

EDU #11977-94
C # 320-96
SB # 59-96

IN THE MATTER OF THE TENURE :
HEARING OF HUGO VICARI, HUDSON : STATE BOARD OF EDUCATION
COUNTY VOCATIONAL-TECHNICAL : DECISION
SCHOOL DISTRICT, HUDSON COUNTY. :

Decided by the Commissioner of Education, July 22, 1996

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Brownstein, Booth & Barry (Alexander W. Booth, Jr., Esq., of Counsel)

On October 20, 1994, the Board of Education of the Hudson County Area Vocational-Technical School (hereinafter "Board") certified tenure charges of unbecoming conduct against Hugo Vicari (hereinafter "respondent"), a tenured teaching staff member, alleging that respondent had sexually harassed a teacher in the district's summer program and a 17-year-old student-employee while he was serving as principal of the district's summer school program in 1994. The Board also charged that respondent had inappropriately reprimanded a maintenance employee.

On June 3, 1996, an Administrative Law Judge ("ALJ") found that the Board had proven by a preponderance of the credible evidence that respondent had sexually harassed the teacher and the student-employee. Stressing that the case turned on the credibility of the witnesses, the ALJ found the testimony of both the teacher, Sharon

O'Reilly, and the student-employee, Mary Katherine Karolis, to be credible. The ALJ, however, concluded that the Board had not demonstrated that respondent had inappropriately reprimanded the maintenance worker, finding that the statements made by respondent had not been demeaning, but, rather, were in the nature of health concerns directed towards that employee. The ALJ concluded that respondent's conduct in sexually harassing the two women was sufficiently flagrant to warrant his dismissal from his tenured employment.

On July 22, 1996, the Commissioner adopted the findings and conclusions of the ALJ. The Commissioner agreed that dismissal of respondent from his tenured position was the appropriate penalty under the circumstances.

Respondent filed the instant appeal to the State Board, claiming that the Board had not met its burden of proving the sexual harassment charges.¹

After an exhaustive review of the record, including the transcripts of the hearing held in the Office of Administrative Law, we reverse the decision of the Commissioner on the points of appeal before us. Based on our review of the evidence, we conclude that the Board has not met its burden of demonstrating the truthfulness of the tenure charges alleging sexual harassment by a preponderance of the credible evidence.

The pivotal episode alleged by O'Reilly—and the only incident for which there are eyewitness accounts—occurred on July 15, 1994, prior to a field trip. According to O'Reilly, she had climbed onto a file cabinet in order to hoist herself over a wall

¹ Since the Board has not filed a cross-appeal from that portion of the Commissioner's decision dismissing the tenure charge alleging that respondent had inappropriately reprimanded a maintenance worker, the appeal before us is limited to the Commissioner's determination that the Board had proven the sexual harassment charges.

partition to obtain access to a locked office in which tee shirts for the trip were stored.² Respondent informed O'Reilly that someone was getting a ladder, and he proceeded to help her down from the file cabinet. According to O'Reilly, "...I kind of bent down like in a squat position and Mr. Vicari grabbed my right hand, but instead of grabbing it with his right hand, he grabbed it with his left. So then when I went to hoist myself off the file cabinets, I kind of had to lean into him. He took a step forward and it took not even a second for me to touch the ground. And I put my toes out to touch and he pressed up against me. And he put his head right by my neck so I could kind of feel him breathing." Tr. 6/27/95, at 25-26.

O'Reilly testified that respondent pressed her against the file cabinet and put his hands around her back in an "embrace." She could not estimate the amount of time in which she was held in this position, except to indicate that she was surprised and that "it seemed like a very long time." Id. at 27. She indicated that she put her hands in between them in order to free herself.

According to O'Reilly, respondent then asked her to walk back to the cafeteria with him but that she had refused, thinking that "there was no way I wanted to walk back with him." Id. at 28. She related that respondent left the room without her and that Janet Reynolds, an attendance aide in the district who had witnessed the incident, then told O'Reilly that she "shouldn't let [respondent] do that to you." Id. at 29.

