

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Scott Levy, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, September 20, 2022

For the Appellant, Nicholas Poberezhsky, Esq.

For the Respondent, State Board of Examiners, Amna Toor, 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 Scott Levy's appeal of the Order of the State Board of Examiners (Board), dated September 20, 2022, suspending his Teacher of English Certificate of Eligibility, Teacher of Elementary School Grades K-8 Certificate of Eligibility, Teacher of English Certificate, and Teacher of Elementary Grades K-8 Certificate for one year.

On May 20, 2020, the Wyckoff Board of Education filed tenure charges against appellant. These charges stemmed from a series of allegations that appellant engaged in conduct unbecoming a teacher by: 1) physically assaulting a seventh-grade student identified as M.K.; 2) harassing and inappropriately touching a student identified as K.T.; and 3) harassing and inappropriately touching a student identified as A.P. The charges further alleged that: 4) appellant had a substantial record of misconduct, which included prior accusations of inappropriate contact for which remedial measures had been taken and failed, and this pattern of conduct justified his removal from employment.

Following an arbitration, the Arbitrator determined that the district had substantiated all four tenure charges.

Specifically, the Arbitrator found that on January 3, 2020, appellant assaulted M.K. by knocking the books from M.K.'s hands when she approached him for assistance and then intentionally contacting M.K.'s face twice with the back of his hand as she continued to request his assistance with the assignment. In making this determination, the Arbitrator assessed the credibility of the witnesses and found that the student's testimony was clear, consistent, and unembellished. Conversely, the Arbitrator found that appellant's testimony had changed over time, and it appeared to the Arbitrator that appellant was "attempting to minimize his culpability for [the] incident, while avoiding an affirmative admission." The Arbitrator found that "[i]n sum ... [appellant's] testimony simply lacks the ring of truth."

The Arbitrator further found that appellant engaged in the harassment and inappropriate touching of K.T. during the 2019-2020 school year. This conduct included frequent and intentional placing of appellant's hands on K.T.'s shoulders and back, as well as placing his hand over K.T.'s hands while looking at her computer. The Arbitrator also found that on one occasion appellant had placed his hand on K.T.'s thigh while looking at her computer. The Arbitrator found K.T.'s testimony to be clear, consistent, and credible, while appellant's testimony was less persuasive and a "post hoc effort to recast his undeniable misconduct."

The Arbitrator also found that appellant engaged in the harassment and inappropriate touching of A.P. during the 2019-2020 school year. This conduct included appellant frequently and intentionally placing his hands on A.P.'s shoulders and back, as well as putting his hand over A.P.'s hands while looking at her computer. The Arbitrator also found that on one occasion appellant had

placed his hand on A.P.'s thigh while looking at her computer. Arbitrator found A.P.'s testimony to be clear, consistent, and credible, while appellant's testimony was less persuasive.

Finally, the Arbitrator found that, during the 2015-2016 and 2016-2017 school years, appellant had engaged in a course of conduct that "caused his students to feel uncomfortable and undermined the learning environment" and that, taken together with the present allegations, "represented a sufficient linkage between them to sustain [a] charge that [appellant] has engaged in a pattern of inappropriate conduct towards his students." The evidence supporting this tenure charge included a letter from a prior superintendent, which appellant acknowledged receiving, detailing prior allegations of inappropriate touching of students. The Arbitrator expressly found as unpersuasive the appellant's denial that the prior disciplinary action related to his in-classroom behavior, as his denial was directly contradicted by the evidence.

In assessing the penalty, the Arbitrator concluded that appellant's pattern of failing to maintain proper boundaries with students "call[s] for a level of discipline that is sufficient to impress upon [appellant] the serious error of his ways." However, the Arbitrator determined that because he could not find appellant's inappropriate touching to be of a sexual nature, dismissal was not warranted. The Arbitrator imposed a six-month suspension without pay and a requirement that appellant participate in eight hours of professional development classes regarding appropriate teacher-student interactions and classroom management.

