#183-10 (OAL Decision: Not yet available online)

DEPARTMENT OF CHILDREN AND :
FAMILIES, INSTITUTIONAL ABUSE :
INVESTIGATION UNIT, :
PETITIONER, :
V. :
M.D., :
RESPONDENT, :
AND :
IN THE MATTER OF THE TENURE :
HEARING OF MICHAEL DOUGHERTY :
SCHOOL DISTRICT OF THE CITY OF :
TRENTON, MERCER COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Department of Children and Families, Institutional Abuse Investigation Unit (DCF-IAIU) substantiated that M.D. placed a seventh grade student under his charge in substantial risk of harm by directing and allowing the student, J.W., to retrieve a book from a slanted roof approximately 20 feet above paved ground. Following the DCF complaint, the District filed tenure charges of unbecoming conduct against M.D. – a social studies teacher – and sought his removal from his tenured position. The cases were consolidated; DCF was determined to have the predominant interest; and the ALJ ordered the record as to the substantiated neglect charge sealed.

The ALJ found, *inter alia,* that: J.W. was a credible witness, in contrast to the respondent; respondent, M.D., was overwhelmed by the demands of his classroom, and asked J.W. to retrieve a textbook from the roof outside of the classroom window; M.D. realized that he made a serious mistake in judgment, but nonetheless allowed J.W. to step out onto a slanted roof; M.D. repeatedly disregarded procedures described in the school handbook, including allowing students to play card games during instructional time, showing violent "R" rated movies such as "Glory" to 7th graders, and failing to carry his roll book with him during fire drills. The ALJ concluded that the DCF/IAIU finding of substantiated neglect should be affirmed, as should the Board's removal of respondent's tenure, and ordered respondent's name to be maintained on the central registry.

The Chief of Staff of the DCF found no indication that the ALJ's determination was arbitrary, capricious or unreasonable, and adopted the Initial Decision, modifying it only to the extent that the reasoning in the Initial Decision was supplemented by the reasoning in contained in the DCF's Final Decision. Further, the DCF determined that M.D.'s name would be placed on the central registry.

The Commissioner's sole focus in this matter is to determine whether the District's tenure charges against M.D. have been sustained. The Commissioner concurred with the ALJ's findings that the District has established conduct unbecoming. Accordingly, the Initial Decision affirming the Board's tenure charges of unbecoming conduct was adopted, and the respondent dismissed from his tenured teaching position. The matter was transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

June 17, 2010

RECORD PARTIALLY SEALED

OAL DKT. NO. HSV 2576-09
AGENCY DKT. NO. AHU #08-0990

OAL DKT. NO. EDU 895-09
AGENCY DKT. NO. 43-3/09
(CONSOLIDATED)

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DECISION

Procedural History

On May 27, 2008 respondent M.D. – a tenured social studies teacher at Rivera Elementary School in the City of Trenton – was allegedly involved in an incident with J.W., a thirteen-year old seventh grade student, where it is charged that respondent requested J.W. to

retrieve a textbook from the roof outside of his classroom; J.W. climbed onto a chair to the window sill, dropped down approximately one and a half feet to the roof; she then walked approximately 2 to 3 feet onto the asphalt shingle roof, which sloped at an approximate 30 degree angle and was approximately 20 feet above the black top driveway; J.W. retrieved the book and climbed back in the window as instructed by M.D. By letter dated July 31, 2008, the Department of Children and Families (DCF), Institutional Abuse Investigation Unit (IAIU), informed M.D. that – upon investigation by the IAIU – it was found that allegations that he placed J.W. in serious risk of harm, in contravention of *N.J.S.A.* 9:6-8.21, had been substantiated. M.D. was further advised that he had a right to appeal this determination – which he ultimately did – and the matter was transmitted by the DCF to the Office of Administrative Law (OAL) for hearing on April 3, 2009.

On March 3, 2009, the School District of the City of Trenton (District) certified tenure charges against M.D. to the Commissioner of Education. This certification consisted of One Charge with 33 paragraphs which, in addition to the May 27, 2008 incident involving J.W., included other alleged charges of inappropriate behavior by respondent, *i.e.*,

- November 28, 2006 – respondent removed a student's "hoodie" in the hallway in violation of school policy.
- December 1, 2006 – the school principal observed students playing cards in respondent's class during instructional time in violation of school policy.
- April 20, 2007 – during a fire drill, respondent did not have his roll book with him in violation of school policy.
- April 20, 2007 – the school principal observed respondent showing an R-rated movie to his class in violation of school policy.

