C #185-97
SB # 46-97

IN THE MATTER OF THE TENURE :

HEARING OF ALYCE STEWART, STATE- : STATE BOARD OF EDUCATION

OPERATED SCHOOL DISTRICT OF THE : DECISION

CITY OF NEWARK, ESSEX COUNTY. :

Decided by the Commissioner of Education, April 15, 1997

For the Petitioner-Respondent, Murray, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Louis R. Franzese, Esq., of Counsel)

For the Respondent-Appellant, Samuel Manigault, Esq.

On December 11, 1996, the State-operated School District of the City of Newark (hereinafter "State-operated District") certified tenure charges of unbecoming conduct against Alyce Stewart (hereinafter "appellant"), alleging that she had knowingly participated in conduct intended to defraud the State Health Benefits Program by conspiring with Dr. Carl H. Lichtman, a licensed psychologist, to submit false claims for psychological services purportedly rendered. The State-operated District contended that appellant had provided Dr. Lichtman with personal information regarding herself and her dependents which was utilized by Dr. Lichtman to submit fraudulent claims to the insurance carrier for payment for psychological services. The State-operated District further alleged that, in exchange for the provision of such information, appellant had received and accepted a check from Dr. Lichtman in the amount of $3,181 as her

share of the insurance payments received by him for her false claims, and that such conduct "resulted in a theft of and improper payment of public monies."

The statement of evidence with the tenure charges included an affidavit from Dr. Lichtman in which he admitted that between 1986 and 1995, he had been "involved in a scheme to defraud insurance carriers, including the State Health Benefits Program as administered by a third party administrator, by submitting false claims for psychological services purportedly rendered for insureds and/or their dependents." Lichtman Affidavit, at 1. He stated that "[u]pon receipt of payment from the carrier for the alleged treatments, I retained a portion of the amount paid on the false claims, usually seventy-five percent (75%), and gave the insureds a portion of the amount received by me on the false claims, usually twenty-five percent (25%)." Id. at 1-2.

Dr. Lichtman acknowledged that appellant had provided him with information for herself and her dependents necessary to submit false claims, and that he had not treated appellant or her dependents. He then used the information provided by appellant to submit false claims to the State Health Benefits Program and received approximately $12,724 from the insurance carrier. Dr. Lichtman averred that in July 1994, he had "issued a personal check payable to Alyce Stewart totalling approximately $3,181.00, representing approximately twenty-five percent (25%) of the amount I received on the false claims I had submitted for her....I mailed the personal check to Alyce Stewart, and the check was negotiated." Id. at 2.

On December 12, 1996, the Director of the Bureau of Controversies and Disputes ("C & D") acknowledged receipt of those tenure charges from the State-operated District. A copy of that acknowledgment was also sent to appellant. On

January 6, 1997, the Director of C & D notified appellant that she had not filed an answer to those charges.[1] On January 29, 1997, the Director of C & D again notified appellant of her failure to file an answer and advised her that unless she filed an answer within ten days, each count in the petition would be deemed to be admitted. By letter dated February 6, 1997, Raymond J. Zeltner, Esq. advised the Director of C & D that he had been retained to represent appellant and that appellant had not received the notices in a timely manner since they had been sent to her former address. He requested that any further correspondence be directed to his office, and he also provided appellant's new address.

By letter dated February 11, 1997, the Director of C & D acknowledged Mr. Zeltner's letter of February 6 and advised him that the counsel for the State-operated District was being requested to provide Mr. Zeltner with another copy of the tenure charges. He was accorded an additional 20 days from receipt of those charges to file an answer on behalf of appellant. On February 12, 1997, the State-operated District sent another copy of the tenure charges to Mr. Zeltner.

By letter dated March 13, 1997, the Director of C & D notified Mr. Zeltner that he had still failed to file an answer to the charges. Mr. Zeltner was advised that unless an answer was received within ten days, each count of the petition would be deemed to be admitted and the Commissioner of Education would decide the matter on a summary basis. A copy of that letter was also sent to appellant.

[1] N.J.A.C. 6:24-1.4(a) requires a respondent to file an answer to a petition of appeal within 20 days after receipt of that petition. The answer must "state in short and plain terms the defenses to each claim asserted and shall admit or deny the allegation(s) of the petition." N.J.A.C. 6:24-1.4(b) provides that a respondent "may not generally deny all the allegations, but shall make specific denials which meet the substance of designated allegations or paragraphs of the complaint."

On April 15, 1997, more than a month later, the Commissioner, still having received no answer to the charges, deemed each count to be admitted and directed that summary judgment be rendered in favor of the State-operated District. As a result, he directed that appellant be dismissed from her tenured employment.