Thereafter, the Board issued an Order to Show Cause as to why appellant's certificates should not be suspended or revoked. Appellant filed an answer on August 12, 2021, raising several defenses. On May 19, 2022, the Board sent a hearing notice to appellant, advising him that there appeared to be no material facts in dispute. Appellant provided a written response to the Board on June 16, 2022, indicating that while he "vehemently disputes several of the factual determinations' found by the

Arbitrator ... [appellant] does not request that this matter be transferred to the Office of Administrative Law.” The Board found that it was constrained by the doctrine of collateral estoppel; therefore, there were no material facts in dispute, and the Board proceeded on a summary basis pursuant to *N.J.A.C. 6A:9B-4.6(h)*.¹

In an Order of Suspension dated September 20, 2022, the Board, after adopting the facts as found by the Arbitrator, held that Appellant engaged in conduct unbecoming a teacher and that his conduct provided just cause to act against his certificates pursuant to *N.J.A.C. 6A:9B-4.5*. Further, after considering the mitigating factors, including appellant’s lengthy and otherwise successful career and the fact that the touching was not of a sexual nature, the Board found that a one-year suspension of appellant’s certificates was the appropriate sanction. The within appeal followed.

On appeal, appellant argues that the Board failed to give sufficient consideration to appellant’s state of mind. Appellant contends that a showing of specific intent to commit conduct unbecoming a teacher is necessary to act against an individual’s certificates. Appellant claims that the Arbitrator did not find that he intended to make inappropriate contact with the students and instead found that the contact was incidental or accidental. Appellant also argues that the penalty imposed is excessive and that the Board should have given deference to the Arbitrator’s penalty assessment, as the arbitrator was in a better position to assess the nature of the misconduct. Appellant further asserts that the factors identified in *In re Tenure Hearing Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967) weigh against suspension or revocation.

¹ Appellant, in his reply brief, argues for the first time that this matter should have been sent to the Office of Administrative Law (OAL) to determine his specific intent and should not have proceeded summarily. A review of the proceedings and decision before the Arbitrator makes clear that the record was sufficiently developed to permit the Board to proceed summarily, pursuant to *N.J.A.C. 6A:9B-4.6(h)*. Further, based on the June 16, 2022, letter, appellant appears to have understood the nature of the proceedings and raised no objection to proceeding on a summary basis in this matter.

In reviewing appeals from decisions of the Board, the Commissioner may not substitute her judgment for that of the Board as 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)*. Upon a comprehensive review, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that a one-year suspension of his certificates was the appropriate penalty.

Appellant's insistence that his physical contact with students was merely incidental or accidental is contrary to the record, the substantiated charges, and the factual and credibility findings made by the Arbitrator. For each of the substantiated charges, the Arbitrator found that appellant engaged in repeated intentional physical contact with students, causing them distress. The Arbitrator also found that the amount of force utilized by appellant does not change the essential nature of his conduct. Furthermore, the Arbitrator found appellant's innocent explanations for the contact to be unpersuasive.

Appellant's assertion that the Board must find that appellant specifically intended to engage in conduct unbecoming a teacher is contrary to law. Unbecoming conduct has been defined as conduct that "has a tendency to destroy public respect for [government] employees and confidence in the operation of public services." *Bound Brook Bd. Of Educ. v. Ciripompa*, 13 228 N.J. 4, 13 (2017) (internal citations omitted). Taking appellant at his word that he did not intend to engage in conduct unbecoming a teacher, appellant's subjective intentions do not cure the shock and upset felt by the students who were subject to his repeated unwanted contact, nor do they restore the public's respect and confidence in the provision of public services.

Finally, with regard to appellant’s argument that the Board should defer to the Arbitrator’s penalty determination, 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 without affording the arbitrator’s penalty determination any special deference. See *In the Matter of the Certificates of Nicholas Cilento*, Commissioner Decision No. 131-22, dated June 23, 2022² (issuing a two-year suspension of the appellant’s certificates after an arbitrator issued a three-month suspension in a tenure proceeding).

There is nothing in the record to suggest that the Board’s decision to suspend appellant’s certificates for one year was arbitrary, capricious, or unreasonable.³ Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.⁴


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

Date of Decision: September 7, 2023
Date of Mailing: September 8, 2023

² This decision is currently pending review in the Appellate Division. Appellant requested that the within matter be held in abeyance until the *Cilento* appeal has been concluded, arguing that the decision may be dispositive in this matter. Appellant’s request is denied.

³ Appellant argues that the suspension is inconsistent with the factors to be considered pursuant to *Fulcomer, supra*. The Commissioner notes that *Fulcomer* pertains to penalties imposed in tenure proceedings, and not proceedings before the Board. Nonetheless, the Commissioner finds that the Board’s penalty determination is consistent with the *Fulcomer* factors.

⁴ 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.