

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

.....
**In the Matter of the Tenure Hearing of
Jose DaCosta,**

(Respondent)

AND

**AWARD
AND OPINION**

**State-Operated School District of the City of
Newark, Essex County, New Jersey.
(NPS) (Claimant) (District)**

Agency Docket No.: 352/11-12
.....

BEFORE: ERNEST WEISS, ARBITRATOR

APPEARANCES: For Claimant: Kerri A. Wright, Esq.
 Suzanne E. Peters, Esq.
 Porzio, Bromberg & Newman, P.C.

For Respondent: Adam Epstein, Esq.
 Steven J. Kaflowitz, Esq.
 On the brief.
 Caruso Smith Edell Picini P.C.

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of N.J.S.18A:6-16 as amended by P.L. 2012,c.26. This matter of, Tenure Hearing of Jose DaCosta of State-Operated School District of the City of Newark, Essex County, was referred to me by M. Kathleen Duncan, Director of the Bureau of Controversies and Disputes, New Jersey Department of Education.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

(As presented in the post-hearing brief of counsel to NPS)

Mr. Jose DaCosta began his employment with NPS as a per diem teacher and thereafter was employed as a full time teacher commencing on or about October 1, 2004. (T5.96:16-1741 He began teaching at American History High School ("American History") in the fall of 2010. (T1.23:19-11.) American History represents the fourth school in six years for Mr. DaCosta. In fact, prior to starting at American History, Mr. DaCosta had been placed at Barringer High School. Technology High School, and the Academy of Vocational Careers. (T1.28:1-2.)

A. Robert Gregory is Principal of American History (hereinafter "Principal Gregory"). (T1.16:19.) He testified that, although he had heard negative comments about Mr. DaCosta's behavior from administrators at his prior schools, Principal Gregory tried "to take those statements with a grain of salt." (T1.30:7-12.) By refusing to allow other peoples' perception of Mr. DaCosta influence his own, he sought to allow Mr. DaCosta to start at American History with a clean slate. (Id.) However, throughout the course of Mr. DaCosta's time at American History, Principal Gregory learned that there was merit to what he had been told about Mr. DaCosta's behavior by either observing personally or learning of Mr. DaCosta's inappropriate behavior in and out of the classroom.

Principal Gregory testified regarding his standard operating procedure when it came to investigating complaints from students regarding the behavior or conduct of a teacher. He

followed this procedure precisely with each complaint he received regarding Mr. DaCosta. (T1.51:8-22.) Pursuant to this protocol, Principal Gregory randomly chose at least three other students in the class and asked them to describe what they observed between the complaining students and Mr. DaCosta. He interviewed students individually so that they would not be inclined to adopt the version of events put forth by a classmate. (T1.52:19-23.) Additionally he did not call the students into his office, but rather asked them casually in the hallway what happened to avoid making a big deal of the situation. Many times students told him what happened, but refused to write statements because they did not want to “snitch”. (T1.53:7-14) If Principal Gregory received sufficient confirmation of the incident, he would either speak with Mr. DaCosta directly or issue a memorandum to Mr. DaCosta apprising him of the complaint and setting forth his expectations for the future. (T1.54:15-16.) As stated by Principal Gregory, the purpose of the written memorandum is to bring about an immediate end to the improper conduct, whatever it might be.

After receiving several complaints from students and their parents during the 2010-2011 and 2011-2012 school years and confirming the veracity of such complaints, Principal Gregory began to refer incidents to NPS’s Department of Labor Relations. (T1.31:16-17.) This Department is responsible for working out minor discipline issues through Newark Teachers Union. However, each time, Labor Relations directed Principal Gregory to the NPS Legal Department because Mr. DaCosta’s actions warranted more than simply minor discipline; they warranted tenure charges. (T1.31:18-20.) As a result, Principal Gregory forwarded all accumulated documentation to the NPS Legal Department in March 2012 and certified tenure charges for conduct unbecoming against Mr. DaCosta. (T1.32:13-16.)

On November 28, 2012 Cami Anderson, State District Superintendent, reviewed the charges as well as Mr. DaCosta’s written response and independently determined that the incidents were sufficient to warrant dismissal.

(The Superintendent’s certification was then submitted to the Commissioner of Education, who, on December 24, 2012 referred the charges through Kathleen Duncan, Director of the Bureau of Controversies & Disputes to Panel Arbitrator Ernest Weiss, in accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act (TE0ACHNJ).

On January 25, 2013, the parties gathered at the law offices of Porzio Bromberg & Newman, in Morristown NJ. and in the presence of the arbitrator reached agreement on the

questions of discovery and the forthcoming procedure with respect to the dates and locale of the five Tenure hearings. The parties also agreed to have a verbatim transcript of the sworn testimony of fifteen witnesses during the five full days of hearing. Additionally, they were granted the opportunity to submit post-hearing briefs on or before February 26, 2013 simultaneously to each other and to the Arbitrator, which were timely received.)

Each transcript is identified as T1, T2, "T3, T4 or T5. Each transcript is numbered in chronological order.

STATEMENT OF CHARGES

I, A. ROBERT GREGORY, Principal of American History High School, a school that is part of the State-operated School District of the City of Newark in the County of Essex (the "District"), do herewith charge that Jose DaCosta ("Respondent"), a tenured teaching staff member, is guilty of unbecoming conduct and other just cause sufficient to warrant dismissal under N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law.

CHARGE ONE: CONDUCT UNBECOMING

1. On or about April 20, 1998, Respondent began his employment with the District as a per diem teacher and thereafter was employed as a full time teacher commencing on or about October 1, 2004 and has attained tenure since then.
2. During the 2011-12 school year, Respondent was assigned to American History High School as a full time science/chemistry teacher that year.
3. Throughout the past two years, Respondent has been involved in multiple extremely inappropriate and highly egregious incidents involving several young female students.

THE A.M. INCIDENT

4. On or about March 15, 2011, Respondent and District female student A.M. got into a verbal argument during the 8th period of the school day wherein Respondent initiated by telling A.M. that she should be on a "daily" to which A.M. responded. See Exhibit A.
5. Approximately 5 minutes later, Respondent initiated another argument by stating to A.M. "that

why you have a gap" See Exhibit A.

6. In turn A. M. responded back stating that Respondent had rotten teeth. See Exhibit A.

7. After a subsequent exchange occurred, Respondent replied to A.M. by stating "Fuck You" to which A.M. responded back with same and attempted to contact her mother on her phone when Respondent prohibited her from doing so. See Exhibit A.

8. Thereafter, A.M.'s mother Maria Machado filed a formal complaint with the school referencing the March 15, 2011 incident when Respondent told A.M. that she needed to be on a daily and that she had a gap and indicated that such an exchange was inappropriate. See Exhibit B.

9. Respondent's comments and actions constitute acts that are reasonably motivated by A.M.'s gender and serve to substantially disrupt and/or interfere with the orderly operation of the school

10. Respondent's humiliation of and use of sexual references and profanity against A.M. violates the rights of A. M. and may serve to emotionally harm A.M. and place her in reasonable fear of physical and/or emotional harm to AM's person or property.

11. Respondent's use of sexual references against A.M. is extremely inappropriate and constitutes sexual harassment, intimidation and bullying.

12. Respondent's use of profanity and humiliation against A.M. is extremely inappropriate and against school policy and constitutes harassment and intimidation and bullying.

13. Respondent's actions violated the District's Harassment, Intimidation and Bullying policies which prohibits such acts against students.

14. Respondent's actions, humiliation of and use of sexual references and profanity against A.M. was extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

15. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

16. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment.

CHARGE TWO: CONDUCT UNBECOMING

THE K.W. INCIDENT

17. The District restates the allegations contained in Charge One and re allege and incorporate them by reference as if fully set forth at length herein.

18. On February 24, 2012 during the 8th period chemistry class, Respondent got into an argument with female student K.W. where in response to stating that Respondent did not do anything, Respondent stated in front of the class that K.W. was not going to be anything and that K.W.'s mother was still living with her own mother (K.W.'s grandmother). See Exhibit C.

19. After K.W. asked why he didn't say that to K.W.'s mother, Respondent replied that he says whatever he wants and that K.W.'s mother did not say anything at a prior conference or when Respondent saw K.W.'s mother at a night club. See Exhibit C.

20. Thereafter, Respondent began laughing at K.W. which was followed by the class laughing too. See Exhibit C.

21. Thereafter, on February 27, 2012, K.W.'s mother Ms. Wilson filed a formal complaint with the school indicating that Respondent was verbally abusing K.W. day after day, harassing K.W. and requested to have K.W. removed from Respondent's class immediately. See Exhibit D.

22. Respondent's ridiculing and humiliation of K.W. in front of the rest of her class resulting in the class laughing at K.W. served to substantially disrupt and/or interfere with the orderly operation of the school.

23. Respondent's ridiculing and humiliation of K.W. violates the rights of K.W. and may serve to emotionally harm K W and place her in reasonable fear of physical and/or emotional harm to K.W.'s person or property.

24. Respondent's actions, personal attack against K.W.'s mother as well as Respondent's humiliation and ridiculing of K.W.'s personal circumstances in front of her class resulting in the rest of the class laughing at K.W. constitutes harassment, intimidation and bullying.

25. Respondent's actions violate the District's Harassment, Intimidation and Bullying policies which prohibits such acts against students.

26. Respondent's actions in ridiculing and humiliating K.W. and her mother is extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

27. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

28. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment

CHARGE THREE: CONDUCT UNBECOMING

THE FEBRUARY 24, 2012 INCIDENT

29. The District restates the allegations contained in Charges One and Two and re allege and incorporate them by reference as if fully set forth at length herein.

30. On February 24, 2012, Respondent told his class that he didn't "give a fuck about" their grades and that he was just the teacher. See Exhibit E.

31. Respondent also stated to the class that "I'm the shit in this school, I have no competition in this school." See Exhibit E.

32. Respondent continued his tirade and told his students that he could get more girls than they could in the school. See Exhibit E.

33. Respondent's use of profanity against his class as well as his sexual references served to substantially disrupt and/or interfere with the orderly operation of the school.

34. Respondent's use of profanity against his class as well as the use of sexual references in their presence places his class in reasonable fear of physical and/or emotional harm to their persons or property.

35. Respondent's actions and use of profanity and sexual references was inappropriate and constitutes intimidation and bullying.

36. Respondent's actions violated the District's Harassment, Intimidation and Bullying policies which prohibits such acts against students.

37. Respondent's actions in using profanity against his students as well as his sexual references was extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

38. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

39. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment.

CHARGE FOUR: CONDUCT UNBECOMING

THE D.M. INCIDENT

40. The District restates the allegations contained in Charges One, Two and Three and realleges and incorporate them by reference as if fully set forth at length herein.

41. On January 13, 2012 after around 9:00 p.m., Respondent called the personal cell phone of District female student D.M. stating "This is your worst nightmare. Where is your mother?" See Exhibit F.

42. Once she returned home, DM discovered that Respondent had called DM's house phone just prior to calling DM on her cell phone. See Exhibit F.

43. DM also stated that other students complained that Respondent called their cellphones and houses over the same weekend. See Exhibit F.

44. Thereafter, on February 3, 2012, D.M.'s mother Akilah Bond formally submitted a complaint to the school wherein she indicated that DM is constantly coming home every day, very upset, with complaints about Respondent. See Exhibit G.

45. Ms. Bond also indicated that Respondent had called D.M.'s personal cell phone telling D.M. that he is her worst nightmare. See Exhibit G.

46. Ms. Bond indicated that Respondent never contacted her prior to Respondent appearing at her house looking for D.M. at 8:00 p.m. on a weekend night when Ms. Bond was not there. See Exhibit G.

47. Ms. Bond also indicated that it was extremely inappropriate for a male teacher such as Respondent to behave this way towards a female student. See Exhibit G.

48. Respondent's actions in appearing at D.M.'s home as well as his unauthorized communications with D.M. outside of school violates the rights of D.M. and may serve to emotionally harm D.M. and place her in reasonable fear of physical and/or emotional harm to D.M.'s person or property.

49. Respondent's communications directly with D.M. outside of the school as well as his appearance at her home without parental permission was extremely inappropriate and constitutes harassment and intimidation.

50. Respondent's actions violated the District's Harassment, Intimidation and Bullying policies which prohibits such acts against students.

51. Respondent's actions in communicating with D.M. outside of the school without parental authorization as well as Respondent's intimidating comments are extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

52. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

53. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment.

CHARGE FIVE: CONDUCT UNBECOMING

THE S.W. INCIDENT

54. The District restates the allegations contained in Charges One Two, Three and Four and reallege and incorporate them by reference as if fully set forth at length herein.

55. On or about Saturday, January 28, 2012, Respondent visited the home of female District student S.W. to address the student's behavior in class despite the fact that an administrative parent conference was already scheduled to be held in the near future that Monday, January 30, 2012 at the school. See Exhibit A.

56. While at the home of SM., Respondent claimed to S.W.'s parents that S W. had cursed at Respondent in class. See Exhibit H.

57. S.W.'s father screamed to have Respondent get off his porch while being restrained by his wife. See Exhibit H.

58. The next day, S.W.'s father arrived at the school to report a complaint that Respondent was harassing his daughter. See Exhibit H.

59. Respondent's appearance at S.W.'s house without parental authorization violated the rights of S.W. and may serve to emotionally harm S.W. and place her in reasonable fear of physical and/or emotional harm to S.W.'s person or property.

60. Respondent's appearance at S.W.' house was inappropriate and against school policy and constituted harassment, intimidation and bullying.

61. Respondent's actions violated the District's Harassment, Intimidation and Bullying policies which prohibits such acts against students.

62. Respondent's actions and appearance at S.W.'s house without authorization was extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

63. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

64. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment

CHARGE SIX: CONDUCT UNBECOMING

THE D.A. INCIDENT

65. The District restates the allegations contained in Charges One, Two, Three, Four and Five and reallege and incorporate them by reference as if fully set forth at length herein.

66. On December 8, 2011 during 8th period chemistry class, Respondent's cell phone rang during class with a ring tone from a song called "Sexy and I Know It" which has a corresponding video featuring men dancing in bikinis. See Exhibit I.

67. In response to student discussion regarding the video to the song, Respondent stated in front of several female students including female student D.A. that the video made him feel "small". See Exhibit I.

68. D.A. felt that the statement was inappropriate when it was said in front of her as well as other female students. See Exhibit I.

69. Respondent's use of a sexual reference to refer to his genitalia before D.A. as well as other female students violated the rights of D.A. and may serve to emotionally harm D.A. and place her in reasonable fear of physical and/or emotional harm to D.A.'s person or property.

70. Respondent's sexual reference to his class regarding his genitalia was extremely inappropriate and constituted sexual harassment and intimidation.

71. Respondent's actions violated the District's Harassment, Intimidation and Bullying policies which prohibit such acts against students.

72. Respondent's actions in using sexual references in referring to his genitalia was extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

73. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

74. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment.

CHARGE SEVEN: CONDUCT UNBECOMING

THE NEWARK POLICE INCIDENT

75. The District restates the allegations contained in Charges One, Two, Three, Four, Five and Six and reallege and incorporate them by reference as if fully set forth at length herein.

76. Pursuant to District policies, a student who displays disruptive behavior and demonstrates unexcused tardiness, class cutting and absence is committing Level 1 Misconduct which subjects the student to such corrective action as verbal reprimand, parental contact, peer mediation, conference, withdrawal of privileges, detention, behavioral contract and/or a behavioral improvement program. See Exhibit J.

77. On January 31, 2012, while midterm examinations were being held, Respondent contacted the Newark Police Department to report that he was having a problem with District female students D.M and S.W. See Exhibit K and L

78. The Newark Police Department dispatched Police Officer Terrell Day ("Officer Day") to American History High School who appeared at Principal A Robert Gregory's ("Principal Gregory's") office. See Exhibit K and L.

79. Officer Day had stated that a teacher in Room 405 had called to report that he was being harassed by two students and requested additional information from Principal Gregory. See Exhibit K and L.

80. After Principal Gregory and District Security indicated that they had no knowledge of why Respondent would have called Newark Police, Officer Day, Principal Gregory and District Security rushed to locate Respondent in the event that he was in danger. See Exhibit K and L.

81. Shortly thereafter, Respondent was found on the fourth floor in a locked classroom that was empty and contained no students. See Exhibit K, L and M.

82. After unlocking his room and in response to why the police were called, Respondent

indicated that he was having problems with the behavior of two female students, D.M and S W., and that he wanted to file a harassment complaint against them. See Exhibit K and L.

83. Because Respondent's classroom was empty at that time, Respondent further went on to clarify that female student S W had been disrespectful the day before on January 30, 2012 in his presence and that was the reason for calling the police. See Exhibit L and M.

84. After Officer Day reviewed three incident reports that Respondent had provided involving S.W. relating to claims of cut classes, lateness and disrespectful behavior, Officer Day, Principal Gregory and Respondent's Union Representative all determined that the matter would be handled by the District independent of Newark Police. See Exhibits K and L

85. Respondent's actions in calling the Newark Police Department to the school to address a student discipline matter that should have been addressed by Respondent himself was inappropriate and against the District's Discipline Plan and Policy.

86. Respondent's actions in calling the Newark Police Department to the school during midterm examinations for a matter that had occurred the day before interrupted the school testing environment and was against District policies.

87. Respondent's actions in attempting to have students D.M. and S W. arrested for alleged Level 1 Misconduct was inappropriate, against school policy and constituted harassment, intimidation and bullying.

88. Respondent's actions in summoning the Newark Police Department to American History High School for a non-emergency constituted a misuse of public resources and violated District policies.

89. Respondent's actions in calling the Newark Police Department to the school during instructional time for a non-emergency matter involving two students which Respondent had already had prior, extremely inappropriate contact with in the past was inappropriate and highly

egregious in and of itself given the heightened standards of conduct to which educators are held.

90. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

91. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment.

CHARGE EIGHT: CONDUCT UNBECOMING

THE WEBSITE

92. The District restates the allegations contained in Charges One, Two, Three, Four, Five, Six and Seven and reallege and incorporate them by reference as if fully set forth at length herein.

93. During the 2011-12 school year, Respondent maintained a website. See Exhibit N.

94. During the 2011-12 school year, Respondent promoted the use of the Website to his students during class.

95. The Website features several Menu Links at the top of the default Welcome page which were titled "Welcome", "Classes", "Schools", "About Me" and "My Album". See Exhibit N.

96. All visitors to the Website's first encounter the default Welcome page which features a picture of Respondent in casual clothing with a younger girl with a salutation stating "Welcome to J. DaCosta's website. This site has been created to facilitate the distribution of information on professional and personal levels. Hope you enjoy the site and make the most of it!" See Exhibit N.

97. The next menu link at the top of the default Welcome page of the Website is entitled "Classes" and features, among other things, thumbnails/hyperlinks for various topics including "Chemistry", "Physics", "Desktop Publishing", "Computer Applications", "Biology", "Environmental Science" and "Earth Science". See Exhibit O.

98. Each thumbnail hyperlink opens additional content on the Website. For example, selecting the Chemistry thumbnail/hyperlink displays what appears to be a form of class syllabus and contains, among other things, the statement "Welcome to my Chemistry Page. In this page you will find an array of resources for the aforementioned class that are available to you. In the event that you are absent or merely wish to look through additional material, visit this page. This page will be updated periodically, so come back to visit. See Exhibit P.

99. The "My Albums" page contains an interactive picture gallery containing several pictures of children as well as personal pictures of Respondent in both casual and partial clothing. See Exhibit Q.

100. One picture dated February 8, 2011 entitled "IMQ0288" features an image of Respondent shirtless on a beach. (For inclusion as exhibits in these charges only, the images of all children from the Web Site have been redacted even though no such protections existed on the Web Site). See Exhibit R.

101. Another picture contained under "My Albums" entitled "2010 Union Beach" page contains images of young girls in swimsuits. See Exhibit S.

102. Other pictures under "My Albums" feature several unidentified young children being displayed on Respondent's site in various activities. See Exhibit Q.

103. The images displayed on the Website do not have any instructional value whatsoever.

104. Respondent's exposure of an image of himself while partially clothed to his students via the Website was extremely inappropriate, against District policy and constituted sexual harassment and intimidation.

105. Respondent's exposure of images of young girls in swimwear to his students via the Website was extremely inappropriate, against District policy and constituted harassment and

intimidation.

106. Respondent's inclusion of images of children on the Website was without District authorization, extremely inappropriate, against District policy and constituted harassment and intimidation.

107. Respondent's actions violated the District's Harassment, Intimidation and Bullying policies which prohibits such acts against students.

108. Respondent's actions in exposing male and female students to partially clothed images of himself as well as images of young girls in bathing suits and other young children without authorization, are extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

109. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior with female students.

110. Pursuant to N.J.A.C. 6A:9-17.5, the Board of Examiners may find that Respondent's conduct demonstrates just cause for revocation of Respondent's New Jersey Teacher Certificate.

111. Respondent's willful and inappropriate misconduct described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment.

CHARGE NINE: CONDUCT UNBECOMING

ABSENCE WITHOUT LEAVE

112. The District restates the allegations contained in Charges One, Two, Three, Four, Five, Six, Seven and Eight and re allege and incorporate them by reference as if fully set forth at length herein.

113. The District requires teachers who are assigned to a Regional location to report to the Regional location and remain at their assigned location for the duration of the contractual school

day with the exception of a lunch period. See Exhibit S.

114. The District requires all employees to record their "punch" in and out times via a finger scanning device known as the Kronos System which electronically reads and scans each employee's individual/unique fingerprints to register a time punch.

115. In addition to electronically recording their entry and exit times via the Kronos System, teachers who are assigned to a regional office are also required to physically write and record the times that they report to work in the morning, leave and come back for lunch and when they leave at the end of the contractual school day in a hand written "log book". See Exhibit T.

116. On or about April 12, 2012, Respondent was reassigned to the East Central Regional Office of the District where he was required to report and remain at the assigned location each day during NPS contractual hours.

117. Respondent was required to both scan in via the Kronos System and simultaneously physically sign in and out throughout the day whenever he left the Regional location during an authorized leave. See Exhibit T.

118. Starting on April 13, 2012, although Respondent began to physically enter into the log book the time when he purportedly arrived in the morning, the time he left and returned from lunch and when he left for the day, Respondent never scanned out during lunch. See Exhibit U.

119. Instead of remaining at the assigned location for the contractual school day, Respondent was observed on a regular basis leaving the building right after scanning in the morning and returning to the location just before he was required to scan out for the day even though he was physically entering into the log book that he was at the location throughout the day. See Exhibit V.

120. On May 8, 2012, East Central Region Special Assistant Anita Ziyad ("Special Assistant Ziyad") warned Respondent that although he was expected to report/remain at the location during contractual hours, a review of his attendance records as well as daily observations

revealed that he had been leaving the location and returning at the end of the day. See Exhibit V.

121. Respondent was also verbally warned once again on May 16, 2012 that the continuation of such a pattern will result in further disciplinary action. See Exhibit V.

122. Respondent continued his pattern of leaving the location after scanning in and returning to the location just prior to scanning out for the day despite the fact that Respondent had been fraudulently entering into the log book that he had been remaining at the Regional Location throughout the day. See Exhibit T and V.

123. Respondent's fraudulent entries as well as his absence without leave from his assigned location throughout the day constituted absence without leave, theft of time and public monies, and were against school policy.

124. Respondent's actions in leaving his assigned location while punched in were inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held.

125. Respondent's inappropriate conduct touches upon his character and highlight his propensity to engage in inappropriate and disturbing behavior.

126. Pursuant to N.J.A.C. 6A:9-17.5, the Board of Examiners may find that Respondent's conduct demonstrates just cause for revocation of Respondent's New Jersey Teacher Certificate.

127. Respondent's willful and inappropriate absence described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment

CHARGE TEN: OTHER SUFFICIENT CAUSE

128. The District restates the allegations contained in Charges One, Two, Three, Four, Five Six, Seven, Eight and Nine and re allege and incorporate them by reference as if fully set forth at length herein.

129. The cumulative effect of Respondent's misconduct as set forth above constitutes other sufficient cause sufficient to warrant dismissal or a reduction in salary.

The above charge is supported by the Statement of Evidence under oath by A.

Robert Gregory, Dated: October 2, 2012

POSITION OF RESPONDENT

LEGAL ARGUMENT

(As presented in the post-hearing brief of counsel for Mr. DaCosta)

Mr. DaCosta testified credibly that the charges against him are untrue and were the product of a vendetta against him, orchestrated by Mr. Gregory, in response to Mr. DaCosta having reported that students might have been cheating on the HSPA test. Notably, Mr. Alcivar corroborated this claim by his testimony that he heard Mr. Gregory, speaking of Mr. DaCosta, state, "There is a certain person in this faculty trying to ruin what we have as a family created. We are going to get rid of him no matter what it takes." (5T75). In fact, although Mr. Gregory testified that he was not aware of the alleged cheating on the HSPA until an e-mail exchange in either December 2011 or January 2012 (2T68), A.M. testified that she was aware of the allegation about her cheating on the HSPA in either April or May of 2011, and had gone to Mr. Gregory and reported it to him right away. According to A.M., Mr. Gregory then told A.M. that Mr. DaCosta was "only doing this in retaliation" and that he "had it under control." (2T 184 to 185). Time and time again, Mr. Gregory's testimony was contradicted by the alleged victims themselves, disproving his credibility as a witness.

It is submitted that Mr. Gregory, by his testimony, unwittingly produced the strongest proof in favor of Mr. DaCosta's charge. Mr. Gregory's testimony clearly betrayed him as a zealot with regard to American History High School. Mr. Gregory constantly interjected into his testimony his fantastical opinion that American History High School was a perfect school, attended by perfect students and run by a perfect administration. By his testimony he inadvertently proved that he was precisely the sort of person who would indeed seek to exact revenge, by any means available, upon a teacher who had sought to tarnish his school's

reputation. That is the logical explanation as to why Mr. DaCosta, after teaching in Newark Public Schools for so many years, suddenly was subjected to a flurry of complaints regarding his alleged interactions with students over a period of only a few months during the 2011 to 2012 school year.

POINT I

CHARGE 1 (A.M. INCIDENT), CHARGE 2 (K.W. INCIDENT), CHARGE 3 (FEBRUARY 24, 2012 INCIDENT), CHARGE 4 (D.M. INCIDENT), CHARGE 6 (D.A. INCIDENT), AND CHARGE 9 (ADMINISTRATIVE LEAVE) ARE COMPLETELY UNTRUE

Mr. DaCosta's average class size at American History High School was approximately twenty (20) students. (5T98). With regard to these supposed classroom incidents alleged in Charges 1, 2, 3, 4 and 6, while they supposedly took place in front of a classroom of students, the Board only produced one student witness to testify with regard to each charge. Even more telling is the fact that K.W. and D A were classmates in the same eighth period Chemistry class on February 24, 2012, but neither student corroborated the story of the other regarding the incidents that supposedly took place in front of the entire classroom on the day in question. Additionally, M.M. and D.M. were also in the same Chemistry class on February 24, 2012 (different than K.W. and DA.), but D.M. failed to corroborate the allegations levied by M.M. regarding incidents that supposedly took place in front of the entire classroom on the day in question. (5T298 to 299). In fact, D.M. never testified to any incident whereby Mr. DaCosta spoke about sexual content or genitalia at any time.

This becomes even more suspicious when considering the fact that most of the student witnesses produced by the Board with regard to these charges had been reprimanded by Mr. DaCosta for behavioral issues numerous times prior to the incidents to which they testified about. As stated earlier, motive is a factor that must be considered in the determination as to which party's version of an incident has the reasonable probability of the truth. "The interest, motive bias or prejudice of a witness may affect his credibility and justify the [trier of fact] whose province it is to pass upon the credibility of an interested witness in disbelieving his testimony." State v. Salimone 19 N.J. Super. 600. 609 (App. Div. 1952); State v. Bicanich 132 N.J. Super. 393 (App. Div. 1973).

Applying these legal standards to the testimony offered at the hearings conducted in this

matter, the conclusion should be drawn that Mr. DaCosta and his supporting witnesses testified credibly while the witnesses for the District did not.

In addition, as to Mr. DaCosta's supposed misconduct while on administrative leave, the documentary evidence shows this charge to be false.

Charge 1

More particularly, with regard to the lack of credibility of the District's witnesses as to charge 1, cross-examination of Mr. Gregory brought out that A.M. instigated the incident by challenging Mr. DaCosta's authority in front of the other students and that she cursed at him, stating "'F--- you,' to him. (2T39 to 40). A.M. also violated school policy by using her cell phone to contact her mother after Mr. DaCosta had prohibited her from doing so. (2T40-41). A.M., however, was not disciplined for her inappropriate conduct. (2T43-44; 2T49).

Of particular note, the written charges regarding this incident asserted that A.M. was placed in fear of physical harm, However Mr. Gregory conceded that this assertion was not accurate. It was similarly revealed that the charge that Mr. DaCosta used a sexual reference against A.M. was inaccurate in that it referred to his alleged use of the term "F--- you," under circumstances where, if believed to have occurred at all, that term was clearly not being employed in a sexual manner. (2T50-52). Indeed, A.M. testified that she did not feel as if she was being emotionally or physically harmed by Mr. DaCosta, and that she did not believe that Mr. DaCosta had said anything of a sexual nature to her. (2T176 to 177; 2T188). Here again, Mr. Gregory's zealotry compelled him to not only file charges, but to add an unquestionably false, sexual accusation to those charges.

On cross, A.M. testified that when she went to Mr. Gregory to report this incident, she was not crying. (2T177). This completely contradicted Mr. Gregory's earlier testimony that "when [A.M.] came down to my office immediately following the incident she was crying." (T64-11 to 19).

Charge 2

As to charge 2, involving K.W., cross-examination revealed that while Mr. Gregory had described her as a timid girl and someone with no disciplinary history, there was, in fact, a behavioral modification log in existence with regard to K.W., showing three behavioral incidents in Mr. DaCosta's class alone that proved that K.W. was not a timid child. (2T63-67). Cross also

revealed that the charge levied against Mr. DaCosta that he placed K.W. in "reasonable fear of physical injury" was not valid. (2T83-5 to 85-2).

Testimony from K.W. showed that even she admitted that Mr. DaCosta had not spoken disrespectfully to her in the past, even though she had been disrespectful towards him in the past. (3T71 to 72; 3T84). She also conceded that the incident in question occurred after she had "probably" made a disrespectful remark towards Mr. DaCosta after he had handed out assignments to the class. (3T72). She further testified that he had never physically threatened her or made any sexual comments to her or given her reason to fear him. In addition, she stated that while her statement, P-5, asserted that he had screamed at her, in truth he had just raised his voice and never left his desk at the front of the classroom. (3T74 to 75; 3T90 to 91).

Charge 3

It is submitted that Mr. DaCosta testified credibly in denying the allegations set forth in this charge. As to the District's evidence, again, all that the District could produce was a single student when his alleged misconduct supposedly occurred before a roomful of students. It is also submitted that it is not possible that if Mr. DaCosta behaved in the manner described in charge 3, two former students of his would have come forward to testify under oath that he was, actually, a wonderful teacher who was always helpful to those in his charge.

Furthermore, as stated earlier, M.M. confirmed that, to the best of her knowledge, Mr. DaCosta was unaware about the fact that she was a lesbian and that Mr. DaCosta had never asked her about her sexuality. (5T29). When combining M.M.'s testimony with the fact that Mr. DaCosta testified that he was unaware as of the date of the alleged incident that M.M. was a lesbian, it has clearly been established that Mr. DaCosta had no knowledge of M.M.'s sexuality at that time. Therefore, the allegation that Mr. DaCosta would have made comments to M.M. about being able to get more girls than her, clearly based on the premise of her being a lesbian, with no corroboration from anyone else in the classroom, contextually make no sense and is completely unbelievable.

Charge 4

As to the credibility of D.M.'s accusation that Mr. DaCosta called her on her cell phone and told her he was her worst nightmare, D.M. admitted that she had been disciplined on at least

three occasions by Mr. DaCosta for improper behavior in his classroom. Her testimony, in essence, was that she felt justified in acting improperly, including using profanity towards Mr. DaCosta, because she did not approve of his teaching methods, while recognizing that he was knowledgeable in his field. She sometimes understood his explanations, but sometimes did not. Her grades in chemistry were bad, "like F." (3T104 to 109; 3T126). D.M. did not believe it was improper for her to curse at Mr. DaCosta or other teachers because in her view doing so was expressing herself. (3T127 to 128).

Moreover, the charges allege, at paragraph 42, that, "D.M. discovered that Respondent had called D.M.'s house just prior to calling D.M. on her cell phone. " Even if Mr. DaCosta had called D.M.'s home phone, according to Mr. Gregory, calling the homes of students is encouraged. (2T112-24 to 113-8). However, the facts prove that once again D.M. lied under oath. According to D.M.'s own mother, unless someone left a voicemail, she would not be aware of someone calling while she was not home because she did not have caller ID. (2T280 to 281). Furthermore, D.M. stated that she was upset that Mr. DaCosta had her cell phone number. (3T97 to 98). However, as proven through the introduction of evidence (R-9), D.M. provided Mr. DaCosta with her cell phone number at the beginning of the school year when she filled out a Student Information Sheet.

Due to the fact that D.M. lied numerous times under oath throughout the course of her testimony, and was even contradicted by the testimony of her own mother, with no other witness brought forth to corroborate the allegation levied against Mr. DaCosta, the allegations of Charge 4 cannot be believed, and thus must be dismissed.

Charge 6

Regarding the incident of December 8, 2011, involving D.A. in Mr. DaCosta's Chemistry class, he admitted that his phone rang and the tone was from the song, "I'm Sexy and I Know It." But Mr. DaCosta credibly testified that he had not seen the video that accompanies that song prior to that date, and testified that the video that accompanies that song was never played in his classroom. Mr. DaCosta did not discuss his genitalia with his students and never stated that the video made him "feel small." (5T166 to 168). In fact, D.A. herself stated that Mr. DaCosta did not explicitly refer to his genitalia when making this alleged remark and she had never heard him make any sexual references to either her or any other student in the class. (3T161).

Charge 9

Ms. Ziyad's accusations concerning Mr. DaCosta's supposed misconduct while on administrative leave were proved false by the documentary evidence. Ms. Ziyad verified that her signature was at the bottom of each sign-in and sign-out sheet marked as P-49. (3T232 to 233). Ms. Ziyad further testified that the times logged in and out by Mr. DaCosta on all of the documents in P-49 were accurate reflections of the times that Mr. DaCosta was in or out of the building, and that her signature on the documents in P-49 confirmed that. (3T232 to 233). In addition, Ms. Ziyad could not confirm that Mr. DaCosta had ever taken a lunch break for more than an hour. (3T244).

POINT II

CHARGE 4 (D.M. INCIDENT) DOES NOT CONSTITUTE CONDUCT UNBECOMING

As to charge four, while paragraph 42 of the charges alleged that Mr. DaCosta had called D.M.'s house, Mr. Gregory stated on cross that not only are teachers allowed to call students' homes, but, "We encourage that." (2T112-24 to 113-8).

Moreover, D.M. herself admitted that when Mr. DaCosta spoke to her on the phone his words were, "This is your worst nightmare. Where is your mother?" Hence, there should be no dispute that his opening line, assuming Mr. DaCosta even made this remark, was said in a humorous vein, even if the humor was lost on D.M.. Equally obvious, if those two sentences were actually spoken, they prove that the purpose of the phone call was to reach out to D.M.'s mother about D.M.'s behavior in school.

Again, the inclusion of this charge in the list of charges against Mr. DaCosta proves the Mr. Gregory was desperate to find complaints to file against Mr. DaCosta.

POINT III

THE ALLEGATION THAT MR. DACOSTA WENT TO D.M.'S HOME WAS NOT SUPPORTED BY ANY EVIDENCE OTHER THAN HEARSAY

Beyond the issue of credibility, the claim that Mr. DaCosta drove to the home of D.M. is based entirely upon hearsay. D.M.'s mother merely testified as to what she had been told by

neighbors and had no personal knowledge of that claim. Neither did D.M.

As our Supreme Court explained in *Weston v. State* 60 N.J. 36 (1972):

[T]he rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. [Id. at 51].

Furthermore, the rule thus expressed in *Weston* has been codified in the Administrative Code. N.J.A.C. 1:1-15.5(b). Hence, the District failed to prove this allegation by competent proofs.

Furthermore, and as stated earlier, both Mr. DaCosta, through his testimony and his daughter, through stipulations, testified that on the night that Mr. DaCosta had allegedly visited the home of both S.W. and D.M., they had only driven to one student's home. This allegation makes even less sense when considering that it was never alleged that Mr. DaCosta got out of his car and spoke to neighbors or asked about the whereabouts of D.M. or her mother, Akilah Bond. This charge is predicated on a belief that the neighbors thought seeing a red Toyota Camry on the street was suspicious, that the neighbors knew the people in the car were looking for D.M. and Akilah Bond without ever speaking to Mr. DaCosta or his daughter, and that when Ms. Bond heard that a red Camry was looking for her she knew it was Mr. DaCosta's vehicle.

POINT IV

CHARGE 5 (S.W. INCIDENT) DOES NOT CONSTITUTE CONDUCT UNBECOMING

Charge 5 levied against Mr. DaCosta is that he visited the home of S.W. to speak to her parents. The claim that a teacher who visits the home of a parent in order to contact that parent to discuss the student's behavioral problems constitutes teacher misconduct is, frankly absurd on its face.

Mr. DaCosta testified that, to the best of his knowledge, there was no policy against doing so and that he was told by the director of science to the Board that he should do so in order

to reach out to a parent with regard to a child who was a disciplinary problem. (5T148; 5T164 to 165). His testimony in this regard was corroborated by the testimony of Ms. Caviasco. She testified that she was unaware of any district policy that prohibited teachers from visiting the homes of parents of students. She also testified that she did not believe that a teacher needed to ask permission from the administration to call the home of a student. (4T171). When Mr. Gregory was pressed on this point, he could not produce any written school policy prohibiting home visits.

In addition, Mr. DaCosta recorded part of the visit and that recording was played at the hearing (R-I 1), corroborating Mr. DaCosta's testimony that nothing untoward occurred during that visit. (5T153 to 155). Mr. DaCosta also recorded his telephone conversation with S.W.'s mother, proving that she had no idea that a parent-teacher conference had been scheduled for the following Monday morning, thus indisputably proving that Mr. Gregory's testimony as to why the conference never took place, supposedly because of threats from the father of S.W., was false. (5T158 to 163).

Ultimately, the inclusion of this charge proves the lengths that Mr. Gregory was prepared to go to in order to bring charges against Mr. DaCosta.

POINT V

CHARGE 7 (THE NEWARK POLICE INCIDENT) DOES NOT CONSTITUTE CONDUCT UNBECOMING

With regard to Charge 7, involving the Newark police coming to the school, once again Mr. Gregory exaggerates what occurred by asserting that Mr. DaCosta claimed he was under attack and by insisting that this incident disrupted school activities.

To begin with, as Mr. DaCosta testified, D.M. and S.W. had, as in the past, been disrespectful toward him that day, talking over him, arriving late, and mumbling about him. A day or two prior to this incident, Mr. DaCosta had complained to Mr. Gregory about D.M. and S.W. and stated that he needed help from the administration or else he would go to the police. Mr. Gregory responded by telling him to go to the police. Due to Mr. Gregory's unresponsiveness, Mr. DaCosta suffered a great deal of stress, almost to the point of a nervous breakdown. Mr. DaCosta explained that there is only so much verbal abuse and mocking that one can endure from the students and from the administration. (5T168 to 174).

Therefore, on January 31, 2012, Mr. DaCosta contacted Officer Day and advised him he wanted to press harassment charges. He did not tell the officer or anyone else at the Police Department that he was under attack from students. In fact, Officer Day's police report only states that Mr. DaCosta advised that he "was having a problem with two students" and that Mr. DaCosta "wanted to file a harassment complaint against them." (See P-33). The police responded by sending someone to him. (5T168 to 174). The 'police report corroborated Mr. DaCosta's testimony—and thereby contradicted Mr. Gregory's testimony—that he only complained of being harassed.

Of overriding importance, test taking was taking place that day. No test taking was disturbed because the students were not disrupted by this incident, as even Mr. Gregory had to concede. Hence, this incident did not constitute conduct unbecoming.

POINT VI

CHARGE 8 (THE WEBSITE) DOES NOT CONSTITUTE CONDUCT UNBECOMING

One charge against Mr. DaCosta is that he placed a photo of himself in a bathing suit on a beach with his daughter on a section of his website, the photo album section, that he did not direct students to, but that they could nonetheless access. The charges against him also allege that his photo album also contained other photographs of young people in bathing suits. Only the sort of prudery reminiscent of the Victorian Era of more than a century ago would find such photographs to be inappropriate. After all, when was the last time, post-World War I, that someone wearing a bathing suit on a beach was described as "partially clothed"? In fact, Principal Gregory conceded that he too wore swim trunks when he is with his children at the beach. (3T35). Indeed, when Mr. Gregory was pressed on cross-examination to explain why the photograph of Mr. DaCosta wearing a bathing suit was inappropriate, he came up with the desperately absurd assertion that it was inappropriate because it showed that Mr. DaCosta sported a tattoo. All that was missing was Mr. Gregory swooning as he so testified.

Furthermore, and as stated earlier, cross of Principal Gregory revealed that the objection to Mr. DaCosta posting a picture of himself and his daughter on his website, supposedly because it was a personal matter that was of no instructional value, did not actually make sense. Mr. Gregory testified that it would have been acceptable if Mr. DaCosta had had that very same photograph on his desk in the classroom as opposed to on his website. (3T27 to 28; 3T42). No

reasonable or logical person can come to the conclusion that a photograph is inappropriate and of no instructional value when found on a website that students had the option of visiting, but is acceptable under District policy if that very same photograph is put on display on a teacher's desk in front of their classroom for all students in attendance to see.

Again illustrating his lack of credibility, Principal Gregory also testified that the website was intimidating because Mr. DaCosta "constantly promoted it," and at one point attempted to compare Mr. DaCosta's website to those of the Nazis and the Ku-Klux Klan. (3T33 to 34). However, once again contradicting Mr. Gregory's testimony, every single student who testified throughout the hearings stated that they found nothing sexual about the website or the pictures of Mr. DaCosta in a bathing suit with his daughter at the beach, nor did they find anything about the website to be intimidating, inappropriate, or sexually harassing in nature.

POINT VII

THE TENURE CHARGES DO NOT ACCUSE MR. DACOSTA OF INEFFICIENCY AS A TEACHER, AND THUS ANY TESTIMONY OR EVIDENCE REGARDING PURPORTED INEFFICIENCY SHOULD NOT BE DISREGARDED AND NOT CONSIDERED

Time and time again throughout the course of the hearings the Board attempted to make an issue of Mr. DaCosta's teaching abilities and/or style. In fact, every formal observation and mini-observation introduced by the Board and subsequently moved into evidence had nothing to do with the charges levied against Mr. DaCosta. Not one of the observations included observations of inappropriate conduct or language towards students, cursing or making sexual comments towards students, or flirting with female students and treating male and female students differently. If the Board had a problem with Mr. DaCosta's teaching abilities and/or style, they could have brought tenure charges against him for inefficiency. However, the Board chose not to do so, and thus should the arbitration decision should not be tainted by the irrelevant and inappropriate testimony and evidence regarding Mr. DaCosta's teaching abilities.

With that said, Mr. DaCosta is an excellent teacher forced to work with extremely limited resources and an unsupportive administration. Almost every student, as well as Mr. DaCosta and Principal Gregory, testified that American History High School did not have a laboratory. It is impossible for a Chemistry teacher to have students participate in experiments without a

laboratory, chemicals, or any of the other necessary materials required to do so. In fact, for the 2010-2011 school year, Mr. DaCosta's Chemistry classes did not even have the proper textbooks. Mr. DaCosta testified that half of his students had one edition of the textbook, while the other half had to make due with a different edition. (5T112).

Even in light of the difficult circumstances surrounding Mr. DaCosta's teaching environment, Manny Alcivar testified that Mr. DaCosta was one of the best teachers that he had had during his four years at the high school. (5T76). Avanash Ohansam opined that Mr. DaCosta was a very good teacher who knew his subject matter well, taught at a "higher level," and that he gave the students their work, explained it and helped them when they needed help. (4T177). In fact, even D.M. testified that Mr. DaCosta is a "smart guy." (3T104).

POINT VIII

EVEN IF THE ARBITRATOR IS INCLINED TO SUSTAIN SOME, OR ALL, OF THE CHARGES, A LESSER PENALTY THAN DISCHARGE SHOULD BE IMPOSED, IN ACCORDANCE WITH THE DOCTRINE OF PROGRESSIVE DISCIPLINE

The doctrine of progressive discipline provides that an employee's past record must be considered in determining the appropriate penalty. See *West New York v. Bock* 38 N.J. 500 (1962). See also *Smith v. Correctional Institution for Women, Clinton*, OAL Dkt. No. CSV 7133-83 (April 30, 1984). The Commissioner has recognized situations where teachers convicted of tenure charges should receive a penalty less than dismissal. In re Hearing of Ostergren Franklin School District, 1966 S.L.D. 533. In re Hearing of Kittell, Little Silver School District 1972 S.L.D. 535 541. In re Fulcomer 93 N.J. Super. 404 (App. Div. 1967). Factors to be taken into account in making a penalty determination include the nature and circumstances of the incident or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the student and staff, and the likelihood of such behavior recurring. *Id.*

"Conduct unbecoming a teacher" is not specifically defines in the statutes or regulations.

However, various decisions by the Commissioner of Education and/or the Board of Examiners provides some guidance. A conviction of first degree murder constituted conduct unbecoming a teacher. *N.J. Bd. of Examiners v. Krupp* 3 N.J.A.R. 285 (1981). Acts of physical violence on a pupil or the use of unnecessary force constituted conduct unbecoming. *Matter of Doyle* 201

N.J.Super. 347 (App. Div. 1985). A teacher who pled guilty to conspiracy and bookmaking did not commit a crime involving moral turpitude but did commit acts which constituted conduct unbecoming a teacher. *Woodbridge Township School District v. Ramage*, 1 N.J.A.R. 381 (1980). However, in a case involving claims that a teacher allegedly tossed a book towards a student, termination was not warranted, and rather the teacher was reinstated, with a penalty including a reduction in salary equal to the 120 day suspension and loss of increment for the 2012-2013 school year imposed. In the Matter of the Tenure Hearing of Christopher Jorge, School District of the City of Atlantic City, Atlantic County, Agency Dkt. No. 275-9/12 (January 4, 2013).

Applying these standards, the penalty of dismissal in the instant matter would be inappropriate, and if any penalty is warranted at all, it is certainly one much lesser than dismissal. This is so especially given the factual inaccuracies of the Board's witness testimonies, the lack of corroboration of any of the witness testimony, the frivolous nature of many of the charges at issue and the lack of any harm sustained even if the allegations at issue were determined to be somewhat factually accurate. Here, several of the charges against Mr. DaCosta, even if they were true, would not render him unfit to teach.

POINT IX

ALL OF THE TENURE CHARGES AGAINST MR. DACOSTA ARE WITHOUT MERIT

Mr. DaCosta's tape recordings leave no doubt that Mr. Gregory lied about the incident involving Mr. DaCosta visiting the home of S.W and about why the parent-teacher conference with the parents of S.W. did not take place. Thus, the two incidents at issue that could be either proved or disproved by objective evidence, that is, audio recordings, demonstrated that Mr. Gregory had lied.

While Mr. DaCosta was not allowed to play his recording of his parent-teacher conference with Ms. Wilson, the simple fact that he was so eager to play that recording and the District was so anxious to keep it from being heard, should speak volumes as to what was on that recording.

Along this line, the numerous times when cross-examination revealed that there was absolutely no basis for charging Mr. DaCosta, over and over again, with physical or sexual

intimidation, constituted added proof that these charges will not be filed by Mr. Gregory in good faith.

Moreover, with regard to the classroom incidents, while they supposedly took place in front of a classroom of students, only a handful of students stepped forward to testify. A.M., D.M., K.W., and S.W., however, are clearly troubled children. It would be a horrible injustice if Mr. DaCosta's fate were allowed to be decided based on their word.

In contrast to such clearly troubled students, Mr. DaCosta produced two former students, Mr. Alcivar and Ms Ohansam, who testified that Mr. DaCosta was an excellent teacher. While one can readily understand why the students who testified against Mr. DaCosta would be motivated to testify falsely, there is simply no logical explanation as to why these two former pupils would come to the arbitration hearing and falsely testify that Mr. DaCosta was a good teacher. That being so, their testimony has to be believed. If their testimony is true, given that they were simply students in his class, it follows that Mr. DaCosta must have been a good teacher for all of the students that he taught, and was not the monster that he has been portrayed to be by the District's witnesses.

Last, as argued as to several of the incidents, even if they were true, they would not constitute conduct unbecoming.

Along this line, the numerous times when cross-examination revealed that there was absolutely no basis for charging Mr. DaCosta, over and over again, with physical or sexual intimidation, constituting added proof that these charges will not be filed by Mr. Gregory in good faith.

CONCLUSION

For the foregoing reasons, the tenure charges against Mr. DaCosta should be dismissed and Mr. DaCosta should be made whole by being reinstated immediately to a teaching position, with any back pay, benefits, and emoluments, retroactive to the date the tenure charges were filed against him. Alternatively, in the event that any of the tenure charges levied against Mr. DaCosta are upheld, Mr. DaCosta submits that the mitigating factors outlined throughout this summation brief warrant a conclusion that removal is too severe a penalty, and a less severe penalty is warranted under the circumstances.

THE WRITTEN WARNINGS ISSUED TO MR. DaCOSTA. BY NPS.

(As argued by counsel in post-hearing brief)

As the evidence demonstrates, each separate incident rises to the level of conduct unbecoming of a teacher. The cumulative effect of Mr. DaCosta's behavior warrants dismissal, particularly because he was repeatedly told to cease his improper behavior yet failed to do so. The number of documents warning him about the inappropriateness of his conduct as an employee of NPS demonstrates that he knew his behavior was inappropriate and unacceptable. Throughout virtually his entire time as an employee of NPS, Mr. DaCosta had received written memoranda and emails from his supervisors demanding that he refrain from certain inappropriate behavior and/or follow their instructions moving forward. In addition to the testimony presented, the following documents evidence the repeated instructions given to Mr. DaCosta:

- (1) 2007-2008, 2008-2009:** Memoranda to Mr. DaCosta from his supervisors at Barringer High School regarding his failure to meet his professional responsibilities, his conduct unbecoming of a teacher, his insubordination, his repeated absences, and other inappropriate behavior. (P59.)
- (2) December 22, 2008:** Email from Mr. DaCosta's supervisor following an incident where she witnessed him provoking a student to get her to respond negatively to him and found it necessary to remind Mr. DaCosta that it his responsibility to establish a rapport with his students. (P58.)
- (3) April 1, 2011:** Memorandum from Principal Gregory to Mr. DaCosta reprimanding DaCosta for stating "Fuck You" to Alexis Machado and directing him to refrain from further "unhealthy conversations with students." (P4.)
- (4) June 21, 2011:** Mr. DaCosta is told in his Annual Evaluation that he "should establish good relations with all students. As the teacher, he should conduct himself with the utmost professionalism regardless of the students' behavior towards him or otherwise." (P11.)
- (5) November 4, 2011:** Memorandum from Principal Gregory to Mr. DaCosta confirming Principal Gregory's verbal instruction to cease inappropriate behavior with students and promotion of his website. The memorandum documents parental complaints regarding his inappropriate comments to their children and student complaints regarding his flirtatious behavior. (P 12.)
- (6) November 7, 2011:** After receiving an email from the parent of K.C., complaining that Mr. DaCosta had come to their home, Principal Gregory verbally warned Mr. DaCosta not to go to students' homes. (P18.)

- (7) **December 1, 2011:** Memorandum from Principal Gregory to Mr. DaCosta regarding his receipt of a parent complaint of verbal abuse and profanity directed towards a student in which Principal Gregory advised that such behavior is unacceptable. (P14)
- (8) **January 9, 2012:** Memorandum from Principal Gregory reprimanding Mr. DaCosta for failure to remove pictures from, and stop promoting, his website, in spite of being instructed to do so. (P36.)
- (9) **January 9, 2012:** Memorandum from Department Chair Muhammad to Mr. DaCosta reminding Mr. DaCosta of his responsibility to engage students in significant and appropriate activities that will increase their learning of the subject matter. (P45.)
- (10) **January 31, 2012:** Memorandum from Principal Gregory to Mr. DaCosta reminding him that it is unacceptable to visit the home of any student to address disciplinary concerns without seeking consent and approval from the administration, and that it is especially inappropriate to do so on a Saturday night at 8:30 P.M. (P22.)
- (11) **February 1, 2012:** Memorandum from Principal Gregory to Mr. DaCosta reminding him that it is a breach of building protocol to summon the police to the school in a non-emergency situation and without alerting building security and administration first. (P34.)
- (12) **February 7, 2012:** Memorandum from Principal Gregory to Mr. DaCosta reprimanding him for speaking with students on their cell phones without parental or administration consent and instructing him to stop such behavior immediately. (P20.)
- (13) **February 27, 2012:** Memorandum from Principal Gregory to Mr. DaCosta, telling him that his cursing at and degrading of students is completely unprofessional and must cease immediately. (P8.)
- (14) **May 17, 2012:** Letter of warning from Special Assistant Ziyad to Mr. DaCosta documenting a previous verbal warning resulting from his leaving the East Central Region location and reminding him that such behavior is inappropriate. (P51.)
- (15) **June 26, 2012:** Letter from Special Assistant Ziyad to Interim Director Breton explaining that Mr. DaCosta still failed to remain at the Region, despite prior warnings. (P52.)

The number of warnings Mr. DaCosta received during his employment with NPS demonstrates not only his propensity to engage in inappropriate behavior, but also his awareness that such behavior is not acceptable for an NPS teacher. Indeed, the fact that Mr. DaCosta had been warned of inappropriate behavior throughout his time as an employee of NPS is an aggravating factor in this matter.

During the hearing, Mr. DaCosta refused to admit that he received most of the memoranda listed above and further alleged that every single warning was unfairly issued.

(T5.231-239.) His failure to take any responsibility either for engaging in behavior that warranted a warning or receiving the warning suggests this Mr. DaCosta's behavior will not change in the future. The warnings date back from 2007; his inability to accept responsibility or change in 2013 demonstrates that he will never change or take responsibility for his behavior, not now and not six years from now. Accordingly, his consistent disregard for NPS's policies and the expectations for him demonstrates other sufficient cause for his dismissal from NPS.

Additionally, as evidenced through the testimony, many of the problems Mr. DaCosta had with his students -- as alleged in the charges -- began because they specifically asked him why he was not teaching them. For example, one student, K.W., testified that the incident in charge two began because she criticized his teaching style -- specifically, the fact that she felt he was not teaching at all. (T3.57:23-24;58:1-4.) Further, several of the students admitted to complaining about Mr. DaCosta's failure to teach. Indeed, D.M. claimed that she had problems in the class and would complain because Mr. DaCosta would not teach and would then be rude to her. (T3.107:1-14.); see also P21. Ms. Bond also testified that D.M. would complain to her about Mr. DaCosta's refusal to engage the students in learning. (T3.243:2-5.) D.A. also stated that Mr. DaCosta was not teaching, and that she had complained to Principal Gregory in the past about it. (T3.149:14-15.)

Principal Gregory and Department Chair Muhammad testified that, upon their investigation of each of the complaints, they confirmed that the students were correct when they stated that Mr. DaCosta had not been teaching. Indeed, they conducted several mini-observations and all came to the same conclusion: that Mr. DaCosta was not engaging his students in the manner expected from NPS. (P41, P 42, P 43, P44, and P 45.) This further bolsters the credibility of each student witness, as other complaints of theirs were confirmed by the administration to have merit. Additionally, it demonstrates Mr. DaCosta's repeated inappropriate responses when students criticize him, responses that demonstrate a lack of professionalism one would expect from a teacher with nearly eight years experience like Mr. DaCosta, and sufficient cause to warrant dismissal.

DISCUSSION AND OPINION

A thorough review of the extensive sworn testimony of the fifteen witnesses during the five days of hearing before me, reveals that the Mr. Jose DaCosta continuously and repeatedly engaged in conduct unbecoming a tenured high school teacher. During his relatively brief period of teaching in the NPS district, he had been employed in four different schools.

His repeated confrontations with students in his classrooms using vulgar language, particularly with a number of his female students, reveals an arrogant personality not suited for motivating, elevating and inspiring students to learn chemistry. His confrontational behavior poisons the atmosphere and diminishes the self esteem of the students who may not be participating in the confrontations but witness the open negative episodes between fellow students and teacher.

Additionally, the extensive record made before me during the five days of hearing and the verbatim transcribed testimony, reveal fifteen written warnings and memoranda from his current superiors. Significantly, two writings are from his prior supervisors at Barringer High School also indicting his failure to meet his professional responsibilities, his insubordination and his conduct unbecoming of a teacher.(P59) He was also reminded in writing that it is his responsibility to establish a rapport with this students.(P58) In another memo from his supervisor at Barringer, he was admonished that he "...acted inappropriately by getting into the student's face provoking the student to respond negatively."(P61) Document P59 reveals some twenty five written reprimands and warnings. A May 29, 2009 Memorandum he was instructed in part to "stop sending emails, memoranda, etc. that contain sarcastic negative overtones describing your personal feelings. Many of your comments have been deemed threatening and acts of harassment."(NPS 0288) He was warned that his continued behavior will result in further disciplinary

action including tenure charges. The record before me clearly demonstrates that such provocations also continued with students at American History High School, which culminated in the instant tenure charges.

An example of his conduct unbecoming occurred on February 27, 2012, when three students from his class came to Principal Gregory's office in tears reporting that Mr. DaCosta stated in part "*I don't give a fuck about your grade. I'm just here to teach you whatever I'm told to teach...I'm the shit in this school I have no competition.*" He also stated to another student that she will not amount to anything and that "*...your mother is still living with her mother...*" On a number of occasions according to sworn testimony, he has given the middle finger to students. Such unacceptable belligerent behavior by a teacher, especially in the presence of other students in his class is obviously damaging and destructive of the self esteem of the students he is expected to elevate and inspire. This behavior constitutes an obvious example of deliberately cursing and degrading students. It is clearly conduct unbecoming by a teacher and deserving of dismissal.

The testimony of Mr. DaCosta regarding the unscheduled visit to student S.W.'s home on January 31, 2012 at 8:30 PM on a Saturday night, was also revealing his lack of cooperation with his supervisors and his obvious reluctance to be on the "team." Significantly, he states in his testimony that in his eight years of teaching in the District, this was his first home visit. His explanation that he arrived together with his thirteen year old daughter was suspect and unconvincing since she is not an infant, who could not be left alone for the period of the visit. He exposed her to an unknown and unpredictable situation given his recent vulgar confrontations with the student in question. Additionally, he failed to inform her parents that he was recording their conversation on his cell phone.

He failed to explain the necessity of the home visit since he knew that a parent teacher conference was already scheduled to take place at his school with D.

M. and S.W.'s parents and preparations with Principal Gregory and Mr. DaCosta were made and reviewed, regarding the January, 17th S.W. incident in his classroom. However, Mr. DaCosta's version of the incident is contradicted by the written statements of the female students S.W. and D. M. to Principal Gregory.

His accusation that cheating had taken place on the High School Proficiency Assessment Exam (HSPA) exams was likewise merely an assumption by Mr. DaCosta. He testified that he was looking through a list of the results of the test and noticed that student A.M. received a score that high. He testified that student E.L. stated to him that "Oh, that's because I let her copy from me."(T5 177) However, student E.L. did not testify at the instant hearing. Mr. DaCosta was not present at the HSPA testing and did not personally observe the alleged cheating. There is nothing in the record herein to indicate that cheating actually occurred.

However, he claims that his disciplinary reprimands increased after he reported the alleged cheating to his supervisor.

The record also indicates that Mr. DaCosta had actually been assigned to administrative leave on three occasions. Ms. Anita Ziad, Special Assistant to the Assistant Superintendent testified that Mr. DaCosta had been assigned out of his classroom on three separate occasions, while his disciplinary actions were being investigated. He was required to remain on District premises during teaching hours. However, although he signed in and out, Mz. Ziad testified that whenever she looked for him during the day, she could not find him. On several occasions she observed him returning to sign out at the end of his day.

Under cross examination Mr. DaCosta claimed that Ms. Ziad, as well as the other NTS witnesses had lied under oath about him, but he admitted that he "dozed off" during a portion of her testimony at the instant tenure hearing.(T5. 292)

The record before me reveals that he had an ongoing problem controlling his belligerence with students in his class. This behavior was evident by the

disciplinary memoranda in the record, even prior to his arrival at American History High School. He was admonished to cease provoking students into confrontations with him. In testimony on his own behalf, at the instant tenure hearing, he complained that the administration failed to give him support in disciplining disruptive students. He stated in part:

“I remember one time I went home, I almost had a heart attack from all of the stress. I mean I had to call one of my friends to say I’m at such and such street. I did not want to call my mom to make her worry. I’m really—like my heart is beating a lot because there is only so much—I’m only human, there is only so much abuse I can take and mocking, not only from students, but from administration. I had almost a nervous breakdown and I had to call my friend, I’m on such and such a street, if something happens, I’ll call you right back.”(T5 172)

His own testimony herein reveals that he had lost control of his classroom. He was either unable or unwilling to implement traditional disciplinary rules of behavior in his classroom, resulting in three separate occasions of disciplinary administrative leave. His own sarcasm and inappropriate belligerence, such as giving the finger to female students, created a hostile environment that becomes irreparably infectious in the teacher-student relationship.

Such vulgar confrontational behavior with students as “I don’t give a fuck about your grades” and “I am the shit in this school I have no competition in this school”(P15) eliminates the essential respect so vital for a proper learning atmosphere in the classroom. It is clearly an insubordinate continuous conduct unbecoming as charged herein. Having his cell phone ringtone go off to the music of “I’m sexy and I know it” in his class room followed by a discussion of the video

connected with the song, was also obviously inappropriate. Providing a website to his students containing personal photos on the beach without a shirt and with young girls in bathing suits had no instructional value. He was instructed by Principal Gregory to remove the pages of personal material from his website but refused to do so.

The incident of Mr. DaCosta calling the local police was another occasion of confused and inappropriate behavior, without first informing the administration or his supervisor and claiming to the police that he was being harassed by two female students. When the police arrived, Principal Gregory and two school guards rushed to his room with police officer Day and found him to be alone. There were no students in his classroom since they were at another location taking exams and there could not have been a harassment emergency when he called.

After interviewing Mr. DaCosta alone, Officer Day reported to Principal Gregory in part, that "...the teacher has malicious intentions and is trying to engage in sabotage."(P28 NPS 0271) This was a significant opinion of an outside investigator without a special interest in the outcome of this matter.

A thorough consideration of the charges in the record, including the sworn testimony of the witnesses of both parties during the five days of hearing in this matter, unmistakably reveals that Mr. Jose DaCosta is not likely to correct his self inflicted confrontational behavior with his students and his ongoing insubordinate behavior with his supervisors and the Administration of the school.

Consequently, having thoroughly considered all the evidence including the arguments and allegations of both parties, at the hearings before me and in their extensive post hearing written arguments, I have determined, for the above stated reasons, that American History High School Teacher Jose DaCosta is guilty as charged and I make the following Award:

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

.....
In the Matter of the Tenure Hearing of
Jose DaCosta,
(Respondent)

AWARD

AND

State-Operated School District of the City of
Newark, Essex County, New Jersey.
(NPS) (Claimant) (District)

Agency Docket No.: 352/11-12
.....

The undersigned arbitrator, having been designated in accordance with the provisions of N.J.S.18A:6-16 as amended by P.L. 2012,c.26. and having duly heard the proofs and allegations of the parties, AWARDS as follows:

For the above stated reasons, Mr. Jose DaCosta is found guilty as charged of Conduct Unbecoming by the State-Operated School District of the City of Newark, Essex County, NJ.

His tenure teaching certificate is hereby revoked and his employment with Newark Public Schools is hereby terminated.


ERNEST WEISS, ARBITRATOR

STATE OF NEW JERSEY)

SS:

COUNTY OF SOMERSET)

On this 1st day of April, 2013, before me personally came and appeared Ernest Weiss, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed same.