On May 13, 1997, Mr. Zeltner filed the instant appeal on behalf of appellant. On August 8, 1997, a substitution of attorney was filed in which Mr. Zeltner withdrew as counsel for appellant and was replaced by Samuel Manigault, Esq. In an affidavit submitted in support of her appeal, appellant avers that during January and February 1997, she "left numerous messages with Mr. Zeltner's secretary requesting that he respond to the Tenure charge"...and "was reassured by his secretary that the matter was being handled." Appellant's Affidavit, at 1. Appellant asserts that "[i]n the latter part of February and early March, I was consistently reassured by Mr. Zeltner, himself, that everything was okay." Id. She adds that "I have a meritorious defense to the allegations set forth in the Tenure charges in that I am innocent of all criminal charges which is the gravamen of the action against me." Id. at 2.

After a careful review of the record, including the affidavit submitted by appellant, we affirm the decision of the Commissioner as clarified herein.

N.J.A.C. 6:24-1.4(e) authorizes the Commissioner to deem each count of a petition to be admitted and to render a decision by way of summary judgment in the event a respondent fails, after sufficient notice, to file an answer to a petition of appeal. In this case, appellant was provided with notice of the charges and an opportunity to respond. When she failed to respond, she was twice notified of such failure and, in accordance with the terms of N.J.A.C. 6:24-1.4(e), advised that unless she filed an

answer within ten days, each count in the petition would be deemed to be admitted. After her counsel advised the Director of C & D of the delay in receipt of those charges, appellant was provided with an additional 20 days in which to file an answer. When no answer was filed after 20 days, both she and her counsel were again provided with notice that if an answer were not filed within 10 days, each count of the charges would be deemed to be admitted and the Commissioner would render a decision on a summary basis.[2]

Under the circumstances, we find that the Commissioner properly decided this matter on a summary basis, and we find no basis in the instant appeal for disturbing that determination. Appellant has not demonstrated that the failure to answer the charges was excusable under the circumstances or shown that she has a meritorious defense to those charges. See Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div. 1964), aff'd, 43 N.J. 508 (1964). We reiterate that appellant, in addition to her counsel, was provided with a copy of the March 13, 1997 letter from the Director of C & D, which advised that the charges against her would be deemed to be admitted unless an answer was filed within ten days. Yet, appellant had still not filed an answer to the charges more than a month later when the Commissioner rendered his decision on April 15. We note in that regard that there is no indication in her affidavit that appellant contacted Mr. Zeltner after receipt of the March 13 letter. Rather, she avers

[2] We note that, although N.J.A.C. 6:24-1.4(e) provides for two consecutive ten-day notices, appellant had been accorded an additional 20 days to answer the charges and then, after she still failed to file an answer, was advised in writing that each count in the petition would be deemed admitted unless she filed an answer within ten days. Such letters clearly provided appellant with adequate notice in conformity with the terms and intent of the regulation.

only that she was reassured by Mr. Zeltner ”in the latter part of February and early March” that “everything was okay.”

Indeed, appellant has still not responded to those charges. Nor, as a result, has she denied the specific allegations contained therein. The only intimation of a defense provided by appellant is the bald, one-line assertion in her affidavit that she is innocent of the criminal charges arising from the events at issue herein. Given the nature of the tenure charges, the statement of evidence from Dr. Lichtman corroborating and detailing appellant’s participation in the scheme, and appellant’s continuing failure to file an answer asserting her defenses to each claim and admitting or denying the allegations of the petition, N.J.A.C. 6:24-1.4(a), we find that such a statement by appellant is not sufficient in itself to provide her with a showing of a meritorious defense.

We note, moreover, that appellant’s innocence with regard to a particular criminal charge would not necessarily preclude a finding that her actions, if demonstrated, constituted unbecoming conduct. Unbecoming conduct need not constitute a criminal act. In addition, tenure charges require only that the truthfulness of the allegations be established by a preponderance of the credible evidence, unlike a criminal charge in which each element of the crime must be established beyond a reasonable doubt. See In re Polk License Revocation, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) ("In proceedings before an administrative agency...it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt.").

In this case, our review of the tenure charges certified against appellant by the State-operated District and the statement of evidence in support of those charges indicates that appellant had knowingly and willingly engaged in conduct intended to defraud the State Health Benefits Program by conspiring to submit false medical claims for herself and her dependents. Deeming the charges to be admitted, and noting that appellant has still not denied the specific allegations contained therein, we find that appellant's actions constituted unbecoming conduct and that, under the circumstances, such conduct warranted her dismissal.

Consequently, as clarified herein, we affirm the decision of the Commissioner to dismiss appellant from her tenured employment.

October 1, 1997

Date of mailing _____