- September 18, 2007 – respondent failed to pick up his class from the cafeteria in a timely manner in violation of school policy.
- October 11, 2007 – respondent's classroom was in violation of various fire codes.
- November 7, 2007 – respondent permitted more than one student out of his class at a time; permitted students to play cards during instructional time; and exhibited poor classroom management.
- November 16, 2007 – respondent was involved in an incident with student K.F. wherein he pulled off the student's hoodie and leaned on his desk, overturning it and sending the student to the floor.[1]
- December 21, 2007 – principal sent respondent a memo regarding his work attendance (daily absence rate for the 2007-08 school year did not meet District guidelines).
- January 18, 2008 – respondent was written up for failure to meet requirements of the Learning for Learning monitoring checklist.

The District urged that this pattern of unbecoming conduct necessitated M.D.'s dismissal from his tenured employment. With receipt of an answer to the tenure charges from M.D., the matter was transmitted on March 18, 2009 to the OAL for hearing. Aware of the impending filing of the DCF, IAIU case – and recognizing that case and one of the charges in the tenure matter both involved the incident involving J.W., which occurred on May 27, 2008 and presented the same facts for adjudication – the Bureau of Controversies and Disputes transmitted the tenure matter with the following special feature: "Suggest consolidation and predominant interest determination, pursuant to *N.J.A.C.* 1:6B-17 with D.C.F. matter which we have been advised will

[1] This incident was the subject of an IAIU investigation which resulted in an unsubstantiated abuse finding.

be transmitted shortly." The tenure matter and the DCF matter were subsequently assigned to Administrative Law Judge Ana C. Viscomi.

On April 9, 2009, the ALJ issued an Order of Consolidation and Predominant Interest[2] in these matters, ordering therein that the DCF, IAIU shall have the Predominant Interest with regard to issues relating to the charges of child neglect. As such the ALJ's Initial Decision in this consolidated matter would first be filed with the DCF: 1) for a determination by that entity as to whether the factual allegations against M.D., with respect to the J.W. incident, have been established by a preponderance of the competent and credible evidence and constitute neglect warranting inclusion of M.D.'s name on the Central Registry, and 2) for issuance of a final decision by DCF in this regard. Thereafter this decision would be transmitted to the Commissioner of Education to determine – dependent upon the DCF's findings with respect to the J.W. incident which are binding upon him, and his conclusion on the remaining tenure charges – whether M.D.'s conduct is sufficient to warrant his removal or a reduction in salary. Hearing in these consolidated cases took place at the OAL on June 2, June 10, July 10, July 23, July 28, July 29, August 25, September 25, October 13, and October 23, 2009.[3]

The Initial Decision of the ALJ was issued on March 22, 2010 and was received by the DCF on that date. Therein, with respect to the May 27, 2008 J.W. incident – driven largely by her credibility assessments – the ALJ determined:

> In this matter, I found J.W. to be an articulate and sincere 8th grader. She had no reason to discredit the respondent. She testified that she liked Mr. D. and enjoyed being in his class. I found her to be a credible witness in contrast to the respondent. I FIND that M.D. was overwhelmed by the demands of his

[2] On May 19, 2009, the ALJ issued a separate Order partially sealing the record in this matter (the record with respect to the neglect part of the hearing was closed; that which dealt with the tenure charges was left open). She additionally did not seal the Initial Decision.

[3] The instant record includes transcripts of the proceedings conducted on all but the July 10 and August 25, 2009 hearing dates.

> classroom. Upon learning that text books, which looked "new" to him were on the roof, he asked student M.B. to retrieve it. When that student refused, he ultimately asked J.W. to retrieve it. The first textbook was closer to the window. J.W. climbed out onto the slanted roof, approximately 20 feet from the ground and retrieved the book. Upon returning to the inside of the classroom, M.D. asked her to retrieve the second textbook which was near the edge of the roof. She declined. Even if one were to accept as credible M.D.'s version that J.W. volunteered to retrieve the book and was partially out of the window, his duty to her was to use reasonable physical force to prevent her from the foreseeable danger of falling from the roof. Instead, even if one was to accept his version of the events, his focus was on the fact that the textbooks looked "new" and not on the safety of 7th graders entrusted to him. His belated indication that his diabetic condition prevented him from acting appropriately is specious. It did not prevent him from noticing that the textbooks were "new." It did not prevent him from realizing that he made a serious mistake in judgment, if one believes his version of the event, as soon as he told J.W. she could retrieve the book from the roof. Based upon these findings, I CONCLUDE that the DCF appropriately substantiated neglect based upon the May 27, 2008, incident involving the respondent. (Initial Decision at 16)

The ALJ, thus, concluded that respondent's name should be maintained on the Central Registry.

By decision dated May 4, 2010, transmitted to the Commissioner on May 5, 2010, the Acting Commissioner, DCF – after full review of the record, the ALJ's decision, and the parties' exception arguments – first recognized that the credibility determinations of the ALJ could not be modified unless, after a full review of the record, these were found to be arbitrary, capricious or unreasonable or were not supported by sufficient, competent and credible evidence. The Acting Commissioner found that the ALJ provided an explanation of her determination that J.W.'s testimony was more credible than that of M.D. and she found no reason to conclude that such a determination was arbitrary, capricious or unreasonable. The Acting Commissioner determined to modify the ALJ's decision "only to the extent the reasoning in the Initial Decision is supplemented by the reasoning herein." (DCF Decision at 5) Specifically, the Acting Commissioner stated:

As J.W.'s teacher, M.D. had a duty to ensure the student[']s safety. His conduct was grossly and wantonly negligent and placed J.W. at risk of substantial harm when he permitted her to climb out a window onto a roof twenty feet above paved ground. *N.J.S.A.* 9:6-8.21(c)(4)(b) notes in part an:

> abused or neglected child means a child less than 18 years of age whose…physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian…to exercise a minimum degree of care…in providing the child with proper supervision…by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof.

The New Jersey Supreme Court has held that the applicable standard for minimum degree of care is not one of simple negligence, but rather "conduct that is grossly or wantonly negligent, but not necessarily intentional" and "can apply to situations ranging from slight inadvertence to malicious purpose to inflict injury." (citations omitted)

Additionally, respondent's intent to place the child at risk of harm is irrelevant. "Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result…So long as the act or omission that causes injury is done intentionally, whether the actor actually recognizes the highly dangerous character of her conduct is irrelevant…Knowledge will be imputed to the actor." (citations omitted)

As counsel for the Trenton [B]oard of Education correctly noted, *N.J.S.A.* 9:6-8.21(c)(4)(b) includes a "substantial risk thereof" of harm. Indeed, DYFS "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." (citations omitted)

Accordingly, for the reasons set forth within, I find that M.D. committed an act of child neglect when he asked J.W. to climb onto a slanted roof, twenty feet above paved ground, to retrieve a text book…Accordingly, M.D.'s name will be placed on the central registry, pursuant to *N.J.S.A.* 9:6-8.11. (DCF Decision at 4-5)

Commissioner's Decision

The record of this matter – which included the Initial Decision, exhibits, post-hearing submissions of the DCF, the District, and respondents, transcripts of the hearing,[4] the

[4] Including all hearing days except July 10 and August 25, 2009.

decision of the DCF and exceptions of respondent and replies thereto of the District with respect to the tenure charges – have been reviewed.

In his exceptions, respondent charges that the ALJ resolved every dispute in this matter in favor of the District without a sufficient factual basis to do so. Particularly troubling, he maintains, is the fact that the tenure charge relating to the incident involving K.F. – which was the subject of an IAIU investigation which concluded that allegations of abuse were unfounded – should have been dismissed. In support of this argument, respondent points out that *N.J.S.A.* 18A:6-7(a) states:

> When a complaint made against a school employee alleging child abuse or neglect is investigated by the Department of Children and Families, the department shall notify the school district and the employee of it[s] findings. Upon receipt of a finding by the department that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the department from the employee's personnel records. A complaint made against a school employee that has been classified as unfounded by the department shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment.

