

IN THE MATTER OF THE TENURE :
HEARING OF DONALD SALAAM, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP: DECISION
OF IRVINGTON, ESSEX COUNTY. :

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming against respondent Donald Salaam – a tenured teacher with 30 years of experience – for allegedly making inappropriate sexually-oriented comments toward, and inappropriately touching, a female eighth-grade summer school student in August 2008. Respondent denies the charges.

The ALJ found that: the petitioning Board bears the burden of proving the tenure charges of unbecoming conduct against respondent by a preponderance of the credible evidence; there were substantial inconsistencies in the testimony and written statements of the two students who testified on behalf of the petitioning Board; and respondent’s denial that he engaged in any inappropriate conduct in regard to the alleged incident was credible. Accordingly, the ALJ determined that respondent neither made inappropriate physical contact with the student, nor made inappropriate comments to her, and concluded that the Board did not meet its burden of establishing that respondent engaged in any unbecoming conduct. The ALJ ordered that: the tenure charges against Mr. Salaam be dismissed; respondent be restored to his position in the district as of the date of his suspension; and he be awarded back pay and benefits.

Upon independent review of the record, the Commissioner concurred with the ALJ’s findings and adopted the Initial Decision of the OAL as the final decision in this matter.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

February 18, 2010

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District requested and was granted an extension of time within which to file exceptions to the Initial Decision. These exceptions, and respondent’s reply thereto, were submitted in accordance with the extended timelines.

The District’s exceptions charge that the Administrative Law Judge (ALJ) erred in his evaluation of the credible evidence in concluding that the District failed to establish its charges against respondent. Most particularly, it claims he mistakenly discounted the credibility of T.J., whose statements and testimony he found deviated in a substantial manner from those of her fellow classmate S.W. The District argues that the ALJ failed to properly weigh the testimony and consider what was *consistent* between the respective statements and testimony rather than dwell on the inconsistencies. It submits that “the *essence* of T.J.’s testimony and statements demonstrated unbecoming conduct by Mr. Salaam.” (District’s Exceptions at 1-5, quote at 3, emphasis supplied)

In reply, respondent urges that the ALJ – who was in the unique position to hear the testimony of the two student witnesses while at the same time observe their demeanor as they testified – reached the only reasonable conclusions possible as to what testimony to believe and

the weight to be accorded to such testimony. It was the District's burden, respondent posits, to present a preponderance of the credible evidence in order to sustain its tenure charges against him, a burden which it failed to satisfy. As such, respondent maintains the ALJ properly dismissed the charges against him. (Respondent's Reply Exceptions 1-6)

Upon review and consideration of the entire record of this matter – which it is noted included neither transcripts of the proceedings at the OAL nor post-hearing briefs – the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that the District has failed to sustain its burden of proof with regard to the instant charges against respondent, necessitating dismissal of these charges.

Notwithstanding that the Commissioner recognizes that the outcome of this case with regard to the proving of the charges turns almost exclusively on the credibility of witnesses, the District's exception challenge to the ALJ's credibility determinations and his resultant factual findings must be rejected out-of-hand. Initially, it is by now well-established that the Commissioner's review in this regard is severely circumscribed, specifically:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
(*N.J.S.A. 52:14B-10(c)*).

Moreover, the Commissioner is acutely aware that he cannot properly consider rejecting the credence and weight ascribed to witnesses by the ALJ without reviewing those portions of the transcript of the hearing below relevant to the District's exceptions. *See In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987; *Rowley v. Board of Education of Manalapan-Englishtown*, 205 *N.J. Super.* 65 (App. Div. 1985) Inasmuch as it was the District's duty to provide the Commissioner with such portions of the hearing transcript (*Morrison* at 158) to review and allow

him to draw his own conclusions, and the District failed to do so, the Commissioner accepts those credibility determinations reached by the ALJ. Based on the existing record, the Commissioner is satisfied that the ALJ, who had the benefit of observing the witnesses demeanor, considered all testimony and weighed it according to the credibility of the witnesses and the plausibility of its content.

A District which chooses to lodge tenure charges against one of its employees bears the burden of proving those charges by a preponderance of the credible evidence. *In re Tenure Hearing of Grossman*, 127 N.J. Super. 12 (App. Div. 1974) In the instant matter, the paucity of the record and factual evidence in support of the District's charges makes it abundantly clear that the District has not sustained its burden of establishing that respondent engaged in any unbecoming conduct.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. The instant tenure charges are hereby dismissed and the Commissioner directs that respondent be reinstated to his position and credited with all salary and emoluments due him as a result of this decision.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 18, 2010

Date of Mailing: February 23, 2010

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)