

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2452-11T4

IN THE MATTER OF THE TENURE  
HEARING OF JENNIFER  
O'BRIEN, STATE OPERATED  
SCHOOL DISTRICT OF THE CITY  
OF PATERSON, PASSAIC COUNTY.

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Submitted December 18, 2012 – Decided January 11, 2013

Before Judges Yannotti and Harris.

On appeal from the New Jersey Commissioner  
of Education, Docket No. 108-5/11.

Oxford Cohen, PC, attorneys for appellant  
Jennifer O'Brien (Nancy I. Oxford, of  
counsel and on the brief).

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Operated School District of the City of  
Paterson (Mr. Murray and Mr. McDonald, of  
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Jeffrey S. Chiesa, Attorney General,  
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Commissioner of Education (Beth N. Shore,  
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lieu of brief).

PER CURIAM

Jennifer O'Brien (O'Brien) appeals from a final  
determination of the Acting Commissioner of Education, which

upheld her dismissal from her teaching position in the City of Paterson's school district. We affirm.

O'Brien has been employed as a teacher in the Paterson schools since March 1998. She has a master's degree in education, and certifications as an elementary school teacher and supervisor. Prior to the 2010-2011 school year, O'Brien had been assigned to School No. 29 as a technology coordinator.

At the start of the 2010-2011 school year, O'Brien thought she would be teaching kindergarten at School No. 29. However, she was transferred to School No. 21. O'Brien was initially assigned to teach the fifth grade at that school. In December 2010, O'Brien was assigned to teach the first grade.

There are about seven hundred students in the school, and the student body is almost entirely comprised of minority students, including African-Americans and Latinos. There were twenty-three students in O'Brien's first-grade class. Almost all were six years old. All were either Latino or African-American.

On March 28, 2011, O'Brien posted two statements on Facebook, an internet social-networking site. The first statement was, "I'm not a teacher - I'm a warden for future criminals!" The second statement was, "They had a scared straight program in school - why couldn't [I] bring [first] graders?"

The following day, Frank Puglise (Puglise), the principal of School No. 21, received an electronic-mail message from Carlos Ortiz (Ortiz), the principal at School No. 29, where O'Brien had previously worked. Ortiz forwarded O'Brien's Facebook postings to Puglise and asked if "there is anything we can do about this." Ortiz said that he was "appalled" by O'Brien's statements. Puglise looked into the matter and consulted Luis Rojas, the district's Director of Labor Relations. Rojas obtained a copy of O'Brien's Facebook page.

On March 30, 2011, Puglise confronted O'Brien about the postings. According to Puglise, O'Brien insisted that she did not intend her comments to be offensive, but she was otherwise unrepentant. O'Brien was suspended with pay, pending a complete investigation.

News of O'Brien's Facebook postings spread quickly throughout the district. On the morning of March 30, 2011, two angry parents went to Puglise's office to express their outrage. One parent threatened to remove her child from the school. According to Puglise, the school received at least a dozen irate phone calls. At the end of the day, there was a protest outside the school, attended by twenty to twenty-five persons.

The following day, reporters and camera crews from major news organizations descended upon the school and remained there

until late in the afternoon. A larger than usual crowd attended the Home-School Council meeting that evening, and the meeting was principally devoted to the Facebook postings. Parents expressed their outrage concerning the postings, and Puglise reassured the attendees that O'Brien had been removed from the classroom.

On April 14, 2011, the deputy superintendent of schools filed a complaint against O'Brien, charging her with conduct unbecoming a teacher. On May 5, 2011, the district superintendent determined that there was probable cause to support the charges, and if established, were sufficient to warrant O'Brien's removal. O'Brien was suspended without pay, effective May 5, 2011.

The charges were filed with the Commissioner of Education on May 6, 2011. O'Brien answered the charges on May 16, 2011, and the matter was referred to the Office Of Administrative Law for a hearing before an Administrative Law Judge (ALJ).

