

**STATE OF NEW JERSEY  
COMMISSIONER OF THE DEPARTMENT OF EDUCATION**

IN THE MATTER OF THE TENURE CHARGES )  
 AGAINST )  
 )  
 CHARLES WEBBER )  
 )  
 BY )  
 )  
 THE ELIZABETH BOARD OF EDUCATION )  
 UNION COUNTY, NEW JERSEY )  
 \_\_\_\_\_ )

Dkt. No. 123-6/17

**OPINION AND DECISION**

Before Alan A. Symonette, Impartial Arbitrator

Appearances:	Charles Webber	Thomas S. Mirigliano, Esq. Joshua F. McMahon, Esq. Shiller McMahon, LLC
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The Elizabeth Board of Education, Union Cty. New Jersey	Joseph D. Castellucci, Jr., Esq. Nishali Rose, Esq. Lester Taylor, Esq. Florio, Perrucci, Steinhardt & Fader, LLC
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Dates of Hearing	September 28, 2017 September 29, 2017 December 18, 2017 January 18, 2018
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Statement of Decision: Based upon the evidence presented herein, I find that the School District has substantiated the charges filed against the Respondent Charles Webber. He has engaged in a pattern of conduct unbecoming a staff member and there is just cause to terminate his employment. The charges are sustained.

## INTRODUCTION

This matter was brought to arbitration before the undersigned pursuant to P.L. 2012 Chapter 26 of Title 18A *N.J.S.A.* This involves certain charges filed on June 21, 2017 against the Respondent Charles Webber by the School District of Elizabeth, New Jersey. The charges seek to remove Mr. Webber from his position as Custodian for the School District. The Statement of Tenure Charges is set forth as follows:

### **BACKGROUND INFORMATION COMMON TO ALL CHARGES**

Mr. Webber was hired by the Board on or about October 2008 as a substitute custodian. Effective January 18, 2011, Mr. Webber was hired as a full – time employee in the position of custodian. Mr. Webber subsequently earned tenure in that position.

During his employment with the Board, Respondent was, at all times, subject to the terms and conditions of his employment contracts, including but not limited to, the contract for the 2016 – 2017 school year. These contracts obligated Respondent to faithfully perform the duties of the position in accordance with any and all Board policies and any and all applicable laws, rules and regulations.

Elizabeth Board of Education Policy No. 4117.52/4217.52 *Dismissal/Suspension*, states: “The Board will endeavor to protect the school children of this district from the influence of unfit employees. The Board of Education shall challenge the continued employment of any employee who...violates by unbecoming conduct the public trust placed upon employees of this district, or by other means fails to exhibit the good behavior necessary to continued employment...”

Elizabeth Board of Education Policy No. 4119.23/4219.23, *Employee Substance Abuse Procedure* states: “Inducing or attempting to induce others to use illegal drugs, narcotics or alcohol is prohibited on school property and at all school functions.”

Elizabeth Board of Education Policy 4119.26, *Electronic Communication by School Staff* states: “Employee and student electronic communications of any kind shall be limited to legitimate school business as defined within this policy and should be conducted through the district’s computers, district email addresses and telephone systems. School employees will not give out their private cell phone or home phone numbers or personal email addresses to students without prior approval of the principal.” Additionally, Policy 4119.26 states: “As a general rule, employees should not use their personal cell phones to call students, additionally, employees shall not contact students’ cell phones unless directed to do so by the parent/guardian of the student. If cell phone

contact with a student is necessary, the contact shall be as brief and direct as possible. When brief contact is not sufficient and/or feasible to resolve the matter, where appropriate, teachers shall schedule face-to-face conferences during regular classroom and extra-help periods to confer with the student. No cell phone contact shall exceed three replies.” Finally, Policy 4119.26 states: “As a general rule, text messaging is not a preferred method of communication between employees, coaches and volunteers and students. However, any text messages that are sent by staff members, coaches and volunteers shall, as a general rule be sent to the entire class, team, club or organization and not to any student individually. Exceptions may include situations involving confidential medical issues, emergencies or individual issues not involving the entire group. *Staff shall not send messages containing inappropriate material, which includes, but is not limited to, material that: A. May be perceived as profane, obscene, racist, sexist or promote illicit, illegal or unethical activity; B. Violates the district’s affirmative action policies File Codes 2224, 4111.1, 4211.1 and 6121; C Is personal in nature and not related to the business of the district; D. Can be interpreted as provocative, flirtatious or sexual in nature ...or G. Violates other board policies or federal or state laws or regulations.* (emphasis added.)

Elizabeth Board of Education Policy No. 4119.22, *Conduct and Dress*, states, “When an employee, either within the schools or outside normal duties, creates conditions under which the proper operation of the schools is affected, the Board upon recommendation of the Chief School Administrator and in accordance with statutes shall determine whether such acts or lack of action constitute conduct unbecoming a school employee, and if so, will proceed against the employee in accordance with the law. Unbecoming conduct sufficient to warrant board review may result from a single flagrant incident or from a series of incidents.”

Elizabeth Board of Education Policy No. 4199.3, *Duties*, states that, “Each employee shall comply with all requirements of the law, and shall perform all duties commonly performed in his/her position.”

Elizabeth Board of Education Policy No. 6131, *Pledge of Ethics*, states, “All students and adults in the Professional Learning Community are held to the same high ethical standards.”

Additionally, Elizabeth Board of Education Policy No. 4111.1/4211.1, *Affirmative Action/Nondiscrimination*, includes the Board’s policy on sexual harassment and states, “Sexual harassment of staff or children interferes with the learning process

and will not be tolerated in the Elizabeth Public Schools. Harassment by Board members, employees, parents, students, vendors and others doing business with the district is prohibited.”

On November 4, 2016, student A.S., age fifteen (15) divulged to school social worker, Sam Bernstein (“Mr. Bernstein”), that she had inappropriate contact with the Respondent, including that he bought her lunch almost every day, spoke to her about matters of a sexual nature and discussed using a controlled dangerous substance with her.

Acting Assistant Superintendent for Human Resources, Francisco Cuesta (“Mr. Cuesta”) was notified of the allegations and requested that Investigator Tomas Escribano (“Mr. Escribano”) notify the Elizabeth Police Department. Officer Banks (Badge #412) responded to P.S. #2 Winfield Scott School and interviewed Mr. Bernstein and A.S.

Mr. Escribano conducted subsequent interviews with Mr. Bernstein, teacher Shara Greenberg (“Ms. Greenberg”), Mr. Cuesta, A.S. and Respondent. Mr. Bernstein completed a written report and contacted the Division of Child Protection and Permanency. In his report, dated November 4, 2016, Mr. Bernstein stated that A.S. approached him on that date and stated that she had an inappropriate contact with the Respondent. A.S. reported that the inappropriate contact began in September 2016 when Respondent approached A.S. because she was unable to purchase school lunch. A.S. further stated that Respondent began to purchase lunch for her on a daily basis and asked A.S. to eat with him in the school’s boiler room. A.S. reported that during these lunches, Respondent would ask her about her relationship with her boyfriend and discuss her sexual activity. A.S. stated that she did not stop these conversations with Respondent because he was providing her with lunch, which she could not afford and she feared he would stop. Additionally, A.S. also reported to Mr. Bernstein that Respondent gave her \$25 at the end of the 2015 – 2016 school year so that she could have her nails done before graduation.

Further, A.S. reported to Mr. Bernstein that Respondent spoke to her about her time in a rehabilitation facility for marijuana addiction. Respondent admitted to A.S. that he smoked marijuana and offered to smoke marijuana with A.S. after school hours and off school grounds. A.S. declined this offer.

When Mr. Bernstein asked A.S. why she was reporting Respondent at this juncture despite this behavior persisting for months, A.S. stated that she feared Respondent. A.S. stated that Respondent never physically threatened her, but he suggested violence when revealed stories of his violent past and that he, “has stomped on

people's faces and likes fighting people.” Additionally, A.S. reported to Mr. Bernstein that Respondent requested her cellphone number and that she complied with his request. Respondent and A.S. exchanged several inappropriate text messages, including several in which Respondent requested a hug from A.S. and one in which Respondent acknowledged that his behavior with A.S. was against school rules and that he would get into trouble for his actions.

