

#493-10 (OAL Decision: Not yet available online)

JAY BERMAN, :
PETITIONER, :
V. :
BOARD OF EDUCATION OF THE :
BOROUGH OF FORT LEE, :
BERGEN COUNTY. :
RESPONDENT. : COMMISSIONER OF EDUCATION
AND :
DECISION
:
IN THE MATTER OF THE TENURE :
HEARING OF JAY BERMAN, SCHOOL :
DISTRICT OF THE BOROUGH OF :
FORT LEE, BERGEN COUNTY. :

SYNOPSIS

The petitioning Board certified tenure charges of unbecoming conduct, violation of policy and procedure, insubordination, gross negligence and other just cause for dismissal against tenured principal Jay Berman, and also withheld his salary increment for the 2009-2010 school year based on the conduct alleged in the tenure charges. The bulk of the charges against Berman stem from an unauthorized grade changing practice that was implemented by one of the guidance counselors at Fort Lee High School. Respondent denied the charges as alleged.

The ALJ found that: there is no evidence that Berman had any knowledge of the illegal grade changing practice in the guidance department of the high school, as the supervisor of guidance had authority over the guidance counselors, and did not report to the principal; the petitioning Board bears the burden of proving the tenure charges brought against respondent by a preponderance of the competent and credible evidence; and because the tenure charges were not proven, the Board's action in withholding Berman's increment was arbitrary and capricious. Accordingly, the ALJ ordered that all tenure charges brought against respondent be dismissed, and that Berman be paid all back pay and benefits due to him.

Upon a comprehensive and independent review of the record, the Commissioner concurred with the ALJ that the Board had not established that the respondent is guilty of the tenure charges, but found that the ALJ erroneously determined that the Board's failure to prove the tenure charges likewise meant that its decision to withhold the respondent's increment was arbitrary and capricious. The Commissioner found that the decision to withhold an increment does not require a showing sufficient to justify suspension or the revocation of a teacher's tenure, and – once the Board discovered the grade changing scandal – it was reasonable to withhold respondent's increment. Accordingly, the Commissioner dismissed the tenure charges, but affirmed the withholding of respondent's increment.

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.
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November 15, 2010

OAL DKT. NOS. EDU 13226-09, EDU 13559-09 (CONSOLIDATED)
AGENCY DKT. NOS. 271-10/09, 321-11/09

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the Board and the respondent's reply exceptions.

The petitioning school district brought charges against tenured principal Jay Berman alleging unbecoming conduct, violation of policy and procedure, insubordination, gross negligence and other just cause for dismissal under *N.J.S.A. 18A:6-10 et seq.* The Board included various conduct violations in the tenure charges, but the bulk of the charges stem from an unauthorized grade changing practice that was implemented by one of the High School guidance counselors. The Board also withheld respondent's increment for the 2009-2010 school year based upon the conduct alleged in the tenure charges, and the respondent's appeal of such

was consolidated with the tenure case. In her Initial Decision, the Administrative Law Judge (ALJ) found that the Board did not prove the tenure charges by a preponderance of the credible evidence, and therefore dismissed the tenure charges. The ALJ also found that since the Board did not prove the tenure charges, the withholding of the respondent's increment was arbitrary and capricious.

The Board submitted exceptions to support the contention that the ALJ erroneously found that the Board did not prove the tenure charges against the respondent. The Board contends that a building principal has a supervisory responsibility over all aspects of the High School from administration to instruction to maintenance, and as such respondent was ultimately responsible for the grade changing that was occurring in the guidance department. The Board alleges that respondent was disassociated from the guidance department, so much so that the criminal activity was taking place for years without his knowledge. In its exceptions, the Board argues that without any evidence in the record, the ALJ wrongfully created excuses for the respondent's failure to supervise the guidance department, and the ALJ gave undue credence to respondent's testimony with respect to his involvement with the guidance department notwithstanding the fact that it conflicted with other testimony. The Board also contends that the ALJ erred by not finding that respondent's lack of activity with the guidance department was gross negligence.

In addition to the grade changing scandal, the Board argues there were several other deficiencies that the Board uncovered with respect to the respondent's failure to adequately supervise the High School. For example, graded courses and special education courses were not properly counted towards GPA's; the respondent failed to oversee and ensure the safety of the student records and his signature stamp; and the respondent improperly authorized the removal

of four students from 11th to 10th grade in order to avoid having to take the High School Proficiency Assessment exam. The Board argues that it was the respondent's modus operandi to claim he was relying on subordinates to complete certain tasks but he never instituted any safeguards or confirmed that protocols were being followed. As a result, the Board argues that it proved there was just cause for respondent's dismissal.

With respect to the increment withholding, the Board argues that the ALJ erred in simply overturning the increment withholding because she determined that the Board had not met the standard required to prove tenure charges. The Board stresses that the standard for tenure charges is a preponderance of the evidence, which is a far higher standard than that which must be applied for an increment withholding. The Board contends that it was the respondent's burden to disprove the facts that led to the decision to withhold his increment, and that the ALJ's misapplication of the increment withholding standard was legal error. Finally, the Board maintains that ample testimony was presented at the hearing that indicated the respondent's repeated failure to comply with the standard for principals as required by the District, and it was reasonable to hold the respondent accountable for the wrongdoing and criminal malfeasance occurring at the High School.