At the hearing, O'Brien testified that she opened her Facebook page in 2006, and had about three hundred "friends," including family members, friends from high school, friends in the school and district, and what she called "friends of friends." O'Brien said she posted the statement that her students were "future criminals" because of their behaviors, not

because of their race or ethnicity. She stated that six or seven of her students had behavioral problems, which had an adverse impact on the classroom environment.

O'Brien testified that one student had struck her the week before she posted her statements. Other students had stolen from her and other students, and some students hit each other. O'Brien stated that she had sent disciplinary referrals to the school administrators on several occasions, but she thought the referrals had not been addressed adequately. O'Brien said that she never thought all of her students were "future criminals."

O'Brien also testified that a "Scared Straight" program had taken place in her school on the date she posted her statements on Facebook. According to Puglise, the program was designed to deter criminal behavior by having persons convicted of crimes meet with students to describe their experiences in prison. The program was designed for students in grades six and above. O'Brien sat in the program briefly.

She stated that she merely intended to point out that children who misbehaved in her classes should pay the consequences. She said that she was not really advocating a "Scared Straight" program for her students. She explained that she was merely "speaking out of frustration for [her students'] behavior that day." O'Brien said that she was surprised by the

reaction to her postings, and did not anticipate that they would be interpreted as racist.

O'Brien said that she had apologized to Puglise for her posted remarks, although he had testified that she had not done so. O'Brien insisted that she told Puglise that she was sorry her Facebook postings had caused so much trouble.

On October 31, 2011, the ALJ issued her initial decision. The ALJ rejected O'Brien's contention that her comments were protected by the First Amendment to the United States Constitution. The ALJ wrote that O'Brien's remarks were not addressing a matter of public concern, but were "a personal expression" of dissatisfaction with her job.

The ALJ also wrote that, even if O'Brien's comments were on a matter of public concern, her right to express her views was outweighed by the district's need to operate its schools efficiently. The ALJ stated that:

An internet social-networking site such as Facebook is a questionable place to begin an earnest conversation about an important school issue such as classroom discipline. More to the point, a description of first-grade children as criminals with their teacher as their warden is intemperate and vituperative. It becomes impossible for parents to cooperate with or have faith in a teacher who insults their children and trivializes legitimate educational concerns on the internet.

The ALJ added that, while First Amendment protections do not generally rise or fall on the public reactions to a person's statements, "in a public school setting thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools."

The ALJ found that evidence supported the charges of conduct unbecoming a teacher. The ALJ determined that the evidence established that O'Brien failed to maintain a safe, caring, nurturing, educational environment, as alleged in the first charge. The ALJ additionally determined that O'Brien breached her duty as a professional teacher, as alleged in the second charge. In addition, the ALJ found that O'Brien's conduct endangered the mental well-being of the students, as claimed in the fifth charge.

The ALJ also determined O'Brien's actions warranted her removal, although her prior record was unblemished and she had argued she should not be unduly penalized for "a momentary lapse in judgment." The ALJ stated that, while this argument had appeal, it was not persuasive. The ALJ wrote,

If this was an aberrational lapse in judgment, a reaction to an unusually bad day, I would have expected to have heard more genuine and passionate contrition in O'Brien's testimony. I needed to hear that she was terribly sorry she had insulted her young students; that she loved being their teacher; and that she wanted desperately to

return to the classroom. I heard nothing of the sort. Rather, I came away with the impression that O'Brien remained somewhat befuddled by the commotion she had created, and that while she continued to maintain that her conduct was not inappropriate, she was sorry others thought differently.

The ALJ observed that, with some sensitivity training, and after some time to "reflect," O'Brien might successfully return to the classroom. The ALJ concluded, however, that O'Brien's relationship with the Paterson school community had been irreparably damaged, "not because the community thinks so, but because O'Brien fails to understand why it does." The ALJ ordered O'Brien's removal from her tenured position.

O'Brien thereafter filed exceptions to the ALJ's decision with the Acting Commissioner. The district urged the Acting Commissioner to accept the ALJ's decision in its entirety. The Acting Commissioner issued a final decision dated December 12, 2011, in which adopted the ALJ's decision for the reasons stated therein. The Acting Commissioner concluded that O'Brien's Facebook postings were not constitutionally protected; the evidence established that O'Brien engaged in conduct unbecoming a teacher; and removal was the appropriate penalty. This appeal followed.

