School News Briefs

July 2008 Vol. 38, No. 7

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APPELLATE DIVISION DECISION

Teacher's Certificates Revoked for Exchanging Inappropriate Notes with Student

In the Matter of the Revocation of the Teaching Certificates of Michael Nieves by the State Board of Examiners, Dkt. No. A-2627-06T3 (April 7, 2008) (unpublished opinion).

Michael Nieves was formerly employed by the Union City Board of Education (board) as an (nontenured) elementary language arts teacher. Nieves was also a basketball coach.

In the fall of 2002, Nieves began exchanging notes with L.V., a student in one of his classes. The note writing began because L.V. was interested in one of the players that Nieves coached. They exchanged notes every other day for a short period of time and usually threw them away afterwards.

The note writing was brought to the attention of school officials by a parent of a student. On February 3, 2003, the parent and student met with school officials. A number of students, including L.V., were questioned, and were asked to provide any notes from Nieves. Later that day, Nieves and L.V. exchanged notes. The following is the content of the notes:

> [Nieves]: What are you doing during the week we are off from school?
>
> [L.V.]: I don't know, why?
>
> [Nieves]: It might be a good time to get together during the day without anyone knowing!
>
> [L.V.] I don't have plans because my mom[']s getting operated.
>
> [Nieves]: What[']s wrong?
>
> [L.V.]: Something about her eyes.
>
> [Nieves]: I hope everything works out. Do you want to get together over the break? or [sic] are you just talk?
>
> [L.V.]: What do you mean?
>
> [Nieves]: Hang out! Duh
>
> L.V. gave the notes to another classmate, who in turn, gave it to the principal.

Nieves characterized the notes as friendly and joking in nature. L.V. also agreed initially that the notes were just for fun. However, L.V. said that Nieves wrote in one note that "I'll make your body tingle." Nieves denied ever writing such a note, and as for the note exchange on February 3, 2003, Nieves explained that it was kidding around.

On February 23, 2003, the board terminated Nieves's employment. The Union City Education Association (association) filed a grievance challenging his termination. On July 12, 2003, the arbitrator hearing the grievance concluded that the board established just cause for Nieves's removal. The board then notified the State Board of Examiners (SBE) of Nieves's dismissal.

On March 5, 2004, the SBE issued an order to show cause as to why Nieves's teaching certificates should not be suspended or revoked. Three days of testimony were heard by an administrative law judge (ALJ). On November 10, 2005, the ALJ issued an initial decision finding that Nieves had engaged in unbecoming conduct and recommended the revocation of his certificates.

On January 19, 2006, the SBE accepted the ALJ's findings and recommendation, and entered an order revoking Nieves's certificates. Nieves then filed an appeal to the State Board of Education which affirmed the SBE's decision. Nieves then appealed to the Appellate Division.

On appeal, Nieves argued, among other things, that revocation was not warranted, that there was conflicting testimony, and that the SBE failed to meet the burden of proof. The Appellate Division rejected these arguments as without merit. The court commented that Nieves admitted that he authored the February 3, 2003 notes which were clearly inappropriate and left no doubt that he engaged in unbecoming conduct. With respect to the penalty, the court stated that one incident, if sufficiently flagrant, may warrant revocation. In such matters, the court must defer to the administrative agency's decision where it is supported by the record and is not arbitrary, capricious or unreasonable. Therefore, the court affirmed the State Board's decision.

COMMISSIONER DECISIONS

Superintendent Suspended for Six Months Without Pay for Abusing His Position in Directing Staff to Carry over Vacation Days and for Converting Unused Personal Days to Sick Leave in Violation of His Contract

In the Matter of the Tenure Hearing of Dr. David L. Witmer, School District of the Township of Middletown, Monmouth County, C. #493-07 (December 24, 2007) [OAL decision by Joseph F. Martone, ALJ].

