371-02

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA EMRI,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EVESHAM,	:	DECISION
BURLINGTON COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board certified 56 counts of unbecoming conduct against respondent tenured elementary teacher for alleged inappropriate behavior toward students, parents and colleagues and insubordination to administrators. During 19 days of hearing, the Board withdrew 22 counts and the ALJ dismissed some counts in their entirety and some partially. As a result, all of the counts alleging inappropriate treatment of colleagues and parents and insubordination were deleted. The 21 remaining counts dealt with alleged inappropriate behavior towards students.

In light of the record and the testimony of witnesses, the ALJ concluded that the Board did show that respondent over a three-year period exhibited a pattern of inappropriate conduct toward students – an inability to maintain her composure when dealing with difficult students and an insensitivity to the needs of special education students. The ALJ also found that, on two occasions, respondent used racial epithets. The ALJ found, however, that the Board's administrators did not follow the procedure for handling complaints against teachers set forth in the school's policy or the union contract. In addition, the Board did not show any egregious incidents, but had shown a number of incidences establishing a pattern of inappropriate conduct. Thus, the ALJ concluded that removal was too severe a penalty. The ALJ ordered the forfeiture of the first 120 days of salary withheld during the suspension; a suspension without pay for the 2002-03 school year; upon her return, a two-step lowering of her salary on the appropriate salary guide; and, prior to her return, respondent is to take, at her cost, appropriate courses in anger management, the handling of disruptive students and learning techniques applicable to special education students in inclusion classes.

Having considered the record and the testimony of witnesses (the Commissioner was not provided transcripts of the hearings), the Commissioner found that the Board did establish by a preponderance of evidence a pattern of inappropriate behavior constituting conduct unbecoming a teacher. As to penalty, the Commissioner agreed with the ALJ that, in view of all the facts in the matter, including respondent's long, successful and heretofore unblemished teaching career, her professional and personal attributes and the Board's failure to follow its own procedures and to take corrective action concerning respondent's inability to maintain her composure with disruptive and special need students, the extreme penalty of loss of tenured employment was not warranted. The Commissioner found it necessary to balance the totality of the record while stressing that inappropriate behavior cannot be permitted in the school environment. In so doing, the Commissioner modified the ALJ's recommended penalty and ordered that respondent shall suffer a *permanent* reduction of one step on the salary guide and shall forfeit the 120 days' salary already withheld, together with the loss of an additional six months' salary and concomitant emoluments. Moreover, the Commissioner declined to compel respondent to attend training classes as a *punishment*, noting the finding by the State Board in *DiPillo* that "imposing a general continuing education program as a *punishment* for the specific determination of unbecoming conduct made in these proceedings would be both inappropriate and counter to the educational mission of such a program." The Commissioner pointed out that it would be appropriate for the Board to pursue a training requirement for respondent within the provisions of *N.J.A.C.* 6:11-13 *et seq*. and the teachers' contract.

October 21, 2002

OAL DKT. NO. EDU 4579-00
AGENCY DKT. NO. 181-6/00

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed.[1] Respondent's exceptions, the Board's exceptions and respondent's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in rendering his decision herein.

Respondent takes exception to the Administrative Law Judge's (ALJ) conclusions that she engaged in both individual acts and a pattern of conduct rising to the level of unbecoming conduct, stating that the ALJ unreasonably disregarded the testimony of respondent's student eyewitnesses to classroom events, held her responsible whenever a student became upset without assessing the reasonableness of her response, and failed to recognize that the school administration's credibility was negatively affected by its failure to inform her of its concerns or to discipline her at any time. (Respondent's Exceptions at 2) Moreover, respondent claims that unbecoming conduct requires evidence of culpability, *i.e.*, "[willful disregard] for published school rules and policies, a breach of established standards of professional conduct or failure to comply with legally sufficient corrective action." (*Ibid.*)

[1] The parties did not provide the Commissioner with transcripts of the hearings in this matter.

Moreover, respondent asserts, *inter alia*, that the ALJ's conclusions in Counts one and three were made without the benefit of testimony from P.G., the special education student who is the subject of these counts. (*Id*. at 3) Likewise, in Count 18 conclusions were reached without the testimony of special education student, R.S., and in Counts 34 and 35, conclusions were similarly reached without the testimony of special education student, J.M. (*Ibid*.) Respondent further asserts that the only evidence the Board presented in Count 18 was the testimony of the 1999-2000 inclusion teacher, Apryl Peppard, who claimed that she intervened to prevent respondent from scolding R.S. when "at some time she could not identify, she observed but could not hear" a red-faced respondent talking animatedly to R.S., who "was 'shrinking away from her' looking distressed." (*Id*. at 4) Respondent asserts that, at most, the situation with R.S. was a professional disagreement over the handling of a difficult student. (*Id*. at 5) Noting that Ms. Peppard did not hear the conversation and that R.S. did not testify so that an assessment could be made with regard to the content of the conversation, respondent contends that Count 18 should be dismissed for failure to establish the truth of the charge by a preponderance of evidence because the ALJ did not examine whether respondent's conduct was appropriate given the circumstances and did not consider the fact that R.S. was a difficult student with an extensive discipline record. (*Ibid*.)