On November 7, 2016, Mr. Escribano interviewed teacher Shara Greenberg, Ms. Greenberg reported that she was aware of one time that Respondent purchased lunch for A.S. Ms. Greenberg was aware of this incident because Respondent asked her if he could give lunch to A.S. and Ms. Greenberg gave him permission.

Subsequent to Mr. Bernstein's report, Assistant Superintendent Francisco Cuesta removed Respondent from P.S. #2 and informed him of the allegations against him. While in Mr. Cuesta's office, Respondent admitted that he bought A.S. lunch and coerced her into eating it with him in the boiler room, out of sight of the rest of the school community. Respondent also told Mr. Cuesta that he exchanged numbers with A.S. and that he sent her messages regarding when and where to meet for lunch.

Mr. Escribano conducted a formal interview with A.S. on March 8, 2017. A.S. reported that Respondent purchased lunch for her nearly every day for a few months during the 2016-2017 school year, beginning in or about October 2016. A.S. stated that she would meet Respondent in the boiler room to retrieve her lunch from him. A.S. stated that Respondent requested her cell phone number and that he would text her regarding where and when to meet for lunch as well as after school hours. A.S. stated that Respondent would text her messages such as, “goodnight,” “what you doing?” and “have a good weekend.” A.S. also reported that Respondent asked her for a hug in one text message and that this message made her feel uneasy because she does not hug the teachers and they do not hug her. Additionally, A.S. reported that Respondent asked her if she was a virgin and for intimate details about her relationship with her boyfriend. A.S. explained that Respondent asked her about what she and her boyfriend do when they get physical in a sexual way.

A.S. also reported to Mr. Escribano that she spoke to Respondent about her time in a rehabilitation facility for marijuana addiction and that Respondent invited her to smoke marijuana with him after school and off school grounds. A.S. stated that she did not meet with Respondent after school and off school grounds. A.S. stated that she did not meet with Respondent after school.

A.S. further reported that Respondent gave her \$25 at the end of the 2015-2016 school year as a reward for finishing summer school and maintaining passing grades. A.S. stated that she decided to report Respondent because he told her to come to his office to show her something and began asking her additional personal questions that made her uncomfortable. A.S. specified that Respondent asked her about her virginity and if she, “liked it on the top or in the bottom.” A.S. reported that she feels scared of Respondent being in the school, especially in light of the fact that she came forward with these allegations. A.S. stated that she is uneasy because Respondent told her that he liked to stomp people’s faces. Finally A.S. stated that Respondent told her that she would get in trouble if she ever told the principal or the lunch aide about Respondent buying her lunch.

**SPECIFICATION OF CHARGES**

**CHARGE I**

**CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST  
CAUSE REGARDING RESPONDENT’S INAPPROPRIATE CONDUCT  
TOWARD A STUDENT**

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by his acts and omissions relative to student A.S. at P.S. #2 Winfield Scott. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

**Count 1**

During the 2016-2017 school year, Respondent behaved inappropriately with student A.S. in a multitude of ways. Beginning in or around October 2016, Respondent offered to purchase a school lunch for A.S. as she was unable to purchase one for herself. Respondent began to purchase a school lunch for A.S. on a near daily basis and invited her to eat lunch with him in the boiler room. Respondent purchased lunch for purposes of luring A.S. into the boiler room to be out of sight of the school community.

**Count 2**

While they were eating lunch, Respondent would ask A.S. intimate details about her relationship with her boyfriend, including discussing her sexual activities. Specifically, Respondent inappropriately questioned A.S. about her virginity, causing her to feel extremely uncomfortable. Additionally, Respondent questioned A.S. about her sexual preferences, again causing her to feel extreme discomfort.

**Count 3**

During the 2016-2017 school year, Respondent requested A.S.'s cell phone number. On numerous occasions during the 2016-2017 school year, Respondent exchanged inappropriate text messages with student A.S. after school hours and unrelated to an emergency or school business, including a message wherein A.S. requested a sandwich and Respondent replied, "got it already u owe me a hug." On another occasion, Respondent texted A.S., "still waiting for my hug. Lol."

**Count 4**

During the 2016-2017 school year, while eating lunch, Respondent discussed with A.S. his penchant for fighting others, specifically, that he liked to "stomp people's faces," causing A.S. to become uneasy around Respondent and reticent to report Respondent's behavior for fear of reprisal against her.

**CHARGE II**

**CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S ENDANGERING THE WELFARE OF A CHILD BY BRINGING HER TO A BOILER ROOM**

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by his acts and omissions relative to student A.S. at P.S. #2 Winfield Scott. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

By bringing A.S. to the boiler room, Respondent exposed A.S. to dangerous and hazardous conditions, to which a student should not be subjected.

**CHARGE III**

**CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST  
CAUSE REGARDING RESPONDENT'S VIOLATION OF THE EMPLOYEE  
SUBSTANCE ABUSE POLICY**

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by violating Board Policy 4119.23/4219.23 *Employee Substance Abuse Procedure*. His acts and omissions relative to student A.S. at P.S. #2 Winfield Scott, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

During the 2016-2017 school year, while Respondent was eating lunch with A.S. in the boiler room, he discussed with A.S. her admission to a rehabilitation facility for marijuana addiction. At that time, Respondent disclosed to A.S. that he smoked marijuana and asked A.S. to smoke marijuana with him after school off school grounds. A.S. declined this offer. While the act alone is illegal and against school policy, this offer was especially egregious given Respondent's knowledge that A.S. previously received treatment for an addiction to marijuana.

**CHARGE IV**

**CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST  
CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARDS'  
POLICY AGAINST VIOLENCE AND THREATENING BEHAVIOR**

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by violating Board Regulation 4119.22/4219.22 *Violence and Threatening Behavior by Employees of the Elizabeth Board of Education and Parents of Students*. His acts and omissions relative to student A.S. at P.S. #2 Winfield Scott, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

During the 2016-2017 school year, while he was eating lunch with student A.S. in the boiler room, Respondent discussed his violent past with A.S. including that he has stomped on people's faces and likes fighting people. Additionally, Respondent told A.S. that she would be in trouble if she ever told the Principal or lunch aide that Respondent was buying her lunch. Respondent's acts caused A.S. to feel threatened by him and fear



reprisal if she were to divulge Respondent's inappropriate actions with her to anyone, in direct violation of school policy.

**CHARGE V**

**CONDUCT UNBECOMING A STAFF MEMBER, INSUBORDINATION  
AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S  
INAPPROPRIATE CONDUCT TOWARD A STUDENT**

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by his acts and omissions relative to student A.S. at P.S. #2 Winfield Scott. These acts and omissions constitute just cause for immediate dismissal due to conduct unbecoming.

On July 7, 2017 Respondent, through counsel submitted a "Sworn Statement of Position" in response to the charges. Initially, Respondents stated that he "vehemently" denies "that I have demonstrated a lack of character, integrity and/or good faith during the course of my employment and I maintain that I am fit to serve as a member of the custodial staff." He further claims that throughout his career as a custodian he has performed his duties with integrity and good faith. He maintains that he has always been a "diligent, conscientious and hardworking member of the school staff."

With respect to the specific allegations, he states that he was approached by A.S. in the school cafeteria in September 2016 and told that she was refused the service of hot lunches due to her mother's failure to pay for such services. Since she was not entitled to a hot lunch, she would only receive a cheese sandwich which was inadequate. He informed her that she could apply for assistance from the school but A.S. stated that her mother had refused to fill out the necessary paperwork. He stated that A.S. claimed that her mother was neglectful and sometimes she did not eat at all at home. Since he felt sorry for her he asked Shara Greenberg whether he could provide A.S. a hot lunch. She advised him that he could do so.

After purchasing the lunch Respondent claimed that A.S. told him that cafeteria personnel were aware of which students were ineligible for a hot meal and if discovered with same, the food would be

taken away. Since he did not want A.S. to worry about her meal being taken, he suggested that she go to his office in the boiler room to eat.

