

IN THE MATTER OF THE TENURE :
HEARING OF JUAN COTTO, : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :

SYNOPSIS

District certified tenure charges of unbecoming conduct, corporal punishment and insubordination against respondent teacher for alleged incidents from the 1996-97 school year -- using excessive force to discipline students, uttering profanity and making derogatory and demeaning statements to students.

In light of the testimony of the witnesses and the evidence in the record, the ALJ concluded that the District sustained its tenure charges of unbecoming conduct against respondent. The ALJ determined that even though respondent knew that corporal punishment is illegal and had received ample notice to refrain from excessive use of physical force in disciplining students, he used excessive physical force on five separate occasions within a four-month period. Moreover, the ALJ found that not only did respondent control his students by physical intimidation, he also verbally abused them and that respondent had been accused of similar misconduct in 1991. The ALJ concluded the appropriate penalty was dismissal. (*In re Ostergren, In re Cowan*) The ALJ ordered respondent dismissed from his tenured position.

The Commissioner adopted findings and determination in the Initial Decision as his own. Respondent was ordered dismissed from his tenured teaching position as of the date of this decision. The Commissioner forwarded the matter to the State Board of Examiners for action, as it deems appropriate.

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The record and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

The primary arguments set forth in respondent's exceptions are briefly summarized below:

1. The Administrative Law Judge (ALJ) ignored the preponderance of the credible evidence which supported the fact that respondent never acted unprofessional or confrontational while he served as vice principal and that he was unfairly demoted to a teacher status in order that Carmen Ruiz succeed to his earned vice principalship.
2. The preponderance of the credible evidence rebuts the allegation that respondent pushed A.M. against the wall as alleged in count 1(e)(ii).
3. The ALJ failed to recognize that Assistant Superintendent Silva's office placed respondent in a school he requested not to be sent to, thus exhibiting an existing bias against him.
4. Respondent was not credited by the ALJ for the four months of success he had with his class. The ALJ failed to recognize the success respondent had with a difficult class, ignoring the impact on the class when three students were added in December.
5. The ALJ ignored the poor character and credibility of L.B., a student who was not unbiased to respondent and who, himself,

denied the charge that respondent pushed him and forced him to sit down.

6. The preponderance of credible evidence supports the fact respondent never committed the actions alleged in charge 1(e)(iii) involving M.L.

7. The ALJ erred when he concluded that respondent's testimony was that he put L.R. in a wrestling hold and the preponderance of the credible evidence does not sustain that respondent used excessive force.

8. The ALJ failed to acknowledge the evidence that the students who alleged he made derogatory statements were influenced to do so by the administration at the Abington Avenue School and did so to prevent their being retained in sixth grade.

9. The penalty of dismissal as ordered by the ALJ is too severe.

Having conducted a thorough and independent review of the record of this matter, including the transcripts of the 12 days of hearing,¹ the Commissioner concurs with and adopts as his own the ALJ's findings, conclusion and recommended penalty for the reasons well expressed in the Initial Decision, since they are amply supported in the record. In the process of the detailed examination of the record, the Commissioner gave careful consideration to respondent's exceptions but finds no basis in either the transcripts or the record as a whole to overturn the ALJ's credibility determinations in this matter. Further, the Commissioner is fully satisfied that the ALJ's recitation of testimony is thorough and accurate and that the ALJ carefully assessed and gave due weight to conflicts, inconsistencies and potential biases in determining which testimony and evidentiary documentation to credit in reaching his findings of fact.

The Commissioner is unpersuaded by respondent's arguments set forth during the hearing, in his post-hearing brief and in his exceptions, relative to his removal as an acting vice

¹ It is noted for the record that a portion of the June 16, 1998 hearing had to be reconstructed based on the ALJ's notes due to a problem experienced with the audio tape recording of the session. During the last day of the hearing,

principal, after two weeks of service, at the Franklin School, and his assignment as a sixth grade class at the Abington Avenue School, a school to which he had requested not to be assigned. While it is understandable that respondent raises such arguments in an attempt to demonstrate that the tenure charges are a result of bias and bad faith by administrative staff and to impugn the credibility of witnesses, the fact remains that this matter concerns allegations regarding respondent's actions as a *teacher*. In that regard, the ALJ was correct when he stated during the hearing, "One thing that I'd like to make clear is that this really is not a case about why Mr. Cotto was transferred from his vice principal's position to -- to a teaching position. Really it is a tenure charge which picks up at the time he was a teacher. However, I -- I understand, Mr. Liss, you're -- you're raising this as background information to show a bias or an attempt of [the administrative staff to remove respondent]." (Tr. 9/23/98, at 8) Furthermore, the Commissioner is in complete agreement with the ALJ's statement that:

The present matter, however, does not involve the validity of Cotto's transfer, which was the subject of a separate grievance proceeding concerning salary.