With respect to Counts 34 and 35, respondent points out that the ALJ's conclusions were based solely on two teachers' testimony that on occasion they observed respondent take individual students, including a special education student, J.M., out of the classroom for an "inappropriate" discipline of yelling and shaking her finger at the student and making him or her cry. (*Id*. at 6-7) Respondent argues that the ALJ was unable to examine whether respondent's discipline was appropriate because the two teachers could not date or

specify the cause of any discipline they observed during the 1996-1997 and 1997-1998 school years and there was no testimony on behalf of the Board from J.M. or any other student regarding these alleged incidents. (*Id*. at 5-6) Moreover, respondent claims the ALJ disregarded the testimony of nonclassified students who were in her classes in 1996-1997, (M.B.) and 1997-1998 (D.H. and G.F.,) who testified on respondent's behalf that they "never saw respondent mistreat a student or make them cry," and the testimony of two special education students (K.W. and V.B.), who praised respondent and denied that they or anyone else were mistreated (*Id*. at 6) Respondent proffers that K.W., a student who suffered from mild cerebral palsy, testified that she never heard respondent humiliate or scream at a student or touch a student and never observed anything that would make her think that respondent would treat a handicapped student in any manner except with the utmost respect. (*Id*. at 7) Respondent submits that V.B., a classified student in the same fourth-grade class, also testified that she never saw respondent yell at a student or make them cry. (*Ibid*.)

Concerning Count 28, respondent argues that the ALJ gave unreasonable weight to the testimony of M.M.'s classmate twins, S.V. and E.V., who speculated that M.M. must have felt embarrassed when respondent encouraged the class to clap at the end of his presentation because M.M. must have known that he did not do a good job. (*Id*. at 8) Respondent submits that the ALJ should have given more weight to the testimony of M.M. who said that the clapping made him feel better. (*Id*. at 8) The ALJ further erred, respondent claims, when she concluded that respondent's act of unbecoming conduct with respect to M.M. was based upon respondent's alleged disregard for M.M's 504 Plan. (*Ibid*.) Respondent points out the Board stipulated on May 16, 2000 that the tenure charges did not allege a violation of M.M.'s 504 plan. (*Id*. at 8-9) There was also no finding, respondent avers, that her decision requiring M.M. to proceed with

his presentation without the equipment he planned to use was made in order to punish or humiliate him. (*Ibid*.) Conversely, respondent argues, she acted appropriately to resolve a problem which arose unexpectedly, while accomplishing the goals of M.M.'s 504 Plan. (Id. at 10)

Respondent further excepts to the ALJ's conclusion in Counts 9, 13 and 24 that she is guilty of conduct unbecoming a teacher for allegedly discouraging her students from going to the office to complain about her. (*Id*. at 11) Respondent points out that the ALJ relied on two isolated statements by two students in two different years to establish a pattern of conduct, ignoring the testimony of classmates who testified that they never heard the remark. (*Id*. at 11-12) Respondent notes that no student, including the two who reported the remarks, testified that they were actually intimidated or discouraged from complaining about her or that the alleged remarks affected their educational relationship with respondent. (*Id*. at 13) Specifically, with respect to Count 13, respondent argues that the ALJ concluded that respondent spoke with the class about how students were going to the office to complain about her within the context of a discussion about the Columbine tragedy and that the incident was not confirmed by any student. (*Ibid*.) *Citing Rein v. Riverside Twp. Bd. of Education,* 1938 *S.L.D.* 300, 302 (Comm. Ed. 1932), *aff'd* 1938 S.L.D. 302, which states that "[I]f incidental acts occurring in school administration and supervision are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature," respondent therefore urges that Counts 9, 13 and 24 should be dismissed in their entirety because the pattern of unbecoming conduct is based solely on the similarity between the allegations of these counts. (*Id.* at 14)

