

ROSA ASTACIO-BORJA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 PASSAIC COUNTY TECHNICAL- :
 VOCATIONAL HIGH SCHOOL :
 DISTRICT, PASSAIC COUNTY, :
 :
 RESPONDENT. :
 :

SYNOPSIS

Petitioning teacher sought to have the Board institute tenure charges against fellow teacher, Robert Thomas, for alleged verbal assault.

Citing N.J.S.A. 18A:6-11, the ALJ concluded the Board's action in determining not to certify tenure charges against Mr. Thomas was unreasonable and constituted an abuse of its discretion. ALJ ordered that Count 1 of petitioner's Statement of Tenure Charges and Verified Petition be certified and forwarded to the Commissioner of Education.

Commissioner concurred with the initial decision, remanded the matter to the Board and ordered that the Board act, within 45 days of the date of this decision, to certify Count 1 of the charges as such charges relate to the December 5, 1995 incident, in accordance with *N.J.S.A.* 18A:6-11.

March 30, 1998

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The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the Board abused its discretion by failing to certify tenure charges to the Commissioner of Education, in accordance with *N.J.S.A. 18A: 6-11*. As the ALJ correctly observed, *N.J.S.A. 18A:6-11* “**** requires that a local board address two questions when it decides whether to certify tenure charges: 1) Is there probable cause to credit the evidence in support of the charge, and 2) Is such charge, if credited, sufficient to warrant dismissal or reduction in salary?****” (citation omitted) (*Ridgefield Park Educ. Assn. and Clifton L. West, Jr. v. Ridgefield Park Board of Education*, State Board of Education decision, Slip Opinion at p. 4, (February 6, 1985), aff’d N.J. Superior Court, Appellate Division, A-2859-84T7, December 24, 1985. Further, the Commissioner recognizes that, in reviewing a local board’s

conclusion, he may not substitute his judgment for that of the board, but may only determine whether the board properly answered the questions that it was required to address. (*Id.*)

Here, the Commissioner notes that the Board concedes that it found probable cause to credit the facts involving the December 5, 1995 incident which took place in the cafeteria involving petitioner and Robert Thomas. (Board's Brief, December 17, 1997 at p. 2) Further, the Board states

At its meeting to determine whether or not [to certify tenure charges], [it] recognized that the trial of a contested tenure charge is a lengthy, extremely costly and protracted proceeding under existing law. The Board had already entered into an agreement dated February 8, 1996 with Robert Thomas, wherein it was stipulated that Mr. Thomas would undergo follow up counselling as recommended by the psychiatrist selected by the Board of Education. In addition, the Board reserved all rights *** to [withhold] Mr. Thomas' increment. At the Superintendent's option, Mr. Thomas' class would be observed by a supervisor at least once per week and Mr. Thomas was to provide a written apology to Ms. Rosa Astacio-Borja, which could be distributed to the staff at the Superintendent's option. Additionally, the Board at [its] May 28, 1996 meeting voted and withheld the [salary increment] increase for the 1996-97 school year from Robert Thomas.

It is the position of the Respondent that the Respondent's actions are entitled to a presumption of correctness and that, especially with regard to disciplinary decisions, the Commissioner should not interfere unless presented with evidence of illegality or shocking abuse of discretion. (*Id.* at pp. 3, 4)

Indeed, the Board does not even contend that it properly engaged in the required analysis, *i.e.*, an evaluation of the affidavits and examination of the existing law in order to determine whether the charges, *which it found creditable, in part*, would warrant dismissal or reduction in salary. Had the Board done so, it would, or should, have found that relevant case law supports the conclusion that the allegations, if credited, *are* sufficient to warrant dismissal or reduction in salary. (Initial

Decision at p. 9) In this regard, the Commissioner observes that the Board does not dispute that the incident was witnessed by other staff members and by “a cafeteria full of students***.” (*Id.*) The pertinent statute further instructs that where a board finds that probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction in salary, “***then it *shall* forward such written charge to the commissioner for a hearing pursuant to *N.J.S.* 18A:6-16, together with a certificate of such determination.***” (emphasis added) (*N.J.S.A.* 18A:6-11) Therefore, the Board’s decision not to certify tenure charges to the Commissioner in connection with the December 5, 1995 incident was not based on a correct understanding of the existing law, and cannot be upheld.

Accordingly, the Commissioner adopts the initial decision for the reasons expressed therein, and amplified above. The Commissioner remands this matter to the Board and orders that the Board act, within 45 days of the date of this decision, to certify Count I of the charges as such charges relate to the December 5, 1995 incident, in accordance with *N.J.S.A.* 18A:6-11. This order does not preclude the Board from considering the remaining counts listed in petitioner’s charges, consistent with its obligations under *N.J.S.A.* 18A:6-11.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 30, 1998

* This decision, as the Commissioner’s final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.