Reynolds, who was called as a witness by the Board, testified that after O'Reilly had jumped down from the file cabinet, she and respondent "didn't separate like, they were close together and [respondent] was talking to her." Id. at 94. She heard

² We note that there is some disagreement among the witnesses regarding whether O'Reilly had climbed

respondent say something to O'Reilly with the word "feel" in it. She testified that respondent and O'Reilly remained together with respondent's hands on O'Reilly's waist and O'Reilly's hands on respondent's shoulders. Reynolds indicated that the incident lasted "[a] little more than a minute," id. at 99, and that it made her feel uncomfortable. She stated that respondent and O'Reilly separated after a maintenance worker came in with a ladder. Although O'Reilly testified that Reynolds had told her immediately after the incident that she "shouldn't let [respondent] do that to you," id. at 29, Reynolds gave no indication of such a conversation. Instead, Reynolds indicated that she was not aware of what O'Reilly had done after the incident, stating only that O'Reilly had left with respondent and the others. Id. at 112.

Robert Gallagher, a counselor in the district's summer program, testified that respondent "was helping [O'Reilly] down from the desk and his hands were around [her] waist and she was holding him by the shoulders as she came down from the desk. And she was on the floor and he like fell backwards a little bit when I saw him, he like went back a step or two and he just says, are you okay? Are you okay or can you feel the floor? Something to that effect, when he was--when she was on the floor." Tr. 6/28/95, at 136. Gallagher indicated that O'Reilly's hands were on respondent's shoulders and "[i]t looked like she was just placed on the floor when he went back a little bit and he like--he was like releasing her when he kind of, you know, had his hands on her waist and he fell back. So she fell, you know, a little close to him, I guess, when he was trying to set her on the floor." Id. at 137. Gallagher stated that he had not seen respondent do anything inappropriate.

onto a desk or a file cabinet in her attempt to retrieve the tee shirts.

Judy Didden, who worked in the attendance office, also testified that she had not seen respondent do anything inappropriate.

John Holoduek, a teacher in the summer program, testified that respondent, O'Reilly, Gallagher and Didden had passed him in the hallway immediately after retrieving the tee shirts and that they all were smiling and joking. Holoduek stated that O'Reilly was "[s]miling. Acting like the rest." Id. at 24. He also indicated that O'Reilly had asked him during the first week of the summer program about respondent's "marital status, whether or not he was dating or seeing anyone." Id. at 12.

Frances Bojar, a teacher, testified that O'Reilly had asked her during the first week of the summer program whether respondent was "available." Id. at 176. She also indicated that she had overheard a conversation between respondent and O'Reilly in which respondent had asked O'Reilly "if there was a carpool or if he could have a ride to school" and that O'Reilly had responded that "there was a reserved seat on her lap." Id. at 179. Bojar acknowledged that those alleged incidents were not included in a sworn statement she had given to respondent's attorney in September 1994.

Respondent testified on his own behalf and denied any inappropriate behavior. According to respondent, O'Reilly "put her hand on my shoulder--one hand on my shoulder and she put the other hand on my other shoulder, she got off the desk. I put my hands around her waste [sic]. I lost my footing for a few seconds. I asked her if she could feel the floor. She said yes. And I immediately released her." Tr. 6/30/95, at 168. Respondent denied putting his hands around her back or pressing up against her. He acknowledged that they were "face to face, because when I stumbled, I turned my body and then I made sure she was firmly aground and then I released her." Id. at 169.

Although O'Reilly initially denied having asked anyone at the school about respondent's marital status, tr. 6/27/95, at 67, she was recalled as a witness by the Board towards the end of the hearing and acknowledged that she had asked Holoduek and also possibly Bojar "[b]ecause I figured if I knew then the next time [respondent] come [sic] onto me I could say, listen, I know you're married. And maybe he would stop coming onto me." Tr. 9/8/95, at 157-58.

While we recognize that there is evidence in the record which is inconsistent with the version of the tee shirt incident offered by respondent—notably Ms. Reynolds' testimony regarding the duration of that incident—it is the Board which has the burden of demonstrating the truthfulness of the tenure charges by a preponderance of the credible evidence, see In re Polk, 90 N.J. 550 (1982), and we are unable to conclude on the basis of the record before us that the Board has met that burden. There is significant credible evidence in the record which contradicts and in other ways fails to corroborate the version of events related by O'Reilly. Although, for example, O'Reilly testified that she had refused respondent's offer to walk back to the cafeteria with him, Reynolds indicated that O'Reilly had left with respondent, and Holoduek testified that respondent and O'Reilly had passed him in the hallway immediately after retrieving the tee shirts and that they were smiling and joking.