Also, *citing In re Wolf*, 231 *N.J. Super*. 365 (App. Div.), *cert den*. 117 *N.J*. 138 (1989), which states that "[T]he Fourteenth Amendment of the United States Constitution prohibits any state from depriving 'any person of life, liberty, or property, without due process of law'" (at 376) and "It is sufficient for our purposes here to find that credibility was the central issue in the case, and that these examples showed that any matter strongly affecting petitioner's ability to attack credibility could have affected the result of the entire case" (*Id*. at 372-3, n.8), respondent asserts that the ALJ's credibility determinations were tainted by her failure to consider the effect of the administration's willful concealment of the accusations against her at the time the alleged events occurred so as to give her an opportunity to respond when the accusations were fresh. (Respondent's Exceptions at 15-16) Respondent further argues that she was denied due process because the administration not only did not give her an opportunity to address complaints when they occurred, but also did not fully investigate incidents as they arose, and did not warn or discipline her for any incident underlying any charge. (*Id.* at 16) Moreover, respondent points to Count 5 as an illustration of her claim that she was denied a fair opportunity to defend herself, stating that the ALJ credited C.U.'s testimony that respondent publicly criticized her work over M.B.'s denial that she never saw respondent make fun of any student's work and never heard respondent say of C.U.'s work that a second grader could do better. (*Id.* at 17) Respondent takes issue with the ALJ's explanation that C.U. was more credible because she told her mother about the incident at the time it occurred, whereas M.B. did not say anything at the time. (*Id.* at 17-18) The ALJ further speculated that M.B. could also have been absent from class on the day the incident occurred or just did not hear respondent's comment. (*Ibid.*) Arguing that the ALJ's reasoning would only make sense if the incident was promptly disclosed to her so that her witnesses could come forward at the time the incident occurred, respondent

asserts that the administration's failure to contemporaneously disclose this incident to her deprived her of a fair opportunity to defend herself. (*Ibid.*)

Similarly, respondent posits that the ALJ's disregard for the testimony of respondent's student witnesses G.F. and V.B. with regard to Counts 22-25 suffered the same fate because their testimony was found less credible for the same reasons the ALJ dismissed M.B.'s testimony. (*Id*. at 19) Additionally, with respect to the Board's witness in Counts 22-25, respondent notes that the ALJ found S.S.'s testimony that respondent 1) grabbed her arm on two occasions and that 2) Mr. Hampshire gave her permission to leave class and go to the office was not credible because she didn't tell anyone of such conduct at the time these incidents occurred, and because Mr. Hampshire did not corroborate her stories. (*Ibid*.) Despite her own findings that S.S. lied repeatedly, however, the ALJ found S.S. more credible in everything else she said rather than respondent's student witnesses' unrebutted testimony indicating that S.S. was lying. (*Id*. at 18-19)

Respondent further asserts that the administration put her in the position of being charged with unbecoming conduct if she enforced the school's disciplinary policy or conversely being charged with unbecoming conduct for failure to enforce the disciplinary policies. (*Id*. at 20) Respondent points out that the school rules dictate that once a student arrives at homeroom, he or she must remain in homeroom unless permission to leave is granted by the teacher. (*Id*. at 21) The school rules also state that any student leaving class must have a hall pass. (*Ibid*.) In the instance of Counts 23 and 25, respondent submits that she followed the school's disciplinary procedures when S.S. left without permission and without a hall pass. (*Ibid*.) Respondent notes that S.S. testified that she didn't read the policies concerning leaving the classroom because she "got bored." (*Ibid*.) The fact that S.S. became upset for being

disciplined for violating the school's rules cannot support a charge of unbecoming conduct, respondent argues. (*Ibid.*)

Respondent argues that the act of unbecoming conduct alleged in Count three rests entirely on the observations of sixth-grade team members who testified that they saw, but that they did not hear, what occurred between student P.G. and respondent. (*Id*. at 22) Respondent notes that P.G. did not testify. (*Ibid.*) Assuming, *arguendo*, that the incident proceeded as reported by the Board's witnesses, however, respondent argues that the evidence only shows that respondent sent P.G. to the office in error because she mistakenly believed that P.G. had taken a teacher's stool on his own and that the error was quickly rectified and the matter dropped. (*Ibid*.)

Citing Randolph Township Board of Education v. DiPillo, 93 *N.J.A.R*. 2d (EDU) 13, 17 (ALJ Weiss, Sept. 2, 1992), *adopted with modification of penalty*, 93 *N.J.A.R*. 2d (EDU) 24 (Comm. Oct. 30, 1992), *adopted with further modification of penalty*, 95 *N.J.A.R*. 2d (EDU) 206 (State Bd. of Ed. May 3, 1995), which states that "Becoming upset and frazzled, and even crying from time to time because of poor interaction with a teacher does not constitute proof of unbecoming conduct," respondent claims that the ALJ's findings regarding the pattern established by Counts 3, 5, 8, 22, 23, 25, 31 were fatally tainted because any time a child became upset, regardless of the circumstances, respondent was found culpable. (*Ibid.*) Respondent argues that the Board never presented testimony regarding the applicable professional standard nor testimony as to respondent's deficiencies in meeting that standard. (*Id*. at 23) Respondent specifically notes that, although Principal Sama did not testify to any standard of professional care breached by respondent, the ALJ improperly applied Mr. Sama's reasoning in her finding respondent guilty of inappropriate conduct. (*Id.* at 23-24) According to respondent, Mr. Sama

testified that '"he did not care whether the complaints by students or parents were true or not, he just wanted to put a stop to the complaints."' "Under cross examination Mr. Sama admitted that trying to determine truth, right and wrong was not the correct approach." '"If there are feelings by students and parents, what ever the perception is, that is what we need to deal with and find out….I do not think I could resolve these things by finding the truth….To me the issue was not who was right or wrong, but that people felt uncomfortable."' (*Ibid*.)