In reply to the Board's exceptions, the respondent urges the adoption of the Initial Decision asserting that the ALJ's factual and legal determinations should be left undisturbed. The respondent argues that since the increment withholding was based on the same set of facts as the tenure charges, once it was determined that the tenure charges were not proven, the increment withholding was unreasonable. The respondent notes that the increment withholding action was taken by the Board before the tenure charges were instituted and it was predicated exclusively on the grade changing scandal, and not the other alleged conduct that was

included by the Board in the tenure charges. In support of his argument that the increment withholding was arbitrary and capricious, the respondent emphasizes the ALJ's finding that there was not a shred of evidence presented to support that respondent had changed grades or had been aware it was happening.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL between March 8 and May 13, 2010, the Commissioner concurs with the ALJ – for the reasons discussed on pages 24-39 of the Initial Decision – that the Board has not established that respondent is guilty of the tenure charges. The Commissioner finds the Board's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and evidence in concluding that the record did not support the Board's charges. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. Insofar as her opinion on this issue is a credibility determination, the Commissioner may not disturb it unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *N.J.S.A. 52:14B-10C; D.L. and Z.Y., on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 N.J. Super. 269, 273 (App. Div. 2004).

Although there were other conduct violations that the Board alleged in the tenure charges, the bulk of the charges stemmed from the grade changing scandal that had been happening in the guidance department for at least six years.¹ The Commissioner is in accord with the ALJ's finding that there was no evidence that the respondent was aware of the grade changing that had been occurring in the guidance department or in any way condoned such

¹ All of the alleged conduct violations and the ALJ's findings are fully detailed in the Initial Decision.

conduct. The Board maintains that even if the respondent was not aware of the doctoring of transcripts and report cards, as the building principal he should have discovered the wrongdoings. Based on the evidence presented, the Commissioner agrees with the ALJ that it remains unclear as to what authority the respondent had over the guidance department, and that was a factor in determining whether respondent should have been more cognizant of the activities in the guidance office. There was a Director of the Guidance Department who was responsible for the day-to-day operations of the department; performed all of the staff evaluations; and was the direct supervisor of the guidance counselor who was responsible for doctoring the student transcripts and report cards. Further, the respondent did not formally supervise the Director of the Guidance Department, who instead reported directly to the Assistant Superintendent.² As a result, the notion that the respondent should have known what was transpiring within the guidance office does not rise to gross negligence or unbecoming conduct so as to justify the suspension of the respondent or the revocation of his tenure in the absence of any proof that he was involved in the misconduct.

With respect to the withholding of the respondent's increment, the Commissioner finds that the Board's decision to withhold the increment was reasonable based upon the Board's overall disapproval of respondent's level of oversight as a high school principal, and the unacceptable conduct that was occurring in the guidance department. Pursuant to *N.J.S.A. 18A:29-14*, a local board of education may withhold an employee's salary increment for inefficiency or other good cause. *Probst v. Board of Educ. of the Borough of Haddonfield*, 127 *N.J.* 518 (1992). The recommendation and decision to withhold an employee's increment is "a matter of essential managerial prerogative which has been delegated by the legislature to the

² Notably, the Director of the Guidance Department was not subject to any discipline as a result of the grading changing incidents.

board.” *Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass’n*, 79 N.J. 311, 321 (1979). A board’s exercise of its discretionary powers “may not be upset unless patently arbitrary, without rational basis or induced by improper motives.” *Kopera v. Board of Educ. of West Orange*, 60 N.J. Super. 288, 294 (App. Div. 1960) (citations omitted).

In evaluating whether the increment withholding is reasonable, the issues to be determined are: (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind their expertise. *Kopera, supra*, at 296-297. Further, when a school employee challenges a salary increment withholding, he bears the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives. *Kopera, supra*, at 297.

The ALJ erroneously determined that the Board’s failure to prove the tenure charges likewise meant that its decision to withhold the respondent’s increment was arbitrary and capricious. The ALJ’s analysis ignored the critical distinction between the respective burdens of proof. The decision to withhold an increment does not require a showing sufficient to justify suspension or the revocation of a teacher’s tenure. “To do so would convert an increment withholding action into a tenure case, and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-14.” *Reilly v. Parsippany-Troy Hills Twp. Bd. of Educ.*, 1989 S.L.D. 1830, 1843 (citations omitted).

The underlying facts related to the grade changing scandal are undisputed. While the respondent was the principal of the High School, illegal activity was occurring in the guidance department for several years which included unauthorized grade changes on student

transcripts and report cards that were submitted to colleges. Therefore, the remaining question is whether the Board's decision to withhold the respondent's increment was reasonable based on what was happening in the guidance office. Unlike with the tenure charges, the Board did not have the burden of proving the increment withholding was reasonable, but rather it was the respondent's burden of proving that the Board's action was unreasonable.

Once the Board discovered the grade changing scandal, the Commissioner finds that it was reasonable for the Board to withhold the respondent's increment. Although it is not expected that the respondent review each and every transcript that is sent to the colleges, there is a level of accountability that must attach to the fact that it was respondent's signature stamp that was used to certify the transcripts. Moreover this was not an isolated incident in which the guidance counselor altered one transcript; this was a pattern of conduct that was on-going for approximately six years. The building principal has the overall responsibility of ensuring that the high school is running properly, and that the Board policies and procedures are being satisfactorily implemented. As discussed *supra*, there was no evidence that the respondent was aware of or condoned this behavior, or that he was in fact the direct supervisor of the wayward guidance counselor, but that does not mean the respondent should be totally absolved of any responsibility whatsoever. It was reasonable for the Board to assess a degree of accountability to the respondent in the form of an increment withholding, which is not a matter of right but rather "a reward for meritorious service to the school district." *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 N.J. 587, 593-594 (1984).

The Initial Decision is modified in that the Board's decision to withhold respondent's increment is affirmed. The Initial Decision of the OAL is adopted as to the ALJ's

finding that the Board did not prove the tenure charges by a preponderance of the credible evidence. Accordingly, the tenure charges are hereby dismissed.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 15, 2010

Date of Mailing: November 15, 2010

³ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.