Respondent denied purchasing lunch for A.S. “on a daily basis.” In addition, he did not remain with her and talk to her while she was in boiler room. Rather he would leave the lunch in the boiler room, text A.S. to inform her that it was there and leave. As far as him texting A.S., respondent maintained that A.S. requested his cell phone number to communicate. As noted in the copies of the messages, there was only minimal communication with each other. Moreover, there was always substantial traffic in the boiler room so they were not really alone. The door to the boiler room was always open and unlocked. He also noted that the hallway to the boiler room was under consistent video surveillance. From then until his suspension he provided at most four lunches to A.S. Otherwise, he never came in contact with her. Respondent denies ever sending inappropriate text messages nor did he initiate any conversations with A.S.

Respondent maintains that his actions were as a result of an attempt to “help an underprivileged child who came to me for assistance.” He never “lured” or “coerced” A.S. into the boiler room. In this regard he noted that the Department of Children and Families investigated the incident and determined that A.S. was never in any imminent harm.

Respondent denied ever discussing sexual activity or drug use with A.S. Her statements in that regard are a “complete fabrication.” He further denied ever suggesting any violence against her especially stating that he had a penchant for fighting others.

Regardless, Respondent maintains that none of the alleged acts singularly or in combination amount to unbecoming conduct nor do the actions constitute just cause for dismissal. He therefore demands reinstatement with all attendant benefits and emoluments due to him.

#### **BACKGROUND AND SUMMARY OF EVIDENCE PRESENTED**

The School District presented a total of five witnesses in support of its Charges. Those witnesses were Tomas Escribano, AS, Dominic De Anthony, Samuel Bernstein and Francisco Cuesta. The

Respondent presented a total of four witnesses; Giuseppe Papparatto, Shara Greenburg, Respondent and Kaye Gervasi.

Mr. Escribano testified that he was initially hired by the school district in March 2016 and is serving as the lead investigator of employees and students. He also serves as an investigator of residency issues in the District. In November 2016, he was asked by the Francisco Cuesta Acting Assistant Superintendent for Human Resources to go to P.S. #2 Winfield Scott School to investigate an allegation by a student of inappropriate behavior by a staff member.

Once he arrived, he spoke to Mr. Bernstein the School Social Worker. Mr. Bernstein told him that AS had confided in him about a relationship with Respondent and that she had been having lunch with him in the boiler room. He also claimed that AS told him that Respondent had been engaging in inappropriate conversations concerning her virginity and intimate details of what she did with her boyfriend. He also stated that Respondent had engaged in conversations with her about smoking marijuana. She had become afraid because the Respondent stated that he had “bashed” peoples “heads in.”

The police department was also called. The student was summoned to the school’s office and was interviewed by a police officer. In the subsequent police report, AS identified Respondent who she referred to as Mr. Gray as the individual she had met with in the boiler room. The officer did not testify but the report stated as follows:

“On 11-4-2016 I responded to PS#2 Winfield Scott, and was met by Tommy [sic] Escrabiano the Board of Education investigator and Mr. Sam Bernstein the school’s social worker who stated AS who’s a 8<sup>th</sup> grade student gave the following statement. During the last school year (2015 – 2016) she met the Head Custodian Charles Webber who she called Mr. Gray.

Mr. Gray became concerned about AS not being able to have school lunch due to improper or incomplete paper work filled out by her parents, so Mr. Gray began to give A lunch inside the boiler room during her lunch break. As Mr. Gray became more comfortable his line of question also became more inappropriate, he would ask about her virginity and her boyfriend and invited her to smoke SDS marijuana with him off of school property.

While gathering this information A entered the office and further stated she was given \$25.00 last year to get her nails done which lead to her having lunch in the boiler room this September....”

Mr. Escribano subsequently requested video of the boiler room and the hallway. However he could not obtain anything because it is regularly destroyed every two to three weeks.

He returned to see Mr. Cuesta and was told that Respondent was inquiring about what was happening. Mr. Cuesta told him about the accusations. At that time the Respondent stated that he was indeed providing her lunch because he did not want to see a kid go hungry. According to his report, Mr. Escribano stated that in addition, Respondent pulled out his cell phone and showed it to Mr. Cuesta indicating that he had the student's phone number and that they would text each other about the time to meet in the boiler room.

Mr. Escribano also testified that he visited the boiler room as part of his investigation. He noted that the cafeteria is on the same level. The boiler room is down a hallway through a set of doors and then down a few steps. He took photos which were presented at the hearing. He noted that there was no evidence that students had been present in the area.

Mr. Escribano obtained a copy of several text messages between AS and the Respondent. These messages were provided by AS upon a request by Mr. Cuerta. According to Mr. Escribano, the messages showed that AS and Respondent had at least one exchange that was outside of school hours. The following Monday, he interviewed Mr. Webber who stated that he was advised by his attorney that he should not turn over his cell phone.

Mr. Escribano spoke to other witnesses, some provided statements and others he determined did not add to the investigation. One individual he spoke to was Shara Greenberg a teacher in School 2. Ms. Greenberg stated that she had worked in the lunchroom monitoring the students and was approached by the Respondent who told her that he had purchased something for AS and if it was permissible to give the lunch to her. She told him that it was permissible but she did not know where AS was consuming the lunch. She also identified other teachers who worked lunch but according to Mr. Escribano, those teachers did not know anything.

Mr. Bernstein also provided a statement stating that AS had confided that there was a relationship with Respondent; that he was buying her lunch and had asked questions about her virginity. As part of the discussion, AS mentioned to him that she had prior issues with smoking marijuana.

On March 8, 2017 Mr. Escribano took a statement from AS in the principal's office. He concluded that her statement had been consistent with the ones she initially provided to Mr. Bernstein, Mr. Cuesta, and the police. He therefore had no reason to believe that she was lying and did not appear nervous during the interview. AS stated that she became worried about her conversations with Respondent because he had stated to her that he liked to fight and to smash people's faces in and about the sexual questions. She became uncomfortable because the nature of the conversation had changed. She also stated as part of her statement that on two occasions in text messages, Respondent asked for a hug but she did not return it because she did not give teachers hugs.

On cross examination, Mr. Escribano stated that he did not know how or why AS referred to Respondent as Mr. Gray. In recounting his involvement he stated that Mr. Cuesta initially called him about an allegation but Mr. Bernstein told him what was initially said by AS. He also recalled that he was told that AS had initially spoken to Mr. DiAnthony, her teacher who referred her to Mr. Bernstein.

In describing his reporting relationship, Mr. Escribano stated that he reported directly to the school superintendent and report to the Board's Counsel. As far as his methodology, he stated that he did attend other interviews notably in which the police were involved but he did not ask questions at that time. He only observed. In addition, Mr. Escribano admitted that during the time the New Jersey Department of Children and Families was investigating the incident, he stopped proceeding with his inquiries. Thus he did not complete the investigation with the interview of teachers and AS until March, 2017.

Mr. Escribano admitted that he did not interview any students or Mr. D Anthony. In further response to Counsel's questioning, he admitted that he had only read about the \$25 gift. He admitted that

he did not know if teachers house supplies in the boiler room or if there was a security guard posted who could monitor the hallway between the cafeteria and boiler room

AS testified after Mr. Escribano. She stated that she know Respondent as a janitor in her school and had known him for two to three years. She would say hello to him and knew him as Mr. Grey shirt because of the color of shirt he would wear. She recalled that Respondent had given her \$25 as a reward for finishing summer school the prior year. This was the first time he had given her money.

AS testified that Respondent bought her lunch and had “sneaked” it from the cafeteria. She recalls this as the beginning of the 2016 – 17 semester. This, according to AS occurred almost every day. Respondent stated that he was feeling bad because she was not eating lunch. Initially he bought the food and gave it to her. He started bringing the lunch to the boiler room because she was told that they both would be in trouble if the cafeteria lady found out he was buying her lunch. At first he gave hand signals to tell her that the food was available. When they ate in the boiler room she stated that other people were coming around mostly janitors.

During the conversations he asked her about what she and her boyfriend did while they were together. To her it seemed “weird’ at first. He also spoke to her about drugs. I had mentioned that I was in a program for “smoking dope.” It was then he offered to smoke with me after school.

AS testified that at one point he had asked her for her cell phone number because he wanted to know when she was at school and when lunch would be available. In reviewing a transcript of the messages, she noted that he would text her inquiring about what she was doing. He had also asked for a hug more than once but she never gave him a hug. According to AS she considered these requests to be weird. She noted that her teachers did not ask her for a hug. She also admitted that there was no mention of drugs in the text messages.

She decided to approach Mr. DiAnthony because Respondent began making her feel uneasy. She told Mr. DiAnthony in the form of a hypothetical. He told her to report to Mr. Bernstein. She remembered initially being hypothetical but eventually disclosed to him that it was the Respondent.

AS was subjected to a very extensive cross examination. She admitted that she had a “friendly” relationship with Respondent that started in 6<sup>th</sup> grade. In that regard, it became immediately apparent that AS was having difficulty associating the year with the grade she was in at the time. She testified that she attended 6<sup>th</sup> grade for 3 years so she was confused. She recalled that at the time of her testimony she was in 9<sup>th</sup> grade so as of June 2017 she was in summer school completing 8<sup>th</sup> grade.

She stated that according to her recollection, there was no alternative to an unpaid lunch so she told Respondent that she had to pay for lunch and did not have the resources. She told Respondent that her mother did not care about her and her brother had passed away. She felt neglected. Indeed she stated that she did not want Respondent to stop buying her lunch.

AS testified that she was not aware that Respondent had once asked Ms. Greenberg for permission to buy her lunch. She stated that she believed that the “head cafeteria lady” would take her lunch if she could not pay. When Respondent would buy lunch, he would use hand signals and eye contact to tell her that a hot lunch was available. She recalled that Respondent was buying her lunch for a full year.

She recalled that when she returned from drug rehabilitation, Respondent had asked her why she had not been in school for so long. She told him that she was in Trinitas but did not recall his response.

When pressed, AS stated that she did not recall the number of times she went to the boiler room. Regardless, she considered it to be a good idea. The plan was to go to lunch when everyone else started eating. Lunch period for her was 45 minutes. Normally it took about 15 to 20 minutes for her to eat.

With respect to the investigation, he initially approached Mr. DiAnthony because he was one of her favorite teachers. Ms. Greenburg was her homeroom teacher. Mr. DiAnthony encouraged her to go speak to Mr. Bernstein. During her discussion with him, he asked her about the text message so she agreed to print them out. She stated that she was pretty sure she printed them all out. She specifically recalled that Respondent asked for her phone number. However, she stated that they never spoke over the phone.

She also told Mr. Bernstein that Respondent asked inappropriate questions and asked me for a hug. She recalled that he also asked her in person in addition to the text message. She recalled that Respondent disclosed to her that he smoked marijuana also and suggested that they should smoke off campus. She also testified that she did give a statement to the investigator.

AS agreed with Respondent's counsel that Respondent never threatened him nor did she feel unsafe while in the boiler room.

Dominic DiAnthony testified that he was a teacher at School #2 and had been teaching for 15 years. In 2017 he was an art teacher in the AVID college prep program. He taught art education and history. He recalled Respondent as the janitor in his building for a few years. He considered him to be an "awesome" custodian. They would interact regularly in the cafeteria during elementary lunch. He also knew AS because he had her in 5<sup>th</sup> or 6<sup>th</sup> grade.

One day AS approached him and asked a hypothetical question asking what if she encountered someone who made her feel uncomfortable. Mr. DiAnthony stated that he immediately took her into the hallway and began asking her questions. She was generally uncomfortable. When he asked her who it was she would just say a man in the building. She said that he would make her feel uncomfortable and they got personal in nature. He described her demeanor as "not confident." It was apparent that she did not want to get the person in trouble. After talking to AS Mr. DiAnthony immediately passed the matter on to Mr. Bernstein.

Mr. DiAnthony recalled AS as being a student who was loud, obnoxious, bold and forward. During this encounter, she appeared to be embarrassed talking to me about it. Therefore he told her that he would give her to the end of the day to speak to Mr. Bernstein. Therefore she took it on herself to go and see him. His office was next door.

On cross examination Mr. DiAnthony said AS would stroll in the class at any time just to say hello. He recalled that she was a "girl [who] did not miss a meal. On occasion, she would drop into his class room during the lunch period to work. He stated that he would ask her if she had permission to



come into his classroom. During that time he recalled that she was doing some artwork relating to student government. As far as her personal life, DiAnthony never met her family and never knew anything about her family life. He did hear about her having an older boyfriend.

Mr. DiAnthony also recalled that AS was polite to him. While she was brash from time to time he recalled her as being mellower in the 7<sup>th</sup> and 8<sup>th</sup> grade. She was still loud especially in the hallways and would sometimes lash out at teachers.

Samuel Bernstein testified that he was the school based social worker for 17 years. He retired in June, 2017. He was the person responsible for reporting incidents involving students. He knew AS as a student and recalled Respondent as a custodian at School #2. He considered the Respondent to be an excellent head custodian that kept the building clean and neat. AS on the other hand had a history of family issues that were reflected in her attendance.

AS was referred to him by the art teacher. She came and sat in his office and told me that she had an issue with her mother and her mother was not up to date with payments for lunch. Thus she could not have lunch. AS stated that Respondent overheard this and told her that they could meet in the boiler room for lunch. Respondent had previously paid to have her nails done. AS stated that Respondent had questioned her about her sexual activity and marijuana. She said that he knew people in the community and he likes to stomp on people. This made her uncomfortable. She reported that afterwards she became fearful of the Respondent. When she passed him in the hallway, she felt threatened.

Mr. Bernstein was also concerned about where she was eating lunch. He was not aware of the policy regarding the exchange of phone numbers.

With respect to the lunch policy, Mr. Bernstein testified that if he had been aware that AS had a lunch issue, he would have worked out the situation with the kitchen staff. He maintains that he has a small lunch fund to offset student costs. He testified that every week he did fundraising for this purpose. The fund was also used to pay for the 8<sup>th</sup> grade party. Often times he would sponsor a 50/50 raffle to

raise funds. Indeed he recalled the Respondent giving to the fund. Yet Respondent did not report to him about AS and her problems with lunch.

He subsequently reported the conversation with AS to building administration. As the school based social worker it was his responsibility to report such incidents to the state and the police which he did.

On cross examination stated that he normally hosted both group and individual counselling with students regarding academic and family issues. He did not hear of any problems with Respondent through that group. He did know that AS was in and out of the group. That she had an attendance issue at school

He was first notified by Mr. DiAnthony but then AS approached him by himself. She initially refused to name the person to him as well. He gave her the night to think about it. He was concerned that the person may have been doing the same thing to other students. He told AS that she needed to resolve the issue if she felt threatened and the person would be removed so the immediate threat would be resolved. She came in the following morning voluntarily and spoke to him. After he reported the incident, the Board sent the investigator and the police sent a patrolman and a detective. He sat in on the investigatory meetings and submitted an incident report. There were a series of meetings. In each case AS was walked through the incident consistently.

He was aware of AS' issues with lunch. She was eligible to receive a cheese sandwich but did not want it. AS however never disclosed to him that she was going hungry at home. Mr. Bernstein stated that he was aware that AS had been in rehabilitation because he was in communication with counselors about her eventual return to school.

The last witness in the School District's case was Mr. Francisco Cuesta the Interim Superintendent for Human Resources. He has been with the District for 34 years. The last two was with Human Resources. He only knew Respondent "by reputation." When Respondent became aware of the

allegations, he had him brought to his office. He knew the nature of the allegations but not the detail.

Mr. Cuesta advised him of the allegations and told him he was entitled to representation.

Respondent replied that he did not do anything wrong only to make sure that the student had lunch. He stated that he communicated with the student through text messages. He had her cell number and would arrange for a time to have lunch. He knew that it was not appropriate for staff to have the personal numbers of students. Subsequently and after speaking with the investigators and reviewing the report, it was brought to his attention that Respondent had asked AS if she wanted to smoke pot. Mr. Cuesta then reviewed the policies involved in the determination that the Respondent would be subject to charges.

On cross examination, Mr. Cuesta stated that he was not involved in the decision to revoke tenure. His only involvement in discipline concerned recommendations of suspension and reprimands. He spoke to the superintendent and she made the decision. It is the Superintendent's responsibility to recommend to the Board that an individual's tenure be terminated.

The Respondent's first witness was Giuseppe Paparatto. Mr. Paparatto is employed as a Carpenter with the School District. He had been employed for approximately 6 years. In his employment is familiar with School #2. He would report to that school at the beginning of the day to receive his assignment. He would then be dispatched to School #2 or other schools where his skills are needed. I recalled that Respondent was the head custodian.

He essentially knew Respondent from work. They would normally collaborate on the jobs at the beginning and at the close of the day. In performing his job, he became familiar with the workings in the school's boiler room. The cafeteria is on the same floor as the boiler room. He testified that there is security around the cafeteria as well as CCTV cameras around the area. The boiler room itself was quite busy according to Mr. Paparatto. There was a door that allowed access from outside the building. One would normally see plumbers walking through, as well as teachers. As far as he was concerned, he never saw Respondent in the boiler room with children. He was performing his job.

On cross examination Mr. Paparatto acknowledged that even though he reported to School #2 every morning, he was gone and on assignment by 9:00 am.

The following witness was Ms. Shara Greenberg who appeared with counsel from her Union. Ms. Greenberg is a middle school language arts teacher. At the time of the hearing, she was assigned to School #4. While working in School #2 Ms. Greenberg was at times assigned to monitor lunch and recess. Mostly she was on the outside playground. She would work inside for a couple of days to replace someone on medical leave.

The cafeteria itself is located in the basement where there are a few classrooms. The boiler room is close by. There are security guards stationed throughout the school. They are assigned to lunch but that would include both indoor and outdoor assignments. The area outside of the cafeteria is covered by security cameras.

There are two lunch periods, one for the elementary and the other for the middle school children. Another teacher was responsible for identifying the children when they came into the cafeteria. The children had to show their id numbers which were checked by computer. One of her assignments was to make sure the cafeteria tables are cleared off. During the lunch period, students may leave the cafeteria to outside for recess. Students have to seek permission from an adult in order to leave the cafeteria. She was not familiar with the policy that addresses ones eligibility for a hot lunch.

Ms Greenberg testified that she knew AS. She was her mentor for a period of time. She provided academic support and was involved in intervention and referral services. She recalled that AS did have issues with absences but does not know of any particular issues outside of the school. Ms. Greenberg knew Respondent from the building. As the custodian, he had an office in the boiler room. She however did not recall any interaction between Respondent and AS. During the investigation, she was called by Tom Escribano but was not told what the investigation was about. She did provide a statement.

Ms. Greenburg is familiar with Mr. Bernstein but never participated in a 50/50 raffle but knows that he engages in raffles to raise money. At the end of the year, 8<sup>th</sup> graders have a party at a local

restaurant. However, she did not know the specific purpose for the money. Ms. Greenberg testified on cross that she did not know the “protocol of the cafeteria; namely who gets lunch and who does not.

Ms. Lauren Bowers was also called by Respondent’s counsel. She is a fifth grade teacher in School #2. She was hired in 2001 and had worked in other schools teaching 4<sup>th</sup> grade and middle school at other locations. She states that she was assigned to cafeteria duty for the last nine years. Her assignment was to get children to come in, sit down, clear tables. If a student wanted to leave he or she would have to ask one of the security guards or her. There is a security station on the bottom floor and security cameras but she is not sure the cameras cover the boiler room.

Ms. Bowers testified that she was familiar with AS. She had taught her in 6<sup>th</sup> grade. She recalled that she had a poor home life. She repeated 6<sup>th</sup> grade three times. “She wanted to do what she wanted to do with an attitude.” At times she would come to school unwashed and had dirty clothes. She was apparently feeling poor since she was a 14 or 15 year old and still in 6<sup>th</sup> grade. However, she did not know of any romantic relationships between Respondent and her.

Ms. Bowers was also familiar with Respondent. Custodial staff were always in the cafeteria during lunch, cleaning or otherwise assisting. She would frequently see him cleaning up. However she never saw him with AS either inside or outside the cafeteria. She has been to the boiler room but is unfamiliar with what goes on there.

She had been approached by an investigator and asked if she saw any interaction between AS and the Respondent. She was not asked anything about Respondent purchasing her lunch. As far as she is concerned, every student is entitled to a hot lunch. However, the computer knows who is eligible and who is not. If the student does get a hot lunch and cannot pay for it, they are billed for the full amount. However, Respondent did not ask her for permission to give lunch to AS.

The Respondent testified on his own behalf. At the time he was hired by the Board of Education, he was 21 or 22 years old. He stated that his father got him the job through the President of the Board. He claimed that he was hired through “politics.” He became a head custodian in 2014 or 2015 after he

got his boiler license. His work hours are 6:00 am to 3:00 pm. He is responsible for opening the building. He would pick up trash and debris around the property. He then does breakfast and checks for cleanliness in the property. Respondent states that his office is in the boiler room. Teachers keep papers and books. He works with two other custodians. There are security cameras in the area.

Respondent recalled AS as a student who is "loud." He recalled giving her money during the summer of 2015 and 2016. She came up to him and said "if I graduate, will you give me money." He gave her \$25 for graduating summer school. The first time he purchased lunch was near the end of November 2016. According to Respondent AS approached him in the cafeteria and asked "Mr. Charlie can you purchase me lunch?" I responded telling her why didn't she go on line and get lunch. She stated that her mother owed \$450. He subsequently spoke to Shara Greenberg and asked if it was ok to purchase AS a lunch. She responded that she did not see a problem with it. Respondent said he was just trying to help a hungry child. AS told Respondent that she was neglected at home because her brother had died and her mother was mourning his death.

After purchasing the lunch Respondent said that he told AS to go sit down. He said that AS said that if they see her with a hot lunch, they would take it away from her. She did not say who would take the lunch away. As a result, Respondent told her to go to the boiler room to get lunch and when done to report back to him to close the door. Respondent denies ever staying and eating with her. Respondent stated that he purchased lunch for AS about 3 to 4 times.

After the second time, she asked for Respondent's number so that she can text him when she wanted lunch. Whenever she asked, Respondent purchased her lunch. Respondent stated that he bought her lunch because he felt bad and did not want to see her go hungry. However, he never joined her for lunch in the boiler room. Respondent denied ever talking sex with her or smoking marijuana. He stated that he was drug tested to become a custodian and head custodian. All tests were negative. Respondent denied ever discussing fighting with AS. AS at the same time never told her about her drug history or that she was in rehab. After about the 4<sup>th</sup> time, Respondent stopped buying her lunch. He told her to ask

Ms. Kay about qualifying for a free lunch. Respondent told her that he could not do this anymore after about the 4<sup>th</sup> time.

Respondent admits that he did text AS outside of school hours. He felt that she was being neglected. He responded to her texts just trying to be a nice person. He rather tried to end the conversation every time. He also asked for a hug just trying to be nice.

Respondent testified that he first learned of the allegations when he was asked to report to Mr. Cuesta's office. He told Respondent about texting AS and Respondent told him that he simply did not want to see a student go hungry. Respondent did offer to show his phone. I was told to report to HR and report to the "rubber room." He was assigned to the rubber room for about a week. After that time he was told he was suspended without pay. However, the Union challenged the decision stating that Respondent was a tenured employee who cannot be suspended without pay. He ended up going without pay for five months. However, counsel was successful in getting the wages which he was owed during the time of his suspension.

During the years of 2016 and 2017 the respondent was engaged in local politics. He handed out flyers supporting one of the mayoral teams. Approximately three days the election he was approached by Mr. Trillio and two other people who said that he should not forget who got him his job. He said "karma is a bitch." According to Respondent he was implying that he got me my job. He was also familiar with Olga Hugelmeyer the School Superintendent. She was working in opposition to the team he was supporting. His team won the election. When he had his charges filed he asked members of the Board to assist him. They responded that it was out of their hands.

On cross examination Respondent stated that he started buying her lunch in September or October. Yet he brought he lunch only 3 or 4 times. He maintained that he felt bad for AS and asked permission. However, he admitted that he did not ask permission the second time. Respondent also maintained that he never spoke to her about her sex life. He only asked for a hug. Respondent admitted

that it was not okay to give her his cell number. Respondent also admitted that he made a mistake because he asked a 15 year old girl for a hug. He felt bad for her.

Respondent also maintained that he did not know it was wrong to purchase a hot lunch for a student. This was the first school that he worked where the students were poor. Respondent stated that he never ate lunch with A. She asked him for lunch saying that her brother died and her mother was neglecting her. He did not know if A asked other people for lunch nor did he see AS taking any money from a staff member. Respondent testified that he finally told Ms. K to get an application after the 4<sup>th</sup> time. She said that she gave it to her mother but she did not fill it out.

Respondent further admitted that there are nine members on the Board and they had to vote on the tenure charges. Yet Respondent claims that Trillio retaliated against him because he opposed him. All that he knew was that Ms. Hugelmeyer was campaigning for the Trillio team in 2017,

The Respondent's final witness was Kay Gervasi. She had been a cook manager for 18 years. She had been employed by the District for 29 years. She had been working at School #2 for 8 years. Her responsibility was "to make sure the kids were fed." She knew the Respondent from work.

Ms. Gervasi testified that she knew AS was a student. She was eligible for a hot lunch but she had to pay for it. Ms. Gervasi is responsible for enforcing who gets lunch. AS was eligible for a reduced lunch however, she owed about \$205.00 which had been carried over from the previous year. As a result of her arrearages, AS was only entitled to a cheese sandwich with fruit and milk. When this was offered this AS would start screaming and cursing. She refused to have a regular lunch. Eventually Ms. Gervasi acquiesced and gave AS a regular lunch rather than have her curse at her. She did charge her account however. During this period Respondent never approached her for an application for a free lunch on behalf of AS. Rather she did recall AS asking for an application which she provided.

It was understood in the lunch room that kids could not leave without permission. However, Ms. Gervasi stated that she never saw the Respondent and AS eating lunch together. Since June 2017, Ms.



Gervasi has not had to deal with AS. However, the bill for the lunches remains the responsibility of AS and her family.

Ms. Gervasi further testified that she was not familiar with Mr. Bernstein giving money to purchase a lunch on behalf of students. However teachers can come up and purchase a lunch.

At the end of their case, Respondent requested to have Ms. Hugelmeyer testify. Counsel for the School District objected. After initially reviewing the evidence, the undersigned denied the request based on the conclusion that Respondent had not presented sufficient evidence on the issue of political discrimination to extend the hearing for additional days to receive this testimony.

### **SUMMARY OF THE ARGUMENTS OF THE PARTIES**

The School District argues that Respondent is guilty of engaging in conduct unbecoming a staff member. According to the District the term unbecoming conduct is defined as “conduct which has a tendency to destroy public respect for employees and confidence in the operation of public services.” This includes any conduct that adversely affects the morale or efficiency of the District. This may include any conduct that adversely affects the School’s morale or efficiency. This does not necessarily need to be predicated on a violation of any particular rule or regulation but may be merely based upon the violation of an implicit standard of good behavior which applies to an individual who stands in the public eye as an “upholder of that which is morally and legally correct.”

In this case the District maintains that the Respondent is guilty of conduct unbecoming a staff member and/or just cause regarding his inappropriate conduct toward a student. He engaged in what the District describes as “a pattern of inappropriate, dishonest, insubordinate and alarming behavior with AS.” According to the District, Respondent was an adult male 20 years older than AS who “secreted her in the boiler room so as to be out of the prying eyes of other staff members.” Respondent told AS that she should eat lunch in the boiler room so that they did not get into trouble. Respondent stated that he sought permission from Ms. Greenberg to purchase lunch. The District maintains however that “if Greenberg granted him permission, why ask her to come to the boiler room for lunch if not for a more nefarious

purpose?” Furthermore, “if he told AS to eat in the boiler room so that nobody would see her eating a hot lunch, it cannot stand that teachers and custodians were constantly in and out of the boiler room.”

According to the District, numerous witnesses testified that students were not allowed in the boiler room due to the dangerous nature of the room. AS could not point to a specific rule but knew that students were not allowed in the boiler room and never saw another student there. By placing her in that room, Respondent exposed her to dangerous and hazardous conditions.

The District then argues that the Respondent engaged in further unbecoming conduct by the way he engaged with AS in violation of a number of District policies. As AS credibly testified, she grew uncomfortable after the Respondent discussed a number of intimate and inappropriate matters with her. He raised a number of questions of a sexual nature in violation of the District’s harassment policy. He discussed her involvement with marijuana and offered to smoke with her. This was in violation of the District’s substance abuse policy. In this regard, the District notes that in one of the text messages, Respondent asked AS why she was out of school for a period of time during the school year. In this regard the District has surmised that she tell him that she had been attending a rehab program for marijuana use.

Respondent engaged AS through an number of text messages which was not only in violation of the District’s policy on the subject, it contradicted his description of the motivation for buying her lunch in the first place. Respondent testified that he was concerned for AS because her brother recently passed away and that he only texted her asking for a hug to try to comfort her. This is not supported by the evidence as set forth in the text messages.

The District has also stated that part of the reason AS decided to come forward was because she was concerned for her safety. She stated that Respondent had discussed with AS his proclivity for fighting with others and that he likes to “stomp people’s faces.” Indeed AS testified that Respondent discussed his violent past with her and stated that he liked fighting people. Even though Respondent

never directly physically threatened AS, he revealed stories of his violent past. This not only violated Board policy, this behavior was counter to everything school employees were supposed to represent.

The District maintains that the charges in this case should be viewed in their totality. The determination requires consideration of the nature of the act, the totality of the circumstances and the impact on the employee's career. These series of events demonstrate a pattern of behavior which is an indication of unbecoming conduct. Given that each act is so flagrant, once incident should suffice to remove a teaching staff member from his position

In response to Respondent's assertion that his termination was politically motivated, the District maintains that there is no evidence that he obtained his job and subsequent promotion to head custodian "through politics" and that his termination is similarly motivated. Respondent had to be licensed to become a head custodian. Moreover, the Board certified the charges by a vote which involved many of those people that he supported in the prior election. Finally by the time those charges were certified, the DCP&P investigation was no longer ongoing.

In conclusion the District asserts that each of the charges and counts individually warrant dismissal. Respondent took a young female student and capitalized on her vulnerability due to home and school issues. He violated numerous school policies and regulations and tried to keep AS complicit by his plan to indirectly threaten her by discussing his violent past and threatened her ability to continue to receive a hot lunch. Moreover, he exposed AS to dangerous conditions in the boiler room and sexually harassed her by asking her about wildly inappropriate questions about her sex life. Given these circumstances, the charges should be sustained.

The Respondent on the other hand asserts that the claims brought against him were "nothing more than a thinly veiled attempt at retribution by AS and the School District." Respondent claims that AS had a personal motive by reporting false charges against him in response to his unwillingness to continue purchasing her hot lunch while at school. Moreover, the School District showed political animus against Respondent as a result of his "constitutionally – protected exercise of support in favor of an adverse

political candidate in Elizabeth's 2016 election." Respondent also maintained an unblemished personnel file and has consistently received pay raises each year. He has always been a diligent, conscientious and hardworking member of the school staff.

In its argument, Respondent describes unbecoming conduct as "an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy the public respect in the delivery of governmental services. In the context of a dismissal based on charges related to one's tenure, the touchstone is fitness to discharge the duties and functions of one's office or position." This, according to Respondent, takes into account any harm or injurious effect which the conduct may have had on the proper administration of the school system.

In reviewing the testimony, Respondent contends that AS' testimony stands as the sole means by which the School District can demonstrate that he engaged in unbecoming conduct warranting termination. The case turns significantly on the credibility that be reasonably accorded to AS testimony. According to Respondent, AS' testimony is not only unreliable but she contradicts the Board's position in several material respects.

The School District unfairly presents Respondent as "a predator trying to lure a child to a dangerous area of the school for an unknown nefarious purpose." That theory according to Respondent is not supported by the testimony. There are no witnesses to support that AS was somehow lured into a boiler room. In fact, Respondent claims that other janitors were in the area and AS needed permission from a teacher to leave the cafeteria during the lunch period. Given that environment, there was never an opportunity for anyone to engage in any lengthy conversation.

Respondent also asserted that AS requested his phone number, not the other way around. In this regard, Respondent admits that he should not have engaged AS in any text message conversations even though this communication was based on good intentions. Indeed he contends that his request for a hug was not meant to be inappropriate. Rather he was trying to show AS compassion since she had encountered some serious issues at home.

Respondent denies that he demonstrated any threatening conduct that put AS in immediate fear for her safety. Indeed in her testimony, AS denied that she was afraid of Respondent. Her testimony in fact supports Respondent's position that she was never in fear for her safety. Moreover, there were no collaborative facts that indicated that AS presence in the boiler room was inherently dangerous.

Respondent further states that he never violated the Board's substance abuse policy by asking AS to smoke marijuana with him after school. The evidence, notably AS' testimony, could not provide any detail regarding any alleged interaction with Respondent during this period. Respondent's file shows that he does not use drugs.

In addition, AS could not recall when or for how long the conduct which formed the basis for the charges occurred. The School District alleged that the relationship lasted approximately six weeks while AS testified that it actually went on for over a year. She did not have a credible time line which according to Respondent created a serious time line of events. Therefore, her testimony should be completely rejected.

Respondent also maintains that the investigation of the allegations was improper. According to Respondent, the investigation was conducted in such a way that there would be "absolute certainty" that he would be removed from the school as punishment for his adverse political support. According to Respondent the School Board Superintendent, whose discretion stood as the final word on Respondent's position crafted tenure charges to paint him as a "perverse deviant who was preying on the children." In the Respondent's opinion, his transgressions were minimal given the fact that he was only motivated to help a child in need who had reached out to him and told him of the difficulties she was encountering. Respondent conducted himself in good faith motivated only by the best of intentions.

In conclusion, Respondent claims that the School District failed to demonstrate that the charged conduct outlined in the tenure charges even occurred as they claim let alone that it warrants his termination. Respondent categorically denies all allegations other than those indiscretions he admitted. Those do not amount to any terminable offense. Respondent should be reinstated.

## ANALYSIS

I have reviewed all of the evidence presented including my notes of testimony, documents and post – hearing summations. The School District has filed five tenure charges against Respondent asserting in general that he engaged in Conduct Unbecoming a Staff Member arising out of an inappropriate contact with a student.

The District alleged that Respondent purchased lunch for AS and invited her to eat with him in the school’s boiler room. In that regard, the District has maintained that the boiler room is considered to be a dangerous and hazardous area that is not appropriate for student visitors. While eating that lunch Respondent asked AS intimate details about her relationship with her boyfriend including describing any sexual activities with him. He had also asked her about her virginity. In addition, the School District alleged that on another occasion Respondent discussed his violent past and stated that he liked to stomp people’s faces in in violation of the School Board’s regulations regarding workplace violence. The District also alleged that Respondent asked for AS’ cell phone number and engaged her in exchanges of text message which were against policy but that the text messages contained inappropriate content. Finally it was asserted that the Respondent violated the District’s substance abuse policy by disclosing to AS that he smoked marijuana and invited AS to smoke with him off of school property.

The New Jersey courts have clearly established a definition of unbecoming conduct to be applied in tenure matters. Unbecoming behavior has been defined as “conduct which has the tendency to destroy public respect for [government] employees and confidence in the operation of [public] services.” In re Young, 202 N.J. 50, 66, 995 A.2d 826, 835 (2010) quoting from Karins v. City of Atlantic City, 152 N.J. 532, 706 A.2d 706 (1996) “Unbecoming conduct may include “any conduct which adversely affects the morale or efficiency of the department.” *Ibid.* (citation omitted). “The touchstone of the determination lies in the certificate holders, ‘fitness to discharge the duties and functions of one’s office or position.” *Ibid* Citing In Re Grossman, 127 N.J. Super 13, 29; 316 A.2d 39 (App. Div., 1974).

It should be noted that the Court in In Re Young vacated the award of an arbitrator who applied the wrong standard in determining the validity of tenure charges filed against a teacher. Notably the arbitrator erroneously credited the determination of the Department of Children and Families which applied a completely different standard in its investigation. This is important in this case because Respondent's counsel has argued that the School District described Respondent's actions as sexually motivated. This arbitrator has to determine whether the conduct charged as unbecoming based on the definition cited above regardless of the descriptive language used by the District or the specific policy applied. See Bound Brook Bd. Of Education v Ciripompa, 228 N.J. 4, 152 A.3d 931 (2017) "A finding of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. *Ibid* at 13 – 14 (citations omitted) Indeed, the District does not have to sustain every charge in order to establish a pattern of unbecoming conduct. See In RE Tuitt, 2015 N.J. Super (unpub.)

The evidence that has served as the basis for the charges concerns the nature of a relationship that was formed between AS and the Respondent over a period of time beginning in the 2015 – 2016 school year. The School District alleges in essence that Respondent offered to purchase hot lunches for AS and then "lured" her into the boiler room to eat her lunch. In order to facilitate these rendezvous, Respondent and AS exchanged cell phone numbers and engaged in a series of messages. It is through these text messages that Respondent and AS made arrangements to meet for lunch with him purchasing the food and delivering it to the boiler room. These messages were inappropriate in themselves because they violated School policy.

Finally the School District asserts that it was during these lunch meetings Respondent made inappropriate statements questioning AS about her sexuality, inviting her to smoke marijuana and describing his history of violence and stating that he enjoys physically fighting people. This final statement made AS uncomfortable and lead her to report the relationship to a faculty member.

Respondent explains that he began buying lunch for AS because he was feeling sorry for her. She had a difficult home life in which her older brother had passed and she was neglected by her mother. Before he purchased lunch, he asked and received permission from a teacher in the lunchroom. Respondent offered the boiler room because AS stated that she would get into trouble if found eating a hot lunch she did not purchase. The boiler room was an active location with other custodians coming and going as well as teachers.

Respondent denies making the statements alleged by AS. Rather, he alleges that AS concocted the story because Respondent told her that he was going to discontinue buying lunch. Finally the decision to file tenure charges were politically motivated because he was campaigning on behalf of a slate of candidates that opposed the group which was supported by the Schools superintendent. There charges were in retaliation for those efforts.

A review of the evidence shows that Respondent and AS had a complex relationship that extended beyond the facts alleged in the Statement of Charges. One would wonder why AS engaged Respondent in order to ask him to purchase a hot lunch for her. Why didn't AS approach Mr. DiAnthony, the person she identified as her favorite teacher? The evidence shows that this was because Respondent and AS had a friendship that had extended into the prior year. We do not know how their relationship began but we do know as acknowledged by Respondent that he paid AS \$25.00 for graduating summer school the prior semester. This is consistent with AS testimony.<sup>1</sup> There had to be some familiarity between AS and Respondent in order for the initial lunchroom request to take place. AS approached Respondent because she knew she had a supporter who would help her out. In that regard, I acknowledge that Respondent felt sorrow and some empathy for AS given her unfortunate situation at home. However, and as explained below, rather than taking appropriate steps to remedy AS' situation through appropriate

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<sup>1</sup> During her cross examination AS became quite frustrated in describing the time line of events. She became confused as to what grade she was in at the time of the incident. This however did not change her consistent description of facts. One must not that AS is an unusual student because she repeated 6<sup>th</sup> grade 3 times. She had extensive absenteeism due to a number of home related issues. I am not surprised that she would be confused when describing events under such a confused timeline.



channels, Respondent engaged in surreptitious arrangements to provide lunch and engaged in unprofessional communications that were contrary to his role as a member of the school community.

The evidence also showed that AS could have taken other avenues to receive a hot lunch. At all times she would have eaten something if just a cheese sandwich and apple. It was clear that she felt that it was sufficient. She could have also sought more aggressive counseling to assist her to qualify. Indeed, Mr. Greenberg testified that AS could have come to him for support in qualifying for lunch. Respondent could have facilitated this. However, for AS, it was either go to the Respondent or go through the drama with Ms. Gervasi and receive a hot lunch the cost of which would have been placed on an ever escalating tab.

Respondent's offer in and of itself was not good judgement but it was not unbecoming conduct by itself. However, the Respondent's actions after he began buying lunch for AS showed how this mistake in judgement led to more serious issues. Respondent stated that after purchasing lunch for AS he invited her to eat in the boiler room because he understood that AS would "get into trouble" if found eating such a meal. This explanation raises a number of questions regarding Respondent's testimony. Respondent testified that he sought permission to buy AS lunch. This was substantiated by Ms. Greenberg. If respondent had received this permission, then why couldn't he intervene with Ms. Gervasi to explain that he had purchased the lunch? Since he believed that he had permission, he really did not have anything to hide.

Even though there were no explicit policy forbidding students to be in the boiler room, it is clear that that was not a place intended for students. The room contains complex and dangerous machinery as well as an exit to the outside of the building. Even though there may have been other people in the area to make sure nothing inappropriate would occur, this does not excuse in inappropriateness of the decision in the first place. In this regard, the Respondent notes that there was a security desk in the hallway between the boiler room and cafeteria. Accordingly, if security was present, at the time AS walked to the boiler room an alarm would have been raised. However, given the Respondent's argument that AS would have

been in trouble for eating a hot lunch they would have taken steps to avoid security in order to accomplish that goal. This was clearly a breach of school policy and again conduct contrary to Respondent's staff responsibilities.

This need to avoid detection led to the need to set up a system so that Respondent could notify AS when lunch was available. Given the conflict in the testimony between AS and Respondent, the transcript of these text messages is the best evidence available that would describe the nature of the relationship between AS and Respondent during this time. It is my view that the text message exchanges were initiated by Respondent. Even though the initial contact on September 16, 2016 shows that Respondent did not initially know AS' number when she texted, the transcript of the communication the next day shows R telling AS "this is why I tell you text me so she doesn't know u eat." This indicated that Respondent had initially suggested this method of communication as a solution to AS' concern about getting into trouble.

The content of the text messages establishes that AS and Respondent communicated to each other on the following dates: September 16, 19, 20, 21, 23, 26, and 29, October 11, 20 and 21, 2016. These ten days extended from just after the beginning of the semester through the Jewish High Holy Days. The communications occurred through half of the fall semester which is a significant amount of time. Even though Respondent did not purchase lunch every day as alleged in the charges, if one looks at the text messages once can only conclude that arrangements were made to deliver lunch on September 16, 19, 20, 21 and 23. These do not include lunches that were delivered before Respondent and AS exchanged cell numbers. This is contrary to Respondent's claim that he only purchased lunch for AS only three or four times.

The content of the text messages also show that AS and Respondent were engaging in a relationship that was increasingly inappropriate. For example, on September 20, 2016 Respondent and AS had the following exchange:<sup>2</sup>

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<sup>2</sup> Text message translations are in brackets when applicable.

AS: We got two more periods to lunch  
R: k  
R: what time ur lunch  
AS 1:40  
R: k come to my office  
AS try to get me a sandwich please  
R: got it already u owe me a hug  
R: lol  
AS: lol I got you  
R: lol  
AS: thanks Mr. Charlie for the lunch and risking getting in trouble for me.  
R: its all good don't worry  
R: wyd [what you doing?] u home  
AS: I am doing my homework and yea  
R: ok good I'll see you tomorrow night.

On September 23, 2016 they engaged in the following exchange:

R: Pizza today  
AS: thanks  
R: ye  
R: yw [you're welcome]  
AS: Can you get me two? Lol I'm hungry asf [and so forth]  
R: lol I'll try  
AS: you the best  
R: I try  
R: still waiting for my hug

R: lol

AS: you never asked lol

R: should I have to ask

AS: yea

R: ok now I know

AS: lol

AS: wya [where you at?]

R: boiler room

AS: have a good weekend

R: thanks you too

On September 29, 2016 Respondent asked AS what did she do and why she was suspended. Respondent continued to reach out to AS on October 10, 11 asking if she was in school with no response. Then on October 20, 2016, the Respondent and AS had the following exchange:

AS: Hey mr. Charlie – got my old phone number

R: ok I got u wyd [what you doing?]

AS: laying down hbu [how about you?]

R: something

AS: what's that something lol

R: lol my same thing trying put my nephew to sleep

R: bad

AS: aww that's cute

R: lol that's my boy

AS: aww you're such a good uncle

R: thank you

AS: your welcome.

Finally, in the last text entry on October 21, 2016 Respondent asks AS to come see him. She was unable to do so. So Respondent decided to see her the following Tuesday October 25. A week later AS reported the exchange to Mr. Bernstein. We don't know what was said when AS and Respondent met, however based upon the consistent testimony of AS, what was said made her very uncomfortable and made her feel the need to approach Mr. DiAnthony and Mr. Bernstein.

In summary, the evidence as shown through these text messages an increasingly personal exchange of messages that while not sexual in nature are highly inappropriate for a member of a school staff and a student. The nature and timing of these messages lend some credibility to AS' assertions with respect to the District's allegations stating that R asked AS about her intimate relationships with her boyfriend or offered her the opportunity to smoke marijuana or statements about his history of violence.

School personnel, whether pedagogical, support or administration are responsible for maintaining a professional relationship with students in their charge. In many cases, school personnel are described as being *in loco parentis*. They stand in place of the parent and must assume responsibility to exercise appropriate care with a student. To engage in extremely personal relationships severely compromises that standard of responsibility and as such diminishes the morale and respect for the role.

Given these facts, the ultimate question concerns whether Respondent's behavior amounts to unbecoming conduct that warrants the termination of his employment. Does the conduct "have the tendency to destroy public respect for [government] employees and confidence in the operation of [public] services? Respondent contends that he initiated his friendship with AS because he felt sorry for her because she was poor and had a poor home life. Indeed, he admitted that his interactions with AS especially as described in the text messages were simply an instance of poor judgement and should be punished with less discipline. After all, the Respondent has otherwise maintained a clean record as a custodian.

I disagree. While I don't describe Respondent to be a sexual predator as described in some of the School District's allegations, I find that he has exercised exceptionally poor judgement that is highly

inappropriate in the school environment. This cannot be dismissed with a lighter penalty. Respondent's actions can appear to be naive and immature but the nature of the relationship especially as documented shows that that behavior would destroy public respect for school district employees and confidence in the operation of the school. Based upon this evidence, I find that the School District had cause to terminate Respondent based on what is clearly a pattern of inappropriate behavior with a student.

In addition, Respondent claimed that the decision to file charges was politically motivated. I find that Respondent has failed to meet that burden. First, the content of Respondent's admitted action and his acknowledged messages to AS cannot be attributed to any political faction that may have been involved in the 2016 election. Furthermore, there is no evidence presented to show that other employees who engaged in such activity with a student were subsequently excused with a lesser penalty based on political considerations. Finally, the evidence showed that the Board members in attendance all voted to support the Superintendent's action. These included those members who were supported by Respondent. Accordingly I find that Respondent's claims of political bias are without foundation.

In conclusion, I find that the evidence presented created a pattern of unbecoming conduct which supports the conclusion that Respondent should be terminated from his position of custodian with the Elizabeth School District.

**DECISION**

Based upon the evidence presented herein, I find that the School District has substantiated the charges filed against the Respondent Charles Webber. He has engaged in a pattern of conduct unbecoming a staff member and there is just cause to terminate his employment. The charges are sustained.

Dated: March 6, 2018



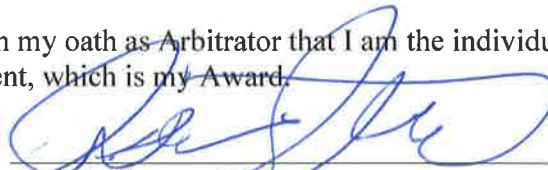
Alan A. Symonette, Arbitrator  
For the Commissioner of Education  
State of New Jersey

Commonwealth of Pennsylvania )  
County of Philadelphia )

ss.:

I, Alan A. Symonette, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Dated: March 6, 2018



Alan A. Symonette

Megan McCrean 3/6/2018

