#308-13

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of

MICHAEL McCAUSLAND

and

BUENA REGIONAL SCHOOL DISTRICT

Agency Docket No.

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration provisions of the TEACH NJ statute as implemented by the Commissioner of Education of the State of New Jersey, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the tenure charges preferred against Michael McCausland by the Buena Regional School District dated May 21, 2013 cannot be sustained. The dismissal of the Respondent shall be reduced to a suspension without pay for the 2013-2014 school year. The terms of the Settlement Agreement entered into on November 2, 2012 shall apply for the 2014-2015 school year. Respondent's seniority shall not be interrupted, nor shall the suspension be considered a break in service for pension purposes.

The Arbitrator hereby retains jurisdiction for the purpose of resolving any dispute that may arise regarding the implementation of the remedy ordered pursuant to this Award.

August 28, 2013

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 28th day of August, 2013 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

An Attorney at Law of the
State of New Jersey

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of

MICHAEL McCAUSLAND

and

BUENA REGIONAL SCHOOL DISTRICT

Agency Docket No. 31-2/13

A hearing was held in the above-entitled matter on August 8, 2013, at the Law Offices of Ned P. Rogovy, in Vineland, New Jersey before Daniel F. Brent, duly designated as Arbitrator. Both parties attended this hearing, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross examine witnesses and to present evidence and arguments. The District submitted a written closing, and the record was declared closed on August 13, 2013.

APPEARANCES

For the District:

Richard A. Asselta, Esq., of Capizola, Pancari, Lapham, and Fralinger, Esqs.

Walter Whitaker, Superintendent of Schools

Moses White, High School Principal

For the Respondent:

Ned P. Rogovoy, Esq.

Michael McCausland, Respondent

ISSUES SUBMITTED

Should the tenure charges preferred against Michael McCausland by the Buena Regional School District dated May 21, 2013 be sustained?

If not, what shall be the remedy?

NATURE OF THE CASE

The Respondent has been employed by the Buena Regional School District for twenty-one years and assigned to teach music, drama and related subjects. He was suspended at the end of the 2012-2013 school year pending determination of tenure charges. The District's action was predicated on two events cited by the District as violating District policy and, more particularly, an event on February 26, 2013 that violated a Settlement Agreement resolving tenure charges previously filed against the Respondent on August 31, 2012. The events underlying the previous tenure charges were not described in the context of the instant case, but these circumstances resulted in the execution by the parties of a Settlement Agreement dated November 2, 2012 (Petitioner Exhibit 1) in which the Respondent was suspended without pay for first half of the 2012-2013 school year and returned to work with express provision in Paragraph F of the Settlement Agreement that he not "participate in or receive a stipend in regard to any drama or theatre production".

According to the District, the Respondent violated this prohibition when he set up a camera and microphone in the sound booth of the High School auditorium, and listened to a portion of the rehearsal of the play

"You're a Good Man Charlie Brown" on the evening of February 26, 2013. The Respondent did not obtain prior authorization for his actions.

On February 27, 2013, the Respondent revealed during a conversation with three students who were doing their homework in the Choir Room after school that he was aware that their play rehearsal the prior evening had ended fairly late because he had listened to a portion of the rehearsal. When the students inquired how he could have heard the rehearsal, including one of the students singing the song "Suppertime", the Respondent informed them that he had set up a camera and microphone in order to listen to the rehearsal. The Respondent also asked the student why the version of "Suppertime" had been played at such a slow tempo, which the student testified she interpreted as being a remark criticizing her performance.

The Respondent's actions came to the attention of the school administration, which conducted an investigation by interviewing several students. The Respondent was not interviewed, nor was he asked to provide a statement about this incident. The District construed his admitted action as a violation of his Settlement Agreement, District policy, student privacy rights, and insubordination and as conduct unbecoming a District employee.

The second incident occurred on or about March 27, 2013, when the Respondent was meeting with his PA Tech Class in the High School auditorium. One or more of his students advised him that another class member, KM, who along with the rest of the seniors in the class had travelled to Florida on the Senior Trip, had been arrested. The Respondent's version of this interaction with his students is that, at the behest of a vocal student, the Respondent used his tablet computer to Google the name of the student in question and was surprised when KM's picture appeared on his I-Pad. The Respondent testified that he then darkened the picture and closed his tablet.

The District contended that the Respondent opened, or permitted a student to open, the mugshot.com website entry depicting the student and to scroll down to reveal booking and other personal information concerning KM, the student who had been arrested for misconduct during the Senior Trip. According to the District, the Respondent either permitted or facilitated a discussion with the students in his class, stating that of the seniors in the PA Tech Class who were on the Senior Trip, he expected that KM would be the student in this situation. KM was suspended for ten days after the Spring Recess in response to misconduct committed while she was on the Senior Trip.

When KM returned to school and learned from other students that her name and picture had been discussed in the PA Tech Class, her mother, highly upset, called the School Principal and demanded that the school investigate. The Principal interviewed all of the PA Tech students, and determined that the Respondent had caused this information to be disseminated to the students during a PA Tech Class session. The Respondent was not interviewed, nor was he asked to provide a statement regarding this incident.

The District construed the Respondent's alleged conduct as conduct unbecoming a District employee, harassment, intimidation, bullying, and violation of school policy, and recommended that tenure charges be filed. The District voted to file charges on June 20, 2013.