Several times during the hearing, Cotto sought to deflect attention from the underlying tenure charges by accusing others of conducting a personal vendetta against him. His attacks were directed not against Lydia Silva alone, but also against Delores Brandao, a vice principal who was his last supervisor, and Carmen Ruiz, the person who replaced him as vice principal. *These collateral issues have little to do with the truth of the tenure charges, which must stand or fall on the credibility of witnesses to the alleged incidents.* (Initial Decision at 4-5, emphasis supplied)

Given the nature of the tenure charges herein, which rest upon a multitude of alleged actions by respondent involving the use of excessive force, corporal punishment and making derogatory and demeaning statements to students, an assessment of the credibility of witnesses is of the utmost importance to a determination in this matter, and, as stated above, the

counsel agreed that the reconstructed testimony derived from the ALJ's notes comported with/were not materially different from their recollection of the testimony. (Tr. 9/23/98, at 4)

Commissioner, upon thorough examination of the record, is fully satisfied that the ALJ properly considered all testimony and measured the credibility of same. In so holding, the Commissioner is aware that this was an admittedly difficult task for the ALJ, particularly in light of the number of student witnesses and the need to examine the testimony of children with great caution (*In the Matter of the Tenure Hearing of Quinones*, 96 N.J.A.R.2d (EDU) 649, 653), a task which, in the Commissioner's judgment, the ALJ did quite competently herein. Contrary to respondent's exceptions, the Commissioner determines that the preponderance of the credible evidence amply supports the ALJ's findings and conclusions relative to the specifications involving A.M., M.L., and L.R.

Furthermore, the Commissioner finds respondent's exceptions with respect to L.B. to be entirely without merit. The ALJ's summation of testimony and his conclusions regarding respondent's pushing L.B. and shoving him into his seat (pages 8-10 of the Initial Decision) are well stated and fully supported by the record. Upon review of the record, the Commissioner does not accept respondent's assertion that L.B. is of "poor character" and biased towards respondent. The Commissioner also rejects respondent's glib suggestion that L.B. denied respondent pushed him and forced him to sit down. L.B.'s account of events regarding the incident was substantially corroborated by a preponderance of the credible evidence by numerous other students. As set forth by the ALJ, L.B. candidly testified, *inter alia*, that he disobeyed respondent by getting up from his chair "plenty of times" (Tr. 6/18/98, at 165) and tried to leave the classroom, despite respondent telling him to sit down. Insofar as falling over his chair is concerned, L.B. was also forthright in acknowledging that the fall could have been accidental in that the heavy weight of his book bag/backpack could have triggered the fall over the chair. (*Id.* at 127,165 and 185) However, as stated by L.B., "It might have been an accident but he shouldn't have pushed me." (*Id.* at 166). Further, the ALJ is correct in finding that

respondent used a disproportionate amount of force, even taking into account L.B.'s disobedience/defiance. As stated by the ALJ:

Unquestionably, L.B.'s failure to remain in his seat was an act of defiance to the authority of his teacher, and the District concedes that Cotto was justified in blocking the doorway to prevent him from leaving the room. Proofs establish, however, that Cotto's response went beyond mere passive resistance. Instead, he repeatedly pushed or shoved the youngster to encourage him to return to his seat. Cotto overreacted to the situation and utilized more force than necessary under the circumstances. Certainly it should have been foreseeable that exerting pressure against a boy wearing a backpack might cause the child to fall and hurt himself. In addition, Cotto failed to explain adequately why he chose to engage in a physical confrontation with one of his students. He could have easily called a security guard for assistance, as he eventually had to do anyway. (Initial Decision at 9-10)

As to respondent's position that the students made false allegations against him to prevent retention in sixth grade, the Commissioner finds no credible evidence in the record to support this.² What is supported by the record is that respondent subjected the students to a constant barrage of negative commentary of a type which could readily cause students to lose confidence in their natural abilities and hamper their ability to succeed in school. (*Id.* at 17) Moreover, the Commissioner finds the ALJ's recitation of testimony and the analysis relative to respondent's derogatory and demeaning comments/remarks to students to be fully supported by the record and he finds totally incredible respondent's attempts to evade culpability with claims that any mention of such things as welfare, crime and crack babies/drug use was tied to instruction in current events. An excerpt from L.B.'s testimony gives some insights into what a student felt, even when news articles may have been used as an instructional strategy. L.B. states when being questioned on cross-examination by *respondent's attorney*:

Q. [D]id you like being taught current events?

² A review of the transcripts indicates that all students who testified in this matter were promoted in 1997 from grade six and in 1998 from grade seven. Further, one student was transferred to the sixth grade Gifted and Talented class when removed from respondent's class and received grades of all B's and one C (Tr. 6/19/98, at 4-5), and in 1998 one student had been promoted to ninth grade, having been moved out of respondent's class in 1997 and placed into seventh grade. (Tr. 7/13/98, at 5 and 53)

A. Yes.

Q. And why did you like it?

A. Because since I don't watch the news a lot it gets me to catch up on the outside world.

Q. Okay.***[N]ow you said that current events is about the outside world, does that refresh you to some degree of what you were talking about in current events with Mr. Cotto?

A. Yes, a little bit.

Q. Okay.***[C]an you remember about some of the subjects you talked about?

A. I remember one subject when he talked about what --what-- the killing of black-on-black, stuff like that.

Q. [C]ould I have that again?

A. [W]hy is the black killing the black and why is there so much black-on-black crime.

Q. Okay. So one subject that he discussed with you in current events is why -- why blacks are killing blacks and why there is so much black crime. That was in -- that was being taught in current events; is that correct?

A. Yes.

Q. And did Mr. Cotto have any newspapers at the time or any -- anything at the time while he was discussing the subject with you?

A. A newspaper.

Q. Now, do you recall him -- the newspapers that he brought in about black-on-black crime and crimes committed by blacks, did he bring in anything about white crime and Puerto Rican crime***did he discuss that type of situation with you?

A. He didn't discuss that.

THE COURT: Pardon me?

[A.] He brought in newspapers but he didn't discuss nothing like that. It always had something to do with black people on welfare, black people killing black, this and that.

Q. Okay.

A. And statistics.

Q. Okay. So he brought in newspapers on welfare during current events and he brought in newspapers on black people killing black people. And during all the time that you had current events did he ever talk about Puerto Ricans?

A. No.

Q. Did he ever bring in papers about Puerto Rico?

A. Once.

Q. Oh.

A. About the Puerto Rican -- about a Puerto Rican parade.

Q. Okay.***Did Mr. Cotto ever say that it was good that black people were killing black people?

A. No.

Q. Was he concerned about black people harming black people?

A. No. ***

A. -- but he was concerned that -- it seemed like he -- he liked it or he just -- it seemed he wasn't concerned in a good way. It was like -- how do you say it-- like happy about it or something like that -- not happy but joy -- he was like glad to see it or something like that.

Q. You thought he was -- it was your impression that he was glad to see that the newspaper said that black people were killing black people -- and that he was glad that -- that there was black crime on black crime.

A. Yes. (Tr. 6/18/98, at 170-174)

As to the ALJ's conclusions of law, the Commissioner fully concurs that the District has sustained its tenure charges against respondent and that the appropriate penalty is dismissal for the reasons set forth in the Initial Decision. Although stated more than thirty years ago, the holding of the Commissioner in *In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 S.L.D. 159 has applicability in the instant matter and bears repeating herein.³ The Commissioner held in *Appleby* that:

While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A. 18A:6-1*) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. [*In re Ostergren, supra*] The Commissioner said further, [*In re Fulcomer, supra*],

“that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. ***The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that ‘it was one of those things that just happen’***. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.”

Thus, when teachers resort to “unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty. [*Ostergren, supra*] (*Appleby*, at 172-173)

³ In the *Appleby* matter, the Commissioner determined the teacher had exhibited a pattern of conduct that demonstrated a disposition to resort to unlawful physical force and to harsh and abusive treatment of students whose conduct the teacher found offensive.

Moreover, the Commissioner is in full agreement with the ALJ's conclusions that a teacher with respondent's experience should have known better than to push, shove and verbally abuse his students and that it is not a mitigating circumstance that Cotto may have resented having been demoted from a supervisory position and put in charge of a difficult-to-teach class. This is particularly true in light of respondent's failure to heed prior warnings about similar misconduct as charged herein. As aptly stated by the ALJ:

Cotto's repetitious misconduct had a devastating effect on classroom atmosphere. Not only did Cotto try to control his students by physical intimidation, but also he cast aspersions on their intellectual capacity, their physical appearance and their ethnicity. Told enough times that they are stupid, ugly, or inferior, impressionable children come to believe what their teacher is saying about them. (Initial Decision at 23)

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. Respondent is dismissed from his tenured teaching position with the State-Operated School District of the City of Newark as of the date of this decision. This matter shall be forwarded to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action as it deems appropriate.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: June 26, 2000

Date of Mailing: June 26, 2000

⁴ This decision, as the Commissioner's final determination, 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.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.