Moreover, although Reynolds testified that respondent and O'Reilly had failed to separate after respondent had helped her down from the filing cabinet, her testimony did not verify that such situation had resulted from improper conduct by respondent, particularly in view of respondent's assertion, which was supported by Gallagher, that he had stumbled. Nor, as previously noted, did Reynolds corroborate O'Reilly's

testimony that Reynolds had told her immediately after that incident that she “shouldn’t let [respondent] do that to you.” We note, in addition, that O’Reilly did not report any of the alleged incidents to district authorities at the time of the incidents.

While we are aware of our obligation to accord due consideration to the fact that the Administrative Law Judge had the opportunity to observe these witnesses, see Quinlan v. Board of Education of North Bergen Township 73 N.J. Super. 42, 50-54 (App. Div. 1962), we are not bound by the ALJ’s assessments of the substance of the testimony or her evaluation of the factors bearing upon credibility. E.g., In the Matter of the Tenure Hearing of Barry Deetz, decided by the State Board of Education, November 7, 1984, aff’d, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986). Moreover, we recognize our responsibility as the ultimate administrative decision-maker in this case to determine the validity of the charges, and we reiterate that the Board had the burden of demonstrating their truthfulness. On the basis of the record before us, we are unable to conclude that it has done so.

O’Reilly further alleged in a sworn statement included in support of the Board’s tenure charges that respondent “right from the beginning of school...made advances to me and asked if I would go out with him.” She alleged, in addition, that respondent had made a bodily motion to her “implying that I should measure his genital area.” She also averred in her statement that after the alleged tee shirt incident, respondent had approached her and “asked ‘Were you excited before.’ I ignored him. A short while later he approached me again and said ‘I have to know if you were excited before.’ I answered ‘No, I wasn’t.’ He said ‘then you have to give me another chance, I know I could get you excited.’” At hearing, respondent denied those allegations, and there is

no independent evidence to corroborate these particular instances of alleged misconduct. See In the Matter of the Tenure Hearing of David C. Borrelli, decided by the State Board of Education, June 1, 1994, aff'd, Docket #A-5627-93T3 (App. Div. 1995). Given our concerns regarding O'Reilly's version of the tee shirt incident, we are also unable to conclude that the Board has demonstrated the truthfulness of these particular charges.

In addition, we find that the Board has failed to demonstrate the truthfulness of the incidents alleged by Ms. Karolis. Karolis testified that she had initially met respondent at school on the first day of the summer program during a meeting for counselors and teachers. She stated that when respondent introduced himself to her, he touched her hand, and possibly her hair, told her she was attractive and then introduced her to the counselors. Karolis further testified that respondent would see her in the hallway and say, "you have to stop calling at night. I know you want me, but you have to stop calling me." Tr. 6/27/95, at 120. According to Ms. Karolis, these statements were made in front of other individuals, although none were produced during the hearing. She also testified that respondent told her, "...you're 17 one more year and your--you have no chance, you're mine, or whatever." Id. In addition, Karolis testified with respect to an alleged incident in which she was walking down the hallway with a counselor when respondent came up, took her arm and said to the counselor: "[C]an I borrow her for an hour and take her in the room and then I'll give her back." Id. at 125. She indicated that this made her feel uncomfortable.

We are unable to conclude on the basis of the record before us that the Board has proven the charge of unbecoming conduct with regard to Karolis. The Board did

not produce any witnesses to corroborate Karolis' allegations, despite the fact that several of the alleged statements were made in front of others. See Borrelli, supra. Moreover, in the absence of proofs providing the context for respondent's alleged comments, we are unable to conclude that the Board has demonstrated that respondent intended to sexually harass Karolis.

Accordingly, we find that the Board has failed to satisfy its burden of proving the sexual harassment charges against respondent by a preponderance of the credible evidence. We therefore reverse the decision of the Commissioner on the points of appeal before us³ and direct the Board to reinstate respondent to his tenured position with back pay and other emoluments, less mitigation.⁴

Attorney exceptions are noted.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing _____

³ See supra note 1.

⁴ We note that the Board filed a request for oral argument on June 22, 1998, after exceptions to the Legal Committee's report had been filed and reviewed. We deny the Board's belated request as not necessary for a fair determination of this matter. N.J.A.C. 6:2-3.2.