Respondent submits that in Count 5, evidence was presented that C.U. was upset over a reprimand on a single occasion, but, she asserts, there was no evidence that she acted in such an outrageous manner that this single incident would establish unbecoming conduct. (*Id*. at 24-25) Neither does the evidence support a finding that respondent's criticism was unwarranted nor is there evidence of constant negativity, disparaging remarks or verbal abuse sufficient to establish unbecoming conduct, respondent argues. (*Ibid*.) That she was found guilty of inappropriate conduct for this incident, respondent asserts, illustrates the point that the ALJ improperly applied Mr. Sama's standard to her, focusing on testimony that the student was upset, to the exclusion of all other testimony. (*Id*. at 24) There was also no evidence that this incident significantly affected the student-teacher relationship, respondent notes, pointing to C.U.'s testimony that she received good grades from respondent the entire year and that she had twice asked for, and received, written recommendations from respondent so that she could advance in karate. (*Ibid*.)

With regard to Count 8, respondent submits that the testimony of Ms. Pascale, the inclusion teacher who was almost always present in the room, testified that the only incident when she disagreed with respondent's conduct towards S.P. during the entire time they taught together involved a professional disagreement over the appropriateness of respondent requiring

S.P. to write a letter of apology to Ms. Pascale for talking back. (*Id*. at 25) Respondent avers that Ms. Pascale could not remember if S.P. actually wrote a letter of apology, or if she received such a letter, or what it may have said. (*Ibid*.) Respondent notes that the Board was unable to produce any letter of apology written by S.P. (*Ibid*.) Moreover, respondent points out that no one, not S.P., his parents or the administration, ever told her until after he was removed from her class, that S.P. was emotionally upset by any incident or that he was upset by what he perceived as mistreatment. (*Id*. at 26-27) Respondent argues that the failure to inform her of any particular incident for more than a year after he left her class deprived her of her ability to make an effective and informed response to this charge. (*Id*. at 27) Additionally, respondent asserts that the administration's failure to adequately investigate allegations and apprise her of incidents as they arose, deprived her with the opportunity to explain and address those concerns and thus deprived her of due process. (*Ibid*.) Respondent further asserts that the ALJ's definition of unbecoming conduct with respect to Counts 1, 3, 5, 8, 22, 23, 25, 31 and 34-35 "would sacrifice effective education on the altar of 'sensitivity' and place the careers of experienced teachers with absolutely unblemished records in the hands of children and an administration which was more interested in blackmailing a tenured teacher into resigning that (sic) provide her a fair opportunity to address and investigate concerns regarding her performance." (*Ibid*.)

Respondent vigorously objects to the ALJ's conclusion that she used the word "nigger" on two occasions outside the hearing of students. (*Id*. at 28) Respondent asserts that it belies reason that she would refer to a student who had been removed from her class as "your typical nigger," as claimed in Count 11, to Ms. Iepson, the very administrator who was watching her every move. (*Id.* at 30) Nor is it believable, respondent claims, that Ms. Iepson, who kept over 200 pages of notes regarding the other alleged incidents, testified that she did not make a

note of respondent's comment because she experienced it herself. (*Id*. at 28) Respondent asserts that the fact that Ms. Iepson did not make a note of such comment in her file and neither disciplined respondent nor made any reference to the alleged incident in her year-end evaluation impeaches Ms. Iepson's testimony. (*Id*. at 28, 30) Respondent further refers to the many witnesses who testified on her behalf, including several African American witnesses, and asserts that the evidence is overwhelming that she has been an active proponent of tolerance and has never used, and is incapable of using, the word "nigger." (*Id*. at 29)

Respondent also posits that the Board presented no evidence and there were no findings that respondent called or labeled African Americans as monkeys in Count 12. (*Id*. at 28) Citing the Initial Decision at page 44, where the ALJ expressly found that respondent "did not intend her statement to be a racial slur," the respondent argues that the ALJ's conclusion that a single innocent comment constituted an act of unbecoming conduct should be rejected. (*Id*. at 29)

Finally, respondent asks the Commissioner to consider the diminishing effect of the dismissal of most of the original 56 counts alleging unbecoming conduct with respect to the Board's assertions that she should be removed from her tenured teaching position. (*Id*. at 31) Respondent further requests that the matter of penalty be remanded so that evidence can be considered with respect to the financial impact of the recommended penalties upon respondent. (*Ibid*.)

