia's witnesses to be "candid, credible, probable, and persuasive." *See* Initial Decision at p. 6. Based upon these credibility findings, the ALJ determined that Valencia has no complaints regarding her performance as a teacher. *Id.* at p. 7. Valencia has been in the classroom for two (2) years since this incident and no student has complained about her. *Id.* She indicates she has a great relationship with her students and parents. No administrator has complained of her. Her evaluations have her rated as "highly effective." *Id.*

A witness testifying on behalf of Valencia described her as "a good friend and a guide." *Id.* at p. 10. He testified that he believed she had a good relationship with her students. *Id.* He stated that one incident does not provide an adequate picture of who Valencia is as a person. *Id.* Another witness described Valencia as dedicated to her students. *Id.* at p. 11. Further, this witness testified she has never known Valencia to disparage students or families to her or other people. *Id.*

During the hearing, Valencia admitted that she made the comments about the students and their homes. *Id.* She acknowledged that there needed to be some punishment because she embarrassed herself and her district. She indicated she believed the Arbitration decision was "fair." *Id.* She expressed regret for her actions and indicated she wishes she could take that day back. *Id.* at p. 12.

ALJ Monaco found that the facts of this case demonstrate that Valencia engaged in conduct unbecoming a teacher. *Id.* at p. 13-14. The issue is whether there should be any sanction against her license for the unbecoming conduct. *Id.* at p. 14. She found that revocation or suspension is

a more severe sanction than a teacher's loss of tenure. *Id.* at p. 15. The arbitrator had concluded that termination of tenure was too harsh a penalty given the mitigating circumstances. Accordingly, ALJ Monaco found that Valencia's unbecoming conduct does not warrant action against her teaching certificates. *Id.*

ALJ Monaco further found that although Valencia's conduct was "undoubtedly misguided and inappropriate," there are several mitigating factors. *Id.* Specifically, Valencia has a lengthy career as a teacher without any prior discipline. There are no complaints from students, parents, faculty, or administrators regarding her teaching. *Id.* Further, Valencia accepted responsibility for her comments and poor judgment. *Id.* She served a suspension without pay and forfeited a salary increment and resigned her position as union president. In conclusion, ALJ Monaco indicated that Valencia's "conduct is not sufficiently flagrant in and of itself to warrant the suspension or revocation of her teaching certificates." *Id.* at p. 16.

The Deputy Attorney General (DAG) representing the Board filed Exceptions. In the Exceptions, the DAG argued that Valencia's conduct was sufficiently egregious to warrant revocation. *See* Exceptions at p. 4. It was argued that although the statement regarding students was not made directly to students, parents or faculty, it was publicly available via YouTube. *Id.* at p. 5-6. Additionally, revocation is still an appropriate penalty regardless of a successful teaching history. *Id.* at p. 7 (citing *In Re Robert Klein*, EDE 09566-17, Initial Decision (May 21, 2019)). Moreover, the exceptions argue that ALJ Monaco failed to take into consideration the biases of Valencia's witnesses as they testified to being good friends with her. *Id.*

Finally, the exceptions indicate that the matter should not be dismissed where unbecoming conduct has been found. *Id.* at p. 10. Valencia's conduct was indicative of poor judgment and a

disregard for student's feelings. *Id.* The mitigating factors do not outweigh the lack of judgment and egregiousness of Valencia's behavior.

Valencia filed a Reply to the Exceptions. Valencia indicates that ALJ Monaco "properly relied on the nature of the offense and mitigating factors when reaching her decision." *See* Reply Exceptions at p. 3. Valencia argues that case law indicates reliance upon the mitigation testimony and evidence is appropriate. *Id.* None of the cases cited in the Exceptions compel a different result in this case. *Id.* at p. 4. The reply argues that reliance upon *In Re Robert Klein* is inappropriate because that case involved violation(s) of a criminal nature. Moreover, Valencia argues that ALJ Monaco properly evaluated the testimony of Valencia's witnesses. *Id.* at p. 6.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of January 21, 2022, the Board reviewed the Initial Decision. After full and fair consideration of the ALJ's Decisions, the Exceptions, and the Reply, the Board voted to adopt the Initial Decision, with modification as to penalty.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. The Board recognizes that Valencia has an otherwise unblemished record, positive evaluations, and appears to currently have good relationships with students, parents and administration.

After reviewing the entire record, the Board agrees with the ALJ's assessment regarding the highly inappropriate nature of Valencia's conduct and agrees that her conduct constitutes

unbecoming conduct. However, the Board diverges with the ALJ's evaluation of the proper resultant penalty and believes that suspension for 2 years is warranted here.

Certainly, Valencia's current success, evaluations, and positive relationships mitigate the penalty in this matter. They do not, however, outweigh the egregious nature of her comments; comments she admitted to making and acknowledges with regret. The Board agrees with Valencia that a response to her unbecoming conduct is warranted here. However, the Board believes that the penalty from the arbitrator and the ALJ was insufficient.

The Board is not bound to the penalty assessed by an Arbitrator as it relates to a challenge on an educator's tenure. Strict adherence to an arbitrator's determination of penalty in a tenure matter essentially hamstring the Board from exercising its responsibility and statutory authority on revocation/suspension of educator certificates, usurping the Board's expertise and authority on these matters. The Board is a separate body with a separate purpose and applies its own, independent analysis and decision as to whether specific conduct warrants action on an educator's teaching certificates. The "responsibility of the [Board] under N.J.S.A. 18:6-38 is not the same as the Commissioner's obligation to determine the appropriate penalty once tenure charges brought against a teaching staff member have been sustained." *IMO Theresa Lucarelli*, Dkt. No. 2-99 (State Board of Education Decision, May 5, 1999), citing *IMO John Ahern*, Dkt No. ____ (State Board of Education Decision, August 5, 1987). Accordingly, the Board disagrees with the penalty assessed by the Arbitrator and likewise by the ALJ.

Unbecoming conduct is an "elastic" phrase, encompassing conduct that "adversely affects the morale or efficiency" of the public entity, or which "has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Importantly, a finding of unbecoming conduct does not

require violating a regulation or law, but can be based on an implied 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.” Ibid.

Allegations of unbecoming conduct call into question a teacher’s fitness to discharge the duties and functions of his or her position. In re the Certificate of Fargo, 91 N.J.A.R.2d (EDE)

1. Unfitness to hold a position in a school can be demonstrated by a series of incidents, or one single incident that is sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff’d, 131 N.J.L. 326 (E. & A. 1944). An appropriate remedy is based upon the totality of the circumstances.

Valencia’s comments about students may not have been intended for a public setting but ended up there via the internet; the comments are/were available for members of the community, students, staff, parents, etc. to view and hear. Although Valencia’s conduct was not criminal in nature nor violative of a law or regulation, as was the case *In Re Robert Klein*, her comments in that specific setting demonstrate a serious lack of judgment that warrants suspension. Her comments destroy respect for public employees and confidence in such services by parents, students and community members.

Accordingly, on January 21, 2022, the Board voted to adopt the Initial Decision with modification as to penalty and ordered the suspension of Valencia’s certificates for two (2) years. On this 4th day of March 2022, the Board formally adopted its written decision to adopt the Initial Decision with modification and it is therefore ORDERED that Kathleen Valencia’s Teacher of Social Studies Certificate of Eligibility with Advanced Standing, Teacher of Elementary Grades K-8 Certificate of Eligibility with Advanced Standing and Teacher of Social Studies Certificate are hereby suspended for a period of two (2) years, effective immediately. It is further ordered

that Valencia return her certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

RS/KAG/cf

Date of Mailing:
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.