Respondent contends that – over his objection – the ALJ held that this statute does not prevent testimony in a legal hearing about events involved in an IAIU unfounded determination as long as they are derived from another source. Respondent maintains that this "very loose interpretation" renders this statute meaningless. "The legislature determined that DCF (IAIU in this case) is the appropriate entity to investigate matters such as this. They have experience and they know the terrain. In directing that full weight be given to an IAIU unfounded determination, and full protection to one accused after such a determination, the legislature wanted to put full reliance on that determination. While we submit that 'full reliance' means evidence concerning the underlying complaint should not be taken, we would respectfully

request that to the extent the Court disagrees, then at least due consideration be given to the unfounded determination of IAIU and the impact of such a finding on a claim of unbecoming conduct." (Respondent's Exceptions at 4)

Respondent next contends that the "non-abuse" portion of these tenure charges are simply insufficient to constitute unbecoming conduct. Moreover, they evidence that Principal Marazzo – the only witness against respondent on all of these charges – is so completely biased against him as to render his testimony "incredible and meaningless." For the ALJ to accept Marazzo's testimony as fully credible and to discount testimony of respondent, he argues, "led to an improper determination of unbecoming conduct that should be reversed. (*Id.* at 5)

In reply, the District submits that respondent's argument that *N.J.S.A.* 18A:6-7(a) precludes the District's tenure charge involving student K.F. – which was the subject of an IAIU investigation where allegations of abuse were determined to be unfounded – is specious. As the District specifically "removed any reference to the complaint, investigation, or report of the Department of Children and Families from Respondent's employee records and did not used (sic) them to prove the tenure charges against Respondent, it was in full compliance with *N.J.S.A.* 18A:7-6(a)." Furthermore, it argues, although respondent claims that this statute precludes presentation in a legal proceeding of evidence about events which were the subject of an IAIU unfounded determination, he is mistaken for a number of reasons. First of all, the District proposes, the purpose of an IAIU investigation was to make a determination as to whether the actions of respondent constituted child abuse. In contrast, the purpose of the District's independent investigation of this incident was to determine whether respondent's actions were in violation of the District's physical contact policy and, as such, constitute

unbecoming conduct. Secondly, the District cites to *In re Young*, 2009 WL 1789466[5], wherein the Appellate Division held "there is nothing in the law that precludes the school district from conducting it[s] own independent investigation and based thereon from pursuing charges for conduct unbecoming a teacher and/or other just cause for dismissal under its own statutory scheme and pursuant to its own jurisdiction." (District's Reply Exceptions at 4-5, quotations at 5)

Finally, although respondent asserts that the "non-abuse" charges are insufficient to constitute unbecoming conduct, the District points out that he makes no argument or demonstration in support of this claim. The District emphasizes that the ALJ was able to observe, listen to and judge the credibility of the witnesses during the course of the hearing and, therefore, her findings of fact and conclusions of law should be accorded proper deference. (*Id.* at 6)

Upon careful and independent review – and recognizing that the findings of fact with respect to the J.W. incident adopted by the DCF in its final decision in this matter are binding on him – the Commissioner's sole focus here is on whether the District's tenure charges against M.D. have been sustained, and on determination of the appropriate penalty to be imposed. In this regard – finding respondent's exception arguments without merit – the Commissioner is in full accord with the factual findings of the ALJ, for the reasons presented on pages 16-18 of the Initial Decision, and her conclusion that these amply establish that:

> Time and time again, respondent exercised poor decision making that placed the safety of the students under his care in jeopardy. Asking students to retrieve books from the roof, tilting a desk because a student refused to identify himself and remove a "hoodie," purposeful failure to acclimate to hand book requirements of taking his roll book with him to fire drills and failure to clear his classroom of

[5] The Commissioner notes that the Supreme Court recently affirmed the Appellate Division's opinion. *In the Matter of the Tenure Hearing of Gilbert Young, Jr., School District of the Borough of Roselle, Union County, 2010 N.J. Lexis 407.*

> obstructions determined to be fire code violations are all the actions of a teacher whose unbecoming conduct warrants his termination from employment. Purposefully ignoring a handbook prohibition of showing an "R"-rated movie to 7th graders under the guise of "academic freedom" constitutes conduct unbecoming. Inability to control his classroom and allowing students to engage in card playing without even noticing it is not an example of effective teaching techniques and constitutes conduct unbecoming. The conglomeration of all of these unfortunate instances over less than two years' period of time amply demonstrate that the respondent [should properly be] removed from his position as a teacher. (Initial Decision at 19)

Accordingly, that portion of the Initial Decision of the OAL dealing with the tenure charges in this consolidated matter – finding respondent M.D. guilty of unbecoming conduct – is adopted as the final decision in this matter. Respondent is hereby dismissed from his tenured teaching position with the School District of the City of Trenton. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: June 17, 2010

Date of Mailing: June 18, 2010

[6] 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)