The Board takes no exception to the ALJ's dismissal of Charges four, six and seven, but does object to the penalty imposed, arguing that dismissal of respondent from her tenured position is the only appropriate remedy given respondent's pattern of conduct and display of inappropriate behavior toward students in the remaining 18 counts. (Board's

Exceptions at 1) The Board avers that respondent's irrational anger and lack of self-control towards students who did not follow the rules, her pattern of insensitivity to the special needs of special education students in her inclusion classes, her attempts to discourage students from complaining about her, and her use of racial epithets warrant the removal of respondent from her tenured teaching position. (*Id.* at 1-2)

Moreover, the Board objects to the requirement that respondent take educational courses as a condition of return to her teaching position. (*Id*. at 2-3) In so doing, the Board points out that respondent has failed to take responsibility for her actions or acknowledge any wrongdoing. (*Ibid.*) Thus, the Board posits, the courses would have no effect because respondent would have to take the courses seriously if they were to be effective. (*Ibid.*)

In her Reply Exceptions, respondent reiterates the points advanced in her exceptions, averring that the Board has failed to establish a pattern of behavior constituting conduct unbecoming a teacher by a preponderance of credible evidence. (Reply Exceptions at 1-2) Respondent argues that because the school's administration never informed her of the complaints of alleged incidents when they occurred so that she would have the opportunity to admit, deny, or otherwise respond to them, nor did the Board warn, reprimand or otherwise discipline her for these incidents, it cannot be concluded that she should lose her tenured teaching position, nor should she be punished for her failure to acknowledge that she did anything wrong as the Board recommends. (*Id*. at 3-4) Noting that the ALJ herself "dismissed either partly (Counts 2, 3, 11 and 18) or in their entirety (Counts 4, 6, 7, 10, 15, 14, 16, 17, 19, 20, 21, 26, 27, 29, 30, 32, 33, 36) twenty two of the thirty six counts involving students, and all twenty of the counts (37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56) involving parents, other educational staff members and administrators, including allegations of

insubordination," petitioner argues that she should not be punished by the extraordinary penalties recommended by the ALJ for her failure to acknowledge wrongdoing. (*Ibid.*)

Respondent further asserts that, although the principal and vice-principal informed her on January 21, 1999 that there would be monthly meetings with her to monitor their concerns regarding her performance, there were only two monthly meetings, one in February 1999 and the other in March 1999. (*Id*. at 4) At the March meeting, the vice-principal informed her that positive comments had been received from three parents of children in her classes and that there would be no further monthly meetings unless additional negative concerns were received. (*Ibid.*) Despite this arrangement, respondent points out that the events underlying counts 2, 3, 11 and 13 allegedly occurred between March 1999 and the end of the school year and that counts 12, 18, 22, 23, 24, 25, 28 and 31 are predicated on events to have allegedly occurred during the 1999-2000 school year. (*Id*. at 3-5) Moreover, respondent avers that the Board did not present any evidence that she was questioned about these events prior to presenting her with tenure charges. (*Id.* at 4) Respondent argues that the administration's concealment of alleged incidents from her and the number of unsupportable accusations brought against her by the Board, dictate that the Commissioner dismiss the ALJ's concern that respondent was unremorseful because she did not admit that she acted improperly. (*Id*. at 6)

Respondent points out that she has been a teacher for over 20 years and that she has a history of both good evaluations and of never being disciplined for anything, "including the incidents underlying any of the Board's charges." (*Id*. at 5) Respondent also points to her service on school committees, to being a mentor for a new teacher, to being involved in school activities and to her commitment to being a good teacher. (*Ibid.*) Moreover, respondent states that during the two years at issue, she had approximately 190 students, including the inclusion

class. (*Ibid*.) Respondent points out that only nine students were found by the ALJ to have been affected to some degree by either inappropriate or unbecoming conduct, that six students testified on her behalf and that three of the students who testified on behalf of the Board said she was creative and that they liked having her as a teacher. (*Ibid*.)