O'Brien raised the following arguments for our consideration: (1) the ALJ and the Commissioner erred by



rejecting her constitutional claim; (2) the tenure charges were not supported by the evidence and should have been dismissed; (3) her removal was not the appropriate penalty. We are satisfied from our review of the record that O'Brien's arguments are without merit.

We accordingly affirm the Acting Commissioner's final determination substantially for the reasons stated by the ALJ and the Acting Commissioner in their decisions. R. 2:11-3(e)(1)(A) and (E). We add the following comments.

The scope of our review in an appeal from a final decision of an administrative agency is limited. Circus Liquors, Inc. v. Twp. of Middletown, 199 N.J. 1, 9 (2009). We must sustain the agency's action in the absence of a "'clear showing' that it is arbitrary, capricious, or unreasonable" or "lacks fair support in the record[.]" Ibid. In reviewing an agency's action, we consider whether: (1) the agency's action is in accordance with the applicable law; (2) there is sufficient credible evidence in the record to support the agency's factual findings; and (3) whether the agency clearly erred in reaching a conclusion that could not have been reasonably made upon consideration of the relevant factors. Id. at 10 (citing Mazza v. Bd. of Trustees, 143 N.J. 22, 25 (1995)). In reviewing the final determination of an administrative agency, we must acknowledge, when appropriate,

an agency's "'expertise and superior knowledge of a particular field.'" Ibid. (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)).

O'Brien argues that her Facebook postings are protected by the First Amendment to the United States Constitution and, therefore, she could not be disciplined or discharged for having posted those statements. We cannot agree.

To determine whether a public employee's statements are protected by the First Amendment, we balance the employee's interest "'as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Karins v. City of Atlantic City, 152 N.J. 532, 549 (1998) (quoting Pickering v. Bd. of Ed., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811, 817 (1968)).

Here, O'Brien claimed that her statements were addressed to a matter of genuine public concern, specifically student behavior in the classroom. The ALJ and Commissioner found, however, that O'Brien was not endeavoring to comment on a matter of public interest, that is, the behavior of students in school but was making a personal statement, driven by her dissatisfaction with her job and conduct of some of her

students. The ALJ and Acting Commissioner further found that, even if O'Brien's comments were on a matter of public concern, her right to express those comments was outweighed by the district's interest in the efficient operation of its schools. There is sufficient credible evidence in the record to support these findings. Therefore, O'Brien failed to establish that her Facebook postings were protected speech under the Pickering balancing test.

O'Brien additionally argues that there was insufficient evidence to support the ALJ's and the Acting Commissioner's finding that she engaged in conduct unbecoming a tenured teacher. We do not agree. As the ALJ pointed out in her initial decision, conduct unbecoming is a term that encompasses any conduct that has a tendency to destroy public respect for government employees and confidence in the operation of public services. Id. at 554.

The ALJ found that, by posting her comments on Facebook, O'Brien "showed a disturbing lack of self-restraint, violated any notion of good behavior, and [acted in a manner that was] inimical to her role as a professional educator." The Acting Commissioner said that O'Brien's actions constituted unbecoming conduct, noting that the posting of such derogatory and demeaning comments about first-grade students showed a lack of

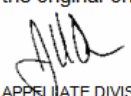
self-control, insensitivity and a lack of professionalism. We are satisfied that there is sufficient credible evidence in the record to support those findings.

O'Brien additionally argues that the penalty of removal is arbitrary, capricious and unreasonable. She argues that, assuming her comments were inappropriate, this was her "sole transgression" in an otherwise unblemished career of more than a decade. She further argues that the ALJ and Acting Commissioner erred by relying in part on the fact that she did not apologize to the community, the students or their parents. O'Brien contends that, if a penalty should be imposed, it should be minimal.

Again, we disagree. We are satisfied that, in determining the appropriate penalty, the ALJ and Acting Commissioner considered all relevant factors and reasonably concluded that the seriousness of O'Brien's conduct warranted her removal from her tenured position in the district.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION