

COMMISSIONER OF EDUCATION, State of New Jersey

IN THE MATTER OF THE PROCEEDING BETWEEN:

Board of Education, Englewood School District

hereinafter,
“Board or Petitioner”

and

Tenured Teacher James Taylor

hereinafter,
“Teacher or Employee”

Petition: Dismissal of Tenured Teacher J. Taylor,
By, Englewood Board of Education

Agency Docket No: 295-9/15

AWARD AND OPINION

Hearings held, Englewood, NJ

December 11, 2015 & March 31, 2016

Briefs received;

April 13, 2016

Date of Award:

May 20, 2016

Arbitrator Jay David Goldstein

APPEARANCES

For, Englewood Board of Education

Mark A Tabakin, Esq.,

Weiner Lesniak, LLP

For, James Taylor, Tenured Teacher

Sanford R Oxfeld, Esq.,

Oxfeld Cohen, PC

INTRODUCTION

The underlying dispute over this dismissal action arose from an incident occurring on March 25, 2015 between the Tenured Teacher [Mr. Taylor] and a student [identified herein as, “B.L.”] who attended the same school. Described in greater detail below the incident is alleged by the “Board” to have been the culminating factor in a series of preceding disciplinary events and/or corrective actions taken with this Teacher. Some disciplinary history and further proceedings are summarized here but presented in greater detail under the Background, Facts, Party Positions, below this section.

2012-2013; it was during this, “... *academic year, James Taylor (“Taylor”) was employed by the Englewood Board of Education (“Board” or “District”) as a tenured teacher of Physical Education/Health. This matter stems from tenure charges ... filed against him for Unbecoming Conduct, Incompetence, Insubordination and Other Just Cause pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq. [Board Brief]*

March 25, 2015; is the undisputed date of the incident which gave rise to the charges brought by the “Board” against the, “Teacher”. The incident involved Teacher /Taylor and a School District student, “B.L.” [Hereinafter, the, “Student”]. [Board Brief and Teacher Brief]

March 26, 2015; “...*Taylor was served with a “Rice Notice” from Interim Superintendent M. Roth.”* Also that date, “... *Interim Superintendent M. Roth authored a letter to Taylor requesting a written statement about what occurred on March 25, 2015.” [Board Brief; citing Exhibits 6 and 7]*

March 27, 2015; is the date of a, “*Memo from Principal Elbert to Interim Superintendent M. Roth describing the security video of the March 25, 2015 incident involving Taylor and B.L.* [Board Brief, referencing Exhibit B-1 and B-2; the Memo and a video, of the March 25th Incident]

March 30, 2015; is the date of, “...*the statement from Taylor to Superintendent of Schools Roth setting forth what occurred during the class period in question, i.e., what occurred during his 4th period class on March 25th* [Teacher’s Brief, citing Teacher Exhibit #1]

March 30, 2015; "...Taylor authored an email to Interim Superintendent M. Roth setting forth Taylor's written statement as to the March 25, 2015 incident with B.L." [Board Brief]

The Teacher's Brief acknowledges the same date, but with the perspective, "...the Taylor statement is dated... less than one week after the event, when what occurred was still fresh in Taylor's memory". [Teacher Brief]

July 29, 2015; Principal Peter Elbert ("Principal Elbert") executed Sworn Tenure Charges of Unbecoming Conduct, Incompetence and Insubordination against Taylor and a Sworn Statement of Evidence in Support of Charges. [Underlining added, Board Brief]

August 4, 2015; "...Board served the tenure charges and statement of evidence on Taylor." [Board Brief]

August 17, 2015; "...Taylor filed with the Board his opposition to the tenure charges" [Board Brief]

September 21, 2015; "the Board certified the tenure charges to the Commissioner of Education. [Board Brief]

September 17, 2015; "...the Board determined that there was probable cause to credit the evidence in support of the tenure charges, that said charges were sufficient, if credited, to warrant Taylor's dismissal and/or reduction in salary, and voted to certify the charges to the Commissioner of Education and suspend Taylor without pay for 120 days or until final determination of the tenure charges" [Board Brief]

September 21, 2015; "...the Board certified the tenure charges to the Commissioner of Education" [Board Brief]

December 3, 2015; pre-Hearing Conference held [Newark, NJ] with parties Counsel, and Arbitrator

December 11, 2015; first Hearing occurs as scheduled. The 'Board' presents its case-in-chief. Thereafter, discovery issues delay proceeding further that day and the matter is continued, generally.

January 18 -22 -28, 2016; 'Stipulation' (1- 8) [Joint Exhibit #2] is drafted by the Parties jointly, ostensibly intending to end discovery and other evidentiary issues. When Arbitrator seeks to clarify certain inconsistencies, several emails result in the Parties disagreeing on the meaning intended.

March 24, 2016; second set of 'Stipulations' are contained in a "MEMO", jointly executed by and between parties' counsel. Pursuant to its terms also admitted to the underlying record of this matter.

The parties agree that this document will guide the next, 'Final' Hearing. [Joint Ex. #1]

March 31, 2016; “*2nd and Final Hearing*” takes place consistent with prior scheduling, ‘Stipulations’ and, is also conducted by agreement between the parties’ Counsel and the Arbitrator, within the terms of Joint Ex. 1; [7 Stipulations].

As a result of two hearings, each side had opportunity to present written exhibits, sworn testimony, cross-examination and rebuttal. The Tenured Teacher was present during both hearings, given opportunity, but did not testify. Each Party agreed to a written closing and the terms of submission.

April 3, 2016; transcribed record of hearing is received.

April 13-19, 2016; by agreed to schedule, the Parties file their closing submissions electronically with the Arbitrator; thereafter mailing same with cited materials, to one another and the Arbitrator. After a Pre-Hearing Conference and two Hearings the record was declared closed upon receipt of the respective closing submissions / briefs. Both sides had been well represented. The representatives acknowledged the stated issue(s) to be properly before the undersigned Neutral.

April 21-22, 2016; an unsolicited and unscheduled ‘Reply Brief’ is forwarded to the Arbitrator by one side only. The opposing party responded to that act: “ *I will not be filing a reply to his initial submission as I do not believe anything other than initial submissions was either agreed upon or in fact contemplated when we spent a great deal of time going over the briefing schedule.*”

ISSUE; while the Parties did not stipulate to a legal issue *per se* they tacitly acknowledged the following questions required answering by their joint participation in these proceedings:

“Did the Board have just cause to discharge Tenured Teacher James Taylor?”

“Whether there is sufficient, credible evidence to sustain the tenure charges against Taylor and ultimately, to warrant his dismissal” [Board Brief] If not, what shall be the remedy?

May 20, 2016; decision rendered; filed with the NJ COMMISSIONER OF EDUCATION.

BACKGROUND, FACTS and PARTY POSITIONS

By way of summary background the Board of Education maintains that, “*21. Taylor’s employment with the Board is replete with instances of aggressive interactions with children, for which he was disciplined. Neither Taylor nor the Englewood Teacher’s Association contested any of the previous disciplinary actions taken. Not only were Taylor’s salary increments withheld for the 2011-2012 academic year, but he was required to complete a corrective action plan and attend professional development seminars on how to deal with “difficult students.”*” [Board Brief]

More to the point of its argument and evidence the Board continues by citing the specific charge against the Tenured Teacher and rationale for its ultimate position, “*Here, Taylor is charged with unbecoming conduct for his aggressive behavior toward student, B.L., and failure to control that aggression. His pattern of aggression and unprofessional behavior makes him unfit to teach children and warrants his dismissal.*” [Board Brief]

On the opposing side, the Tenured Teacher’s view does not fully address the Board’s position as it ignores certain elements in the Teacher’s record [i.e., “... instances of aggressive interactions, ...salary increments withheld..._he was required to complete a corrective action plan and attend professional development seminars on how to deal with “difficult students”]

Yet it does acknowledge the just cause standard. Moreover, there is evidence presented, i.e., the Tenured Teacher’s ‘legal position’ is cited in its Brief as, “*Commissioner decisions..., as well as more recent decisions from tenure arbitrators...*”; for the proposition that, “*The concept of just cause is found twice in the tenure statutes. The first place is N.J.S.A 18A:6-10,*” [Teacher Brief]

The closing Brief for the Teacher proceeds to cite that statute, “*This statute reads in pertinent part: No person shall be dismissed or reduced in compensation (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or . . .* ...except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges...” [Tenured Teacher Brief]

Somewhat painstakingly, the ‘Teacher’s argument proceeds further with the previously referred to legal position:

“That standard was reiterated with the 2012 amendment to the tenure statute which also provided for the first time that arbitrators, not the Commissioner of Education, determine tenure cases. N.J.S.A 18A:6-17.2(d) reads:

Also, it speaks to the burden of proof:

The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met. [Teacher Brief]

Moreover, it cites from what is ostensibly the first arbitration decision under the [prior cited] Statute: *“Arbitrator Joseph Licata’s decision in the Buglovsky/Randolph Board of Education case (a copy of which is attached hereto). It was the first arbitration award made under the new tenure statute, which determination has been uniformly followed consistently thereafter.* [Teacher Brief]

Finally, it maintains what is perceived to be the essence of its argument, citing from the above referenced decision, *“The arbitrator therein held: In the State of New Jersey, tenured teachers shall not be dismissed from his or her position or reduced in compensation “except for inefficiency, incapacity, unbecoming conduct or other just cause.” N.J.S.A 18A:6-10. The burden of proof in a discharge case rests with the employer to prove, by a preponderance of the credible evidence, that the factual allegations are true, and that the penalty imposed is just. Elkouri & Elkouri, How Arbitration Works, 5th Ed, pages 930, et seq. “Preponderance” may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State vs Lewis, 67 NJ 47 (1975).* [Teacher Brief]

In summary of the Employer's Position; it was submitted that, *“As specified in Count One of the Tenure Charges, between February of 2009 and March 25, 2015, Taylor engaged in a pattern of unprofessional and unbecoming conduct that reflects upon his inability and **unfitness** to serve as a public school teacher and ultimately warrants his dismissal.* [Emphasis added; Board Brief]

In its Brief, the Board argues the following points:

*“The culminating event leading to the instant charge occurred on March 25, 2015, when Taylor escalated a dispute with a student from a verbal disagreement to a physical altercation. Instead of seeking assistance from security, staff or school administration, Taylor **initiated physical contact** with the student by “bumping” and pushing him with his torso and “mushing” the student in the head with his hand.*

In summary of the Teacher's Position it argues that, *“...it is respectfully submitted that the tenure charges against Taylor should be dismissed in their entirety. Taylor should be reinstated to his position as a tenured teaching staff member with no penalties and should be given back-pay and all other emoluments of employment for the 120 days suspension which he served. Any reference to this matter should be purged from Taylor’s record.* [Emphasis added; Teacher Brief]

FINDINGS AND OPINION

A careful review of all evidence presented including all documents, hand written and transcribed notes of testimony occurred. They take into account the positions taken and arguments advanced by both parties. Relevant portions of the statutory sections by which the Parties mutually acknowledged being guided were cited herein by each side and are deemed relevant without further recitation. Those Statutes impose a, “just cause” standard for discharge, also granting School Districts the right to issue reasonable rules, orders and regulations, which are not conflicting. There has been no challenge to those statutory standards for discipline.

Analysis; Overview

If the surrounding facts/ interpretation of the March 25, 2015 ‘incident’ were, standing alone, to be the sole determinative factor for whether there was a ‘just cause’ dismissal here, then Teacher’s defense to it might have provided some pause for consideration. Yet, the defense to the incident flies in the face of some additional, very disturbing factors. While the Teacher’s denial, generally, is based loosely upon several common theories of typical workplace violence [attempting to define who was the initiator, aggressor and/or instigator of the ‘Incident’] such theories do not work [or, are misplaced] here in a school environment.

While persuasive that in a day and age of needing a police presence in our schools, this Arbitrator is aware that Teachers’ face much different challenges than in prior generations. That said, this is neither a political forum nor a sociological experiment. Clear Rules are in place for how teachers in this school system should be guided when confronted with troublesome students.

Moreover clear evidence was presented that this Tenured Teacher had been the recipient of retraining and rehabilitative efforts due to his prior misplaced theories about handling difficult situations involving troubled or difficult students.

Yet this Tenured Teacher was caught on a video of the March 25, 2015 'incident' as the clear aggressor, if not, i.e., the initiator and /or instigator, of a physical and /or emotional confrontation with a student. Whether or not the video clearly and absolutely portrays the entirety of both the words and deeds of the confrontation, it is clear enough that the Teacher did not back down nor, take any other action to diffuse the situation from escalating. Instead, the only clear interpretation of the events portrayed in the video demonstrates this Teachers aggressive and unwarranted behavior toward a student.

Moreover as stated above, this Teacher possessed a clear predilection toward similar behavior in past. Corrective actions if not discipline per se were in this Teacher's background, all connected to similar aggressive behavior. Thus, progressive discipline was achieved.

Therefore and notwithstanding the Teacher's defenses [as documented but not testified to] surrounding his actions on March 25, 2015, any attempts to dissect the events of that day are simply deemed to be a futile attempt to avoid the more critical and underlying question about this Teacher's suitability for continued employment within this School District.

Beyond the above the following analysis leads to the decision below.

Burden of Proof

The Board's case-in-chief was brought by Petitioner in a relatively seamless manner. Its case is deemed irrefutable by the evidence presented and clearly supported the burden of proof imposed by the relevant statutes. While processing of the charges appeared somewhat micro-

managed, it was controlled with careful handling and afforded proper and appropriate regard for the rights of Tenured Teacher James Taylor.

The Teacher's case did not reply with specificity to the charges, "...*unbecoming conduct for...aggressive behavior toward student, B.L., and failure to control that aggression. His pattern of aggression and unprofessional behavior makes him unfit to teach children and warrants his dismissal.*" [citing, the Board Brief]. Instead of defending his actions within appropriate guidelines that the Teacher was taught in rehabilitative programs ["...*he was required to complete a corrective action plan and attend professional development seminars on how to deal with "difficult students"*"] clear evidence in the 'video' supports, at minimum, unbecoming conduct for aggressive behavior. While the Teacher's evidence attempts to characterize what is viewable as the Teacher's attempt to properly control the Student's [B. L.] aggression, the opposite is plainly true.

The Teachers evidence flies in the face of clear and convincing evidence to the contrary of his account of a verbal dispute between Student [B.L.] and himself. The Teacher's credibility could not be determined from testimony which did not occur, and could only be tested by viewing the video, which clearly showed the Teacher escalating the dispute ["...*when Taylor escalated a dispute with a student from a verbal disagreement to a physical altercation. Instead of seeking assistance from security, staff or school administration, Taylor initiated physical contact with the student by "bumping" and pushing him with his torso.*"; Board Brief]

Even if we were to credit Teacher's version in part, a reasonable inquiry might be whether there was any reason for him not to have sought the assistance of other professionals to alleviate an already inflamed situation. While a difficult question, it was not within the purview of the neutral to answer why this Teacher, already on notice of prior disciplinary concerns would not have sought the external assistance required in this March 25, 2015 incident. Regardless, the burden of proof was met by the Petitioner and not refuted by the Teacher in his defense.

Thus the just cause standard was met in that a ‘just cause’ dismissal convincingly occurred under the evidence in this case. The overriding principle here is that reasonableness must be found in the enforcement of the behaviors expected of a teacher, i.e., there was a good faith showing that just cause was properly enforced.

Mitigating vs Aggravating Circumstance

The School Board raised the basic premise of the charge against Teacher ‘Taylor’ [*“...using physical force against (the Student)”and, even acknowledged that, “A teacher may use reasonable and necessary physical force against a student under certain circumstances:”*

Following this train of thought the Board explored the circumstances under which physical force was permissible. It cited both statute and case law to support this: “(1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property[.]”, *In re Tenure Hearing of Craft*, 2012 N.J. Super. Unpub. LEXIS 1600, *7-8 (App. Div. July 5, 2012) (citing N.J.S.A. 18A:6-1)

However, none of the above [underlined] potentially mitigating factors were found in the record below.

Instead, the Board returned to the instant matter by maintaining that aggravating factors were present, “...Taylor has engaged in a sustained pattern of unbecoming and aggressive conduct toward children. See Bock, supra. The culminating event was the March 25, 2015, incident which occurred after many years of Taylor being warned about his inappropriate conduct and resulting consequences. Instead of immediately walking away from the incident or obtaining assistance from the teacher in the adjoining gym or security or staff or administration, Taylor continued to aggressively engage with the student and further escalated the situation to physical violence. (See Exhibits B-1 and B-2). Even if the Arbitrator believes that B.L. was an instigator, Taylor was the teacher and was obligated to walk away, not to further engage and never to place his hands upon a child. There is absolutely no excuse for Taylor to have continued the encounter with B.L. to the point of physical violence. [Board Brief, Pg. 24]

It is highly persuasive that the aggravating factors described were present in this record.

“Moreover, there are no mitigating circumstances present to excuse Taylor’s conduct. Unlike in Kearney, or even Craft, Taylor’s reaction on March 25th was not a reflexive, defensive or unintentional action. Taylor showed a complete lack of judgment and control, acted with pure aggression and failed to use any skills he learned from the seminar¹ or seek assistance from security, staff or administration. As a result, Taylor’s conduct completely disrupted the provision of educational services to students, compromised the integrity of the instructional process, detrimentally impacted the educational environment and blatantly disregarded the health, safety and welfare of the students whose safety he was entrusted to protect. Furthermore, Taylor’s past record of aggressive conduct with students, including an increment withholding and fitness for duty issues, should be taken into consideration because it establishes the likelihood that his behavior will reoccur.”

[Board Brief, Pg. 24-25]

Thus on balance here, the Board has pointed to this Tenured Teacher’s numerous prior disciplinary events and admonishment short of discipline, along with follow-up opportunities for rehabilitating his behaviors. Pointed reference is made to this rehabilitative history, ostensibly done to help achieve some degree of normality in the Teachers classroom or other similar setting. The aggravating factors considered here were that this Teacher did not back off or away from an emotional or physical confrontation. He is observed on the video touching and/or pushing Student [B.L.], neither retreating nor calling for other professional assistance and thus demonstrating poor judgement.

Thus there were no factors in mitigation to excuse this Teacher’s conduct. Moreover, based on the clear evidence discussed above his behavior was deemed to include aggravating factors.

In **summation of** the above and after careful consideration of all evidence and the arguments in support thereof, it is conclusive that this Tenured Teacher was dismissed from his employment with the Board for just and sufficient cause.

Accordingly, the Decision follows.

DECISION

Just cause required that the elements of fair and progressive discipline had to be applied before the final step of dismissal could be imposed in this matter. This included a full and fair investigation of the charges, including careful consideration of any mitigating and/or aggravating circumstances. The evidence is clear as detailed hereunder that all of the above elements were present in this case and thus the burden of proof was met by Petitioner.

Moreover, no adequate defenses were raised by the Tenured Teacher to either circumvent or refute the rationale for discipline, the charges or the penalty of dismissal.

Taking all manner of evidence and argument by both parties into deliberation, it is the considered opinion of the undersigned neutral that Petitioner Englewood School District had the absolute right to have charged Tenured Teacher James Taylor with the offenses stated hereunder and, to have caused his dismissal thereafter. In view of the above, the penalty of his dismissal is upheld.

No other remedies apply.

Jay D. Goldstein,
Jay D. Goldstein, Arbitrator

Dated: 20 May 2016
Jenkintown, PA