Respondent further submits that she should not be penalized by a lengthy unpaid suspension to make up for delays in the tenure proceedings which required that the Board pay her for the time between the expiration of the 120-day suspension without pay and the conclusion of the tenure proceedings because, as the ALJ indicated, the hearing was substantially delayed by the Board's failure to complete discovery, its objection to the release of certain student records without an order from Superior Court, and its substitution of counsel. (*Id*. at 6)

Finally, respondent concurs with the Board that imposition of educational courses should *not* be a prerequisite of her return, but for different reasons. (*Id.* at 7) Citing numerous Commissioner's decisions wherein the Commissioner has relied on the State Board's decision in *In the Matter of the Tenure Hearing of DiPillo*, *School District of the Township of Randolph, Morris County*, 95 *N.J.A.R.*2d (EDU) 206, respondent advances the argument that the Commissioner has consistently rejected the imposition of an educational requirement as punishment in a tenure matter. (*Id*. at 8) Respondent thus posits that the ALJ is mistaken in her belief that by detailing the courses to be taken and requiring approval by the school's administration she has avoided the difficulties set forth by the State Board in *DiPillo*. (*Ibid.*) Respondent points out that the ALJ is not a professional educator and is therefore not authorized to write a professional improvement plan, and that even the Board could only impose a training requirement within the provisions of the "Required Professional Development for Teachers" set forth at *N.J.A.C*. 6:11-13.1 *et seq*. and the teachers' contract. (*Ibid*.)

COMMISSIONER'S DETERMINATION

Initially, upon a review of the tenure charges filed in this matter, the Commissioner approves the Board's withdrawal of 22 charges, Counts 14, 17, 19, 20, 26, 27, 29, 33, 36, 37, 41, 42, 44, 45, 46, 47, 48, 49, 53, 54, 55 and 56.[2] Moreover, after a thorough review of the record and the ALJ's Order of September 28, 2001, the Commissioner concurs with the ALJ's Order Granting Summary Decision dismissing Counts 10, 15, 16, 21, 30, 32, 38, 39, 40, 43, 50, 51 and 52, and parts of Counts 2, 3, 4, 6, 11 and 18. As to the remaining charges advanced against respondent, the Commissioner likewise concurs with the dismissal of Counts 4, 6 and 7 in the Initial Decision for the reasons expressed therein.[3] (Initial Decision at 23-25, 28-33, 65, 66 and 68)

Upon a careful and independent review of the record in this matter, the Commissioner concludes that the Board has sustained its burden of proof with respect to respondent's guilt on the remaining counts of the tenure charges by a preponderance of the credible evidence. In so determining, the Commissioner acknowledges that resolution of these charges turns almost exclusively on credibility determinations by the finder of fact, who observed the witnesses firsthand, and are therefore to be accorded great weight in the absence of any meaningful basis on which to challenge them. This is especially true, where, as here, transcripts of the proceedings were not provided to the Commissioner. Accordingly, despite respondent's urging to the contrary, the Commissioner finds no cause to disturb the credibility determinations of the ALJ. It is evident from the Initial Decision that the ALJ carefully

[2] The Commissioner notes that there is nothing in the record explaining the Board's reasoning in withdrawing these charges, which were withdrawn by the Board in the course of presenting its case before the ALJ during the 12 hearing dates ending June 28, 2001. (Initial Decision at 2) In that transcripts of the hearings were not provided, the ALJ's acceptance of the withdrawal of these charges is presumptively valid.

[3] In its exceptions to the Initial Decision, the Board explicitly states that it "takes no exception to the dismissal of Counts 4, 6, and 7***." (Board's Exceptions at 1)

measured conflicts, inconsistencies, and plausibility of content in deciding which testimony to credit, and her determinations are fully supported. As such, they may not be disturbed by the Commissioner. *N.J.S.A*. 52:14B-10(c).

In reviewing the charges, the Commissioner observes that Counts 1, 2,[4] 3, 4, 5, 8, 9, 13, 18, 22, 23, 24, 25, 28, 31, 34, and 35, although filed by the Board as individual charges of unbecoming conduct, "sound" in inefficiency. The Commissioner recognizes that the enabling statute provides that tenured staff shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause***." *N.J.S.A*. 18A:6-10. Additionally, the Commissioner recognizes that "[w]hether the charges fall under any of the categories is a determination for [him] to make." *In the Matter of the Tenure Hearing of Walter Driscoll, School District of Woodstown-Pilsgrove Regional High School, Salem County,* Appellate Division decision October 25, 1983, Docket No. A-748-82T2. In that the Board did not bring these charges as inefficiency, there is no evidence of compliance with the procedural requirements set forth at *N.J.A.C*. 6A:3-5. In point of fact, there is compelling evidence that the Board not only did not comply procedurally with the requirements at *N.J.A.C*. 6A:3-5, but also did not follow its own procedures nor the union contract in handling the complaints about respondent. The complaints were not fully investigated at the time they occurred, no opportunity was provided for respondent to address the complaints and no discipline was imposed on respondent to impress upon her the seriousness of her actions. Moreover, the Board did not require respondent to take courses which might have addressed its concerns with respect to anger management, the handling of disruptive students and techniques applicable to special education

[4] In the course of testimony regarding Count 2, a Board witness, Ms. Pascale, testified that respondent used the word "nigger." (Initial Decision at 40) The charges filed by the Board do not allege the use of the word "nigger" as part of its allegations in Count 2. (Tenure Charges at 3) The ALJ considered this testimony in the discussion of Count 11 in support of the Board's allegations that respondent used the word, "nigger," when referring to a student in a conversation with Ms. Iepson. (Initial Decision at 19, 40)

students. (Initial Decision at 67) The Commissioner therefore finds it necessary to determine whether the classroom management deficiencies alleged by the Board, although sounding in inefficiency, would constitute unbecoming conduct, pursuant to *In the Matter of the Tenure Hearing of Peter Loria, State-operated School District of the City of Newark,* decided by the Commissioner January 26, 1998, slip opinion at 66-73, *citing In re Driscoll, supra.*

The Commissioner finds that, based on the totality of the record before him, the Board has established the following by a preponderance of evidence:

- During the 1997-1998 school year, respondent on occasion inappropriately disciplined some of her fourth-grade students by yelling at them, including special education student, J.M. (Counts 34 and 35)
- During the 1998-1999 school year, respondent acted inappropriately by taking P.G.'s coat, apparently to teach him that it was wrong for him to take another student's property. This caused P.G. to become very upset and the administrative staff had to calm him. (Count 1)
- During the 1998-1999 school year, respondent's desire to exclude P.G. from a classroom party because he had been a disruptive student showed a lack of sensitivity to a special education student. (Count 2)
- During the 1998-1999 school year, respondent became angry and overreacted when she saw P.G. sitting on a teacher's stool during a school program, incorrectly assumed that he had no right to be there and sent him to the office. (Count 3)
- During the 1998-1999 school year, respondent acted inappropriately on one occasion by singling out C.U. and making demeaning comments about her work. (Count 5)
- During the 1998-1999 school year, respondent's conduct toward S.P. created such a negative learning environment that he could not sleep and was removed from respondent's class. (Count 8)
- On at least one occasion during the 1998-1999 school year and at least one occasion during the 1999-2000 school year, respondent attempted to dissuade her students from going to the office to complain about her. (Counts 9 and 24)
- During the 1999-2000 school year, respondent required M.M. to proceed with his presentation without the equipment he had planned to use even though M.M. was obviously upset and cried during the presentation. (Count 28)

- During the 1999-2000 school year, on one occasion, assuming that he had intentionally not done the assignment, respondent was insensitive to the needs of special education student, R.S., by expressing her anger at him for his not completing his spelling assignment. (Count 18)
- During the 1999-2000 school year, respondent caused a student to become very upset by her angry reminders that F.M., a student with a substantial number of absences, had to follow the rules and the school's policies regarding making up homework and tests. (Count 31)
- During the 1999-2000 school year, respondent was rude to student S.S., stating, "if you cannot figure it out, you should not do it," when S.S. asked what assignments she had to make up following an absence. (Count 22)
- During the 1999-2000 school year, respondent exhibited inappropriate anger and overreacted when she saw S.S.'s books in class and realized that S.S. had left the room without permission. (Count 23)
- During the 1999-2000 school year, respondent became severely agitated and angry when S.S. left her room for a second time without permission. Respondent took S.S. into an adjacent empty classroom, shut the door, yelled at S.S. and told her that she was going to write her up for a discipline. Respondent blocked the door with her body when another teacher, Mr. Hampshire, tried to intervene. He had to push the door to get in. (Count 25)

It is now axiomatic that teaching "requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *In the Matter of Jacque L. Sammons,* 1972 *S.L.D*. 302, 321. Here, respondent has exhibited a pattern of inappropriate anger and insensitivity directed towards students which cannot be tolerated in a school setting. Moreover, respondent attempted to discourage students from complaining about this conduct to the school's administration. The Commissioner therefore finds that the charges and proofs established herein *demonstrate* a *pattern of inappropriate behavior* constituting conduct unbecoming a teacher.

The two other remaining counts involve racially inappropriate remarks. In Count 11 respondent used the word "nigger" in referring to a student in a conversation between respondent and the vice-principal, and in Count 12, in the context of discussing a novel opposing

racism, *The Cay*, with her class, respondent remarked that some African American girls reminded her of monkeys touching each other's hair.[5] The Commissioner finds it difficult to reconcile these statements in light of respondent's close friendships with African Americans who testified on her behalf, the fact that the first ten years of her teaching experience were in schools with a large minority population, that the church she attends is approximately 49 percent African American and her efforts to promote tolerance and racial awareness as a part of Black History Month. In the Count 11 incident, however, Vice-principal Iepson's testimony that respondent had referred to a student as "just your typical nigger" was supported by Ms. Pascale's testimony that she had also heard respondent refer to a student using the word "nigger."[6] Thus, although there was convincing testimony that respondent is not a racist, the Commissioner agrees with the ALJ that it apparently does not mean that she would not use, under any circumstances, the word "nigger" to describe a difficult student. (Initial Decision at 40) The Commissioner is therefore persuaded that respondent did use the word "nigger" to describe a difficult student in this incident. With respect to Count 12, while respondent denies that she ever called African American students monkeys, she testified that she had a classroom discussion about how African American students were fascinated by how her hair was blown by the wind and how one asked to touch her hair and how monkeys preened each other. (Initial Decision at 43) Although respondent may not have intended these remarks to be a racial slur, they were ill-chosen and inappropriate words for a teacher to use who was ostensibly trying to teach her students tolerance and racial sensitivity. The Commissioner therefore concludes that these two counts involving racial remarks also constitute conduct unbecoming a teacher.

[5] Although these incidents occurred in the 1998-1999 school year, the Commissioner observes that these incidents were not mentioned in respondent's end of year evaluation for that year. (Exhibit P-12)

[6] As stated above, in the course of the Board's presentation of its proofs in Count 2, Ms. Pascale testified that she and respondent had called P.G. a "nigger" during private conversations. (Initial Decision at 38)

As to the appropriateness of the recommended penalty, the Commissioner agrees with the ALJ that, in view of all the facts in this matter including respondent's long, successful and heretofore unblemished teaching career, her professional and personal attributes, and the Board's failures to: 1) follow its own procedures or the union contract in handling the complaints about respondent, 2) take corrective action to impress upon respondent the seriousness of her actions and 3) include strategies in respondent's Personal Improvement Plan (PIP)[7] to address concerns with respect to anger management and the handling of disruptive students and special need students, that the extreme penalty of loss of tenured employment is not warranted.

The Commissioner finds it necessary therefore to balance the totality of the record herein with the need to stress most emphatically that behavior of the type evinced by respondent cannot be permitted in the school environment. In so doing, the Commissioner determines to modify the ALJ's recommended penalty to impress upon respondent the seriousness of her conduct within the parameters of penalties dispensed in other similar tenure matters. Accordingly, the Commissioner herein orders that respondent shall suffer a *permanent* reduction of one step on the salary guide[8] and shall forfeit the 120 days' salary already withheld, together with an additional six months' salary and concomitant emoluments. *See In the Matter of the Tenure Hearing of Charles Motley, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner August 4, 1999; *In the Matter of the Tenure Hearing of*

[7]Respondent's 1989-1999 end of year evaluation indicates three areas of concern as follows: 1) Barbara has experienced difficulty in attempting to maintain a positive and comfortable classroom environment for some of her students; 2) There are documented instances when Barbara has made parents and students feel uncomfortable about their concerns with specific situations that occurred in the classroom; and 3) It has also become apparent that Barbara tends to experience difficulty with the same students once a concern has been raised and addressed. (Exhibit P-12) Despite these expressed concerns, the Commissioner notes that the PIP only addresses these areas in general terms and does not specify or require any corrective measures or programs to address these identified deficiencies.

[8] It is noted that respondent has no entitlement to receive a salary amount that includes an award of an increment during her suspension following the Board's certification of tenure charges. *See In the Matter of the Tenure Hearing of Anthony Castaldo, School District of the Union County Regional High School No. 1,* decided by the State Board, 1986 *S.L.D.* 3026.

Henry Allegretti, School District of the City of Trenton, decided by the Commissioner March 22, 2000; and *In the Matter of the Tenure Hearing of George Mamunes, Pascack Valley Regional School District,* decided by the Commissioner June 26, 2000.

Moreover, the Commissioner declines to compel respondent to attend training classes as a *punishment* for the reasons expressed in *DiPillo, supra* at 206. In so doing, the Commissioner rejects the ALJ's reasoning that by detailing the courses to be taken and specifying approval by the school's administration she has avoided the difficulties set forth by the State Board in *DiPillo, supra*. In *DiPillo*, the State Board specifically noted that "imposing a general continuing education program as a *punishment* for the specific determination of unbecoming conduct made in these proceedings would be both inappropriate and counter to the educational mission of such a program." (emphasis supplied) *DiPillo, supra* at 208. The Commissioner notes that not only is it the Board's responsibility to develop a PIP to address any deficiencies or areas for growth for each of its individual teachers, including respondent, but also the Board and its professional administrators are in the best position to determine the necessary specific courses or programs that are available to improve teaching or address deficiencies. *See N.J.A.C.* 6:3-4.1. Accordingly, it would be appropriate for the Board to pursue a training requirement for respondent within the provisions of *N.J.A.C.* 6:11-13.1 *et seq*. and the teachers' contract.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2002
Date of Mailing: October 21, 2002

[9] 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.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.