Dr. David L. Witmer was appointed by the board in 2003 as its superintendent of schools under an employment contract that ended June 30, 2008. His employment contract provided for 20 vacation days annually, allowed for up to 10 unused days to be carried over into the next year, and provided for payment of his unused vacation days (upon his retirement or separation from employment). The contract also contained the following provision regarding the use of vacation leave:

> It is the Superintendent's responsibility to schedule vacation with the Board. In the event the Superintendent is planning a vacation of five (5) or more consecutive school days, he shall advise the Board at least two weeks in advance, except in the case of emergency. In the event of vacation of less than five (5) school days, the Superintendent will advise the Board President. The Superintendent shall not take more than fifteen (15) consecutive working days of vacation time without the advance approval of the Board.

The contract also provided Witmer with four personal days per year, and provided for the payment of unused sick leave (upon retirement or separation from employment). On June 30, 2004, Witmer's contract was amended to provide that he may carry-over from year-to-year up to 20 unused vacation days.

On February 7, 2006, the board certified to the Commissioner five tenure charges against Witmer. Charge one alleged that Witmer engaged in unbecoming conduct when he intentionally failed to report two vacation days he took in December 2005. Charge two alleged that he engaged in unbecoming conduct when he misdirected his vacation time by attempting to carry over 20 more vacation days than authorized by his employment contract. Charge three alleged that he engaged in unbecoming conduct when he misdirected personal days by attempting to transfer seven personal days into his sick leave account, despite the fact that it was not permitted by his contract. Charge four alleged that he engaged in unbecoming conduct by abusing his authority in directing staff to confer benefits to him which were unauthorized. Lastly, charge five alleged that he engaged in unbecoming conduct by making knowing misrepresentations to the board.

At the hearing before the administrative law judge (ALJ), the board presented testimony from eight witnesses. Among the witnesses were the business administrator, the personnel director's confidential secretary, and one of the board's attorneys. The confidential secretary testified that she maintained the computer database known as System 3000 which tracked the usage of leave time. In July or August 2005, Witmer directed her to carry over 40 vacation days on his account, even though his amended contract limited the carryover to 20 days. In addition, Witmer directed her to convert his unused personal days into sick days even though his contract was silent on this issue; the first directive came by email dated June 14, 2004 in which he directed staff to transfer three unused personal days into his sick leave account, and the second by memo dated June 29, 2005, which directed staff to transfer four unused personal days to his sick leave account. The confidential secretary subsequently spoke to an assistant superintendent about Witmer's directives. Nevertheless, his directives were complied with since he was the superintendent. They then sought the advice of the board attorney.

The business administrator testified that Witmer was required to give advance notice to the board of his use of vacation days. He and the confidential secretary testified that, in December 2005, Witmer did not list the use of vacation days on December 27 and 28 for a trip to Hawaii. Those vacation days were not accounted for until tenure charges were served on him in January 2006. However, the business administrator admitted that Witmer's regular update to the board indicated that he would be leaving for Hawaii on Christmas day and returning New Year's day. The business administrator also admitted that the contract does not specify how much advance notice of vacation leave must be given for less than five days vacation. There was also a discrepancy with respect to two vacation days taken by Witmer in December 2004, for which he did not account.

The business administrator testified that Witmer was asked about the status of litigation at a board meeting; Witmer stated that the assistant superintendent was handling those matters. Witmer provided a report to the board after that meeting but failed to mention that certain attachments to his report were not original documents and had been altered. The board president also testified about this issue. She stated that Witmer was questioned in closed session about depositions that took place earlier that day and about an investigation that led to the dismissal of a teacher. Witmer denied knowledge of those situations, and stated that he would need to obtain information from the assistant superintendent. She testified that an attachment to his report from the assistant superintendent had been altered by Witmer. It was later learned that Witmer had knowledge of the litigation and the investigation, and that the board believed he misrepresented his lack of knowledge and was not honest with them.

The assistant superintendent testified that he kept Witmer informed of the litigation and of the investigation of the guidance counselor. In fact, Witmer wrote the memo to the teacher to terminate her services, and the assistant superintendent gave Witmer a memo about the litigation.

Witmer was the sole witness to testify in his defense. At the time of his appointment by the board, he negotiated his employment contract with the board attorney, Malachi Kenney, Esquire. Witmer was not represented by an attorney. He never discussed vacation time, personal days or the pro-rating of leave. There was no mention in the contract about any maximum carry-over of days or notifying the personnel office when he was absent.

Witmer testified that the contract provided him with 20 vacation days, and in June 2004, it was amended to permit him to carry 40 vacation days into his vacation bank. He testified that he always informed the board president of his use of vacation days and gave regular updates to the board to keep them informed. In December 2005, he informed the board of his Christmas vacation in closed session, and when he returned, he completed an absence form. Furthermore, it was his belief, based on his contract amendment, that he could have 40 vacation days in the bank plus an additional current 20 days. With respect to the conversion of personal days to sick leave, he testified that his confidential secretary told him he could do so; he denied that he intimidated anyone and denied knowing that this was contrary to the contract.

With regard to the charge that he deceived the board, Witmer testified that he was asked about a deposition that had occurred the morning on December 19, 2005, the same day as the board meeting, and about all outstanding litigation against the district. He told the board that the assistant superintendent and board attorney have the information about all litigation, and that the assistant superintendent was involved with the deposition. He gave the board a brief summary of information and denied that he misrepresented anything to them. He acknowledged removing sections of the assistant superintendent's memo from his report to the board because those sections were not related to questions that were asked, and because they contained statements which were critical of others.

Based on the testimony and evidence presented, the ALJ found that Witmer violated the employment contract by failing to notify the board president that he would be absent and take vacation on December 27 and 28, 2005. The ALJ found that Witmer violated the contract by directing the transfer of all of his unused vacation days to the next school year. The ALJ found that there was no basis for Witmer to interpret the contract in such a way as to permit him to carry 40 vacation days in his bank plus another 20 current vacation days, for a total of 60 days. The ALJ found that Witmer's directives to transfer seven personal days to his sick leave account violated the contract and were done without the knowledge or consent of the board. On the other hand, the ALJ found that there was no evidence to establish that Witmer was untruthful to the board when he advised that he had no knowledge of the depositions on December 19, 2005, since he was not present at them. The ALJ also found that he did not commit any acts of dishonesty by presenting altered versions of the assistant superintendent's memo to the board. However, the ALJ found that Witmer was fully familiar with the investigation leading to the termination of a teacher, and did not respond truthfully when questioned by the board.

With respect to charge one, the ALJ found that Witmer's failure to provide advance notice to the board president for the two vacation days he took in December 2005 did not rise to the level of unbecoming conduct because he obtained no benefit through the violation and subsequently reported his absence and was charged with two days vacation. In regard to charges two and three, Witmer did attempt to confer unauthorized benefits on himself through the carry over of unauthorized vacation days and conversion of personal days to sick leave. Although he never received payment for these unauthorized days, his action in attempting to obtain something of value to which he was not entitled amounted to unbecoming conduct.

With respect to charge four, which alleged abuse of his authority, the ALJ did not believe that sending written directives to staff for

unauthorized benefits was sufficient to rise to unbecoming conduct, and that an element of intimidation, coercion or improper influence was necessary; no such evidence was presented. Lastly, the ALJ found that Dr. Witmer's lack of truthfulness to the board regarding the investigation of the teacher was unbecoming conduct. Based on these conclusions, the ALJ recommended a six-month suspension from duty without pay.

The Commissioner adopted the ALJ's initial decision with modification. The Commissioner concurred that the board established by a preponderance of the credible evidence that Witmer was guilty of unbecoming conduct on charges two, three and five. With respect to charge four, the Commissioner rejected the ALJ's conclusion that the board failed to sustain its burden of proving unbecoming conduct. The Commissioner found that due to the disparate balance of power between Witmer and his staff, that the requirement of intimidation, undue influence or coercion was inherently satisfied. The Commissioner commented that as the chief school administrator, Witmer had the authority to recommend the hiring, renewal, nonrenewal, transfer or termination of every employee, and that directives from him must be received with recognition of the enormous power he possesses. Therefore, the Commissioner found him guilty of unbecoming conduct on four of the five charges.

As to the proper penalty, the Commissioner was mindful that, as superintendent of schools, Witmer

> is held to a standard of behavior unequaled by any other school employee, being required at all times to act with the utmost integrity, good judgment, and self-restraint.

The Commissioner concluded that although Witmer's conduct was extremely serious and evidenced impaired judgment and a total lack of professionalism, it did not warrant his dismissal. Thus, the Commissioner concurred with the ALJ that Witmer should suffer a six-month suspension without pay.

Former Board Member Censured for Confronting Superintendent Following Board Meeting at Which the Superintendent's Salary Increase Was Approved

In the Matter of Ethylene Grimsley, Roselle Board of Education, Union County, C. #79-08 SEC (February 19, 2008) [No OAL decision].

On March 1, 2004, Ethylene Grimsley was a member of the board, and Darlene Roberto was the superintendent of schools. On that date, the board held a meeting at which it approved a merit salary increase for Roberto. Grimsley was not in favor of granting the salary increase.

Following the board meeting, Roberto, Grimsley, and her fellow board members exited the school building to the parking lot. In the parking lot, a heated exchange occurred between Roberto and Grimsley about Roberto's employment contract. Grimsley accused Roberto of lying. When Roberto tried to get into her car to leave, Grimsley slammed her car door shut and prevented Roberto from getting in. Because of her aggressiveness, another female board member stepped in between them, but Grimsley pushed her aside at least two times to try to confront Roberto. Two other board members then rushed over to physically block Grimsley from confronting Roberto. Eventually, Roberto was able to get into her car and drive away. As she did, Grimsley yelled to Roberto that she was lucky that she did not tell everyone that Roberto was drunk at the convention; Roberto replied back that she did not tell everyone that Grimsley embezzled school funds. Grimsley then threw a bottle of water at Roberto's car but missed.

On April 5, 2004, board member, Anthony Esposito, who was present at the March 1st incident, filed a complaint with the School Ethics Commission (SEC) alleging that Grimsley violated *N.J.S.A.* 18A:12-24.1(e) and (i) of the Code of Ethics for School Board Members. It was learned that Roberto filed assault charges against Grimsley in municipal court, and the SEC held the case in abeyance pending the outcome of the municipal court case. Eventually, the municipal court case was resolved, and the SEC held a hearing on Esposito's complaint.

At the hearing, Esposito testified and also presented sworn statements from Roberto, and five other board members which were given to the police. Grimsley did not testify and, in fact, she was no longer a member of the board. In her answer, however, she denied that she violated the Code of Ethics.

Based on Esposito's testimony and the sworn statements, the SEC found that Grimsley and the superintendent exchanged words in the parking lot following the meeting concerning the superintendent's employment contract. When the superintendent attempted to get into her car, Grimsley threw down the papers in her hand and slammed the superintendent's car door shut and blocked her from getting in. Other board members had to prevent Grimsley from assaulting the superintendent, and when the superintendent was driving away, Grimsley yelled that she was drunk at a convention.

The SEC found that Grimsley violated *N.J.S.A.* 18A:12-24.1(e) which states: "I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board." The SEC explained that once the board vote was taken to approve the superintendent's merit increase, it was inappropriate for Grimsley to unilaterally engage in any further discussion with the superintendent. Morever, Grimsley's physical intervention between the superintendent and her car, pushing aside another board member, and Grimsley's parting words to the superintendent as she drove away "constituted private action *significantly* beyond the scope of her duties as a [b]oard member." (Emphasis in original). The SEC found that Grimsley's actions compromised the board because the superintendent reported that she feared for her safety and was afraid to stay at work past 4:00 p.m. In addition, Esposito testified that he believed the incident "altered the momentum of the district."

The SEC also found that Grimsley's conduct violated *N.J.S.A.* 18A:12-24.1(i) which requires a board member to support and protect school personnel in the proper performance of their duties. The SEC found that Grimsley's physical conduct in preventing the superintendent from getting into her car, pushing a fellow board member, along with the accusations that the superintendent was drunk at a convention demonstrate "an aggression that is completely antithetical to her duty as a [b]oard member." Since Grimsley was no longer a member of the board and could not be suspended or removed, the SEC recommended that the Commissioner impose censure as a sanction.

The Commissioner explained that her role was limited to deciding the appropriate penalty, and that she could not review the SEC's determination regarding whether a violation of the School Ethics Act occurred. Based on a review of the entire record, the Commissioner determined to accept the SEC's recommended penalty. Therefore, the Commissioner ordered that Grimsley be censured.

Board Member Censured for Attempting to Review Resumes of Job Applicants Which Were Locked in Administrator's Office

In the Matter of Marlene Polinik, Board of Education of the Township of Wayne, Passaic County, C. #112-08 SEC (March 10, 2008) [No OAL decision].

On August 18, 2006, five members of the Wayne Board of Education (board) filed a complaint with the School Ethics Commission (SEC) alleging that fellow board member, Marlene Polinik, violated the School Ethics Act. Among the charges that they asserted was that Polinik violated *N.J.S.A.* 18A:12-24.1(c), (d), (e), (h) and (i) by going to the board office on July 28, 2006 to review resumes of candidates who applied for a vacant position.

On February 27, 2007, the SEC heard testimony of two of the complaining board members and three witnesses they subpoenaed –the board attorney, the superintendent of schools, and the board president. The SEC also heard testimony from Polinik, and two witnesses she called–a fellow board member named Jane Hutchison, and the assistant superintendent for curriculum and instruction.

Based on the testimony and evidence submitted, the SEC found that on July 28, 2006, Polinik and Hutchison went to the board office, without prior notice to the administration, to review resumes of job applicants. At that point, the superintendent had not made any recommendation regarding the final candidate, but had circulated a memo to the board in which she indicated that a preliminary review had been completed, and that she would probably recommend a candidate at the board meeting on August 24, 2006. The SEC found that Polinik believed that by July 28th, the superintendent had finalized her recommendation because a final candidate was to be presented to the board for a "meet and greet" on August 17th.

Neither the superintendent nor the administrators in charge of human resources were in the office on July 28, 2006. Polinik went directly to the office of the assistant superintendent for curriculum and instruction, who told Polinik she would call the superintendent. Meanwhile, Hutchison waited for Polinik at the personnel office. Polinik then went to the personnel office and told the secretary that she and Hutchison were there to review resumes. The secretary gave Polinik some resumes to review; the assistant superintendent for curriculum and instruction then came to the personnel office.

The SEC then found that Polinik asked the secretary for the rest of the resumes, and she was told that they were locked in the office of the assistant superintendent for administration and supervision, who was not in the office at that time. Polinik then asked the secretary for a key, causing the secretary to feel pressured. The secretary told her that she did not have a key but a custodian might. Polinik then found the custodians eating lunch and they told her that they had a key. Polinik then told the assistant superintendent for curriculum and instruction that the custodians had a key. However, the assistant superintendent for curriculum and instruction was not comfortable going into the locked office. The board president then came and spoke with Polinik and Hutchison in a conference room, and a heated argument erupted. They then contacted the superintendent by telephone who suggested that they contact the board attorney. The board attorney told them that they could not go into a locked office and in the future they should give 24 hours notice prior to reviewing resumes.

Based on the testimony and evidence presented, the SEC concluded that Polinik violated *N.J.S.A.* 18A:12-24.1(c) because she failed to confine her board action to policy making, planning and appraisal. The SEC noted that when Polinik went to the board office, without prior notice, she was accompanied by another board member; she went as a board member to review resumes, and not as a community member or parent. Thus, Polinik took "board action" when she went to the office to review resumes. Further, Polinik's actions went beyond the appraisal of candidate's resumes since she attempted to gain access to resumes in a locked office. The SEC questioned why Polinik could not wait another day to review those resumes. Based on a review of the evidence, the SEC recommended that the Commissioner impose censure as a penalty.

The Commissioner was persuaded that Polinik's conduct went beyond a simple request for information from a secretary. The Commissioner found that Polinik disregarded administrators and the secretary, and engaged in an argument with the board president in her "zeal" to unilaterally pursue the locked-up resumes. Based on this evidence, the Commissioner adopted the SEC's recommended penalty and directed that Polinik be censured.

STATE BOARD OF EXAMINERS DECISION

Teacher's Instructional Certificate Revoked for Knowingly Breaching GEPA Test Security Procedures

In the Matter of the Certificates of Aikaterini Karis, Dkt. No. 0607-111 (January 17, 2008) [OAL decision by Jesse H. Strauss, ALJ].

In March 2006, Aikaterini Karis was employed as an eighth grade language arts teacher in the Wharton School District (district). On March 7, 2006, Karis attended a mandatory proctor training session at which security procedures for the administration of the Grade Eight Proficiency Assessment (GEPA) were discussed. At that training session, she signed a document entitled "Security Procedures" which indicated that items in the test could not be disclosed before, during, or after the administration of the test.

The GEPA was administered in the district on March 13, 14 and 15, 2006. On March 14th, Karis looked inside one of the test booklets and learned that a picture prompt including a man and a mailbox would appear in the language arts literacy portion of the test to be given on the 15th. The afternoon of the 14th, Karis told her students that there might be a picture prompt involving an element of surprise such as getting something in a mailbox. She then had her students write a story with an element of surprise such as getting something exciting in the mail.

Because of Karis's breach of test security, the district was directed by the Office of Evaluation and Assessment in the Department of Education (DOE) not to administer the second part of the language arts literacy test. The district was then required to re-test 95 students in language arts literacy at a cost of $4,680.

The Office of Compliance Investigation (OCI) in the DOE forwarded information about Karis's breach of test security to the State Board of Examiners (SBE). Based on that information, the SBE issued an Order to Show Cause to Karis as to why her certificates should not be revoked or suspended. Karis filed an

answer which indicated that there was no basis to suspend or revoke her certificates. The SBE then transferred the case to the Office of Administrative Law.

Before the administrative law judge (ALJ), Karis stipulated that she had breached test security. Therefore, the only issue before him was the penalty to be imposed. Karis testified that she held two masters degrees and intended to obtain a doctorate. She taught for two years in Englewood and worked in the district for four academic years, and achieved tenure in the 2005-06 school year. She was highly rated in the district and was never disciplined. She testified that the breach of security was a spontaneous exercise of poor judgment; she resigned her position in August 2006, and has not sought another public school district job because she did not want to cause a disruption while the case before the SBE was pending. She expressed sincere remorse for what she had done and desired to resume her teaching career.

The ALJ found just cause to take action against Karis's certificates based on the breach of test security, and a knowing breach of test security constitutes unbecoming conduct. With respect to the proper penalty, the ALJ found that there was no evidence of previous infractions by Karis and she was a superlative teacher. The ALJ found that Karis had already suffered from a self-imposed suspension of over one year since her resignation. Therefore, he recommended that her certificate be suspended until June 30, 2008 so as to express disapproval of her conduct and preserve the integrity of test security procedures.

After consideration of the information in the record, the SBE rejected the ALJ's recommended penalty. The SBE agreed with the ALJ that there was no doubt that Karis had engaged in unbecoming conduct. However, it found that Karis's actions in violating known security procedures and sharing improperly obtained information with her students were inexcusable. Therefore, the SBE ordered that Karis's certificates be revoked.

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