RELEVANT STATUTORY LANGUAGE

P.L. 2012, Ch. 26 (TEACHNJ) ACT

8. N.J.S.A. 18a:6-16:

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section [23] 22 of P.L. 2012 Ch. 26 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

[17] 16 (New Section) a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members. The Board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

* * *

[18] 17. (New Section) a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section [17] 16. of P.L. 2012, Ch. 26. The Board of Education shall adopt a rubric approved by the commissioner.

b. The State District of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C: 52:14B-1 et seq.) to set standards for the approval of evaluation rubrics for teachers, principals, and vice-principals. The standards at a minimum shall include:

***** * *

[23] 22. (New Section)

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L., c. (C

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing District of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing District of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing District of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State District of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

[24] 23. (New Section) a. In the event that the matter before the arbitrator pursuant to section [23] 22 of this act is employee inefficiency pursuant to section [26] 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;

(4) the district's actions were arbitrary and capricious.(b) In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

(d) The Board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

[25] 24. (New Section) The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedures Act," P.L.1968, c.410 (C.52:14B-1 et seq.), in accordance with an expeditious time frame, to set standards for the approval of evaluation rubrics for all teaching staff members, other than those included under the provisions of subsection b. of section [18] 17. of P.L., c. (C.) The standards at a minimum shall include: four defined annual rating categories: ineffective, partially effective, effective and highly effective.

[26] 25. (New Section) a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of the law to the contrary, in the case of a teacher, principal, assistant principal, and vice principal:

(1) The superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

* * *

(d) The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. , c. (C.) ().

[27] 26. (New Section) The commissioner shall have the authority to extend the timelines in the tenure charge process upon a showing of exceptional circumstances.

DISCUSSION AND ANALYSIS

The District has demonstrated persuasively that the Respondent is culpable for two lapses of judgment. At issue in the instant case is whether one or both of these lapses justified terminating his tenure at the Buena Regional School District. The first instance, in which the Respondent used a camera and microphone to listen in on a portion of a play rehearsal violated the terms of the Settlement Agreement regarding prior tenure charges that the parties executed on November 2, 2012. This settlement agreement provided at Paragraph 7 that the Respondent would not "participate in or receive a stipend in regard to any drama or theatre production" for the 2012-2013 school year.

In order to determine the appropriate penalty for the first element of the Respondent's misconduct, a threshold analysis of the Respondent's admitted actions is required to determine whether the these actions constituted participation in a theatre or drama production as contemplated by the parties when they drafted and executed their Settlement Agreement. The parties clearly contemplated that the Respondent would be ineligible for assuming a paid or voluntary role directing, advising, supervising, or in any way actively engaging in the rehearsal of, or production of, a play or other drama performance offering during the 2012-2013 school year.

If the Respondent had interfered with or undermined, whether surreptitiously or overtly, the endeavor of his successor to present a successful production of "You're a Good Man Charlie Brown", such interference could reasonably be deemed to have violated the spirit and the letter of the Settlement Agreement. Furthermore, if the Respondent had interacted with any of the student participants in the production, such interaction could be deemed as violative of the settlement agreement. Both parties were aware, however, when the settlement agreement was drafted and executed that the Respondent was scheduled to teach a class called "PA Tech" in the second semester. This class instructs students on the various aspects of stage lighting, sound engineering and other stagecraft techniques using various modes of technology, including sound amplification.

The Respondent testified credibly regarding the organization of the course curriculum of the PA Tech course by the authors of the syllabus into eight discreet units in a specified sequence and of specified duration. In January and February, the students were engaged in a Sound Technology unit. Independent of any action by the Respondent, two of the nine students in the PA Tech class were invited to fulfill the sound engineer and sound technician role on the production of "You're a Good Man Charlie Brown".

As the production came closer to actual performance, the two PA Tech students encountered technical challenges involving wireless microphones and other sound engineering problems. They presented the difficulties they encountered during the play rehearsals the previous afternoon or evening at the PA Tech class session the next day for discussion and analysis by the Respondent for the benefit of these two students and edification of the other students in the PA Tech Class. This discussion cannot reasonably be construed as participation in the drama production, as the activities occurring during the PA Tech Class period fulfilled the Respondent's teaching obligation and occurred only during class time.

When the Respondent could not successfully diagnose and rectify the technical difficulties causing an electronic hum in the sound system -- which hum could be attributable to a ground loop, a short, or several other electronic causes--in part because the symptoms afforded by the two students were not sufficiently descriptive or complete for an accurate diagnosis, the Respondent used a camera and microphone in the auditorium sound booth to Skype the audio portion of the rehearsal to his home computer. By doing so, the Respondent may have breached school policy, but would not be culpable for a material breach of the Settlement Agreement if he then restricted the use of the information he

gleaned from this transmission to a discussion of resolving technical issues faced by his students during the PA Tech Class the next day. However, especially given the constraints of the Settlement Agreement, he should have sought authorization from a supervisor to activate an electronic transmission of a closed rehearsal involving student performers to his home computer. The Respondent admitted in his testimony that he now realizes he should have sought supervisory approval of his plan.

The Respondent also acknowledged that he made a passing comment to the student, who testified at the arbitration hearing, that he had heard her performance of the song "Suppertime" and inquired why the song was sung so slowly. The student testified credibly that she perceived this inquiry to imply criticism of the student performance. She also reacted adversely when, as she testified, the Respondent said, "It's better that you spend your time doing homework than the play ...." The student witness credibly testified that she found these comments negative, as she interpreted them to imply that the Respondent thought that the production was deficient. She testified, "To me it sounded like he was saying we sucked". The Respondent may not have realized the impact his offhand remark could make, and he undoubtedly did not intend to upset this student or the other two students doing their homework in the Choir Room before the play rehearsal, but his inquiry

about an aspect of the play, while not an explicit articulation of an opinion about the production, was reasonably interpreted by the District as violating, at least technically, the Settlement Agreement by implicitly inserting himself into the play production process. He did not, however, interfere with or overtly undermine the efforts of the students or faculty involved in preparing the play. If he had seen a performance as an audience member and offered feedback after the production closed, his comments might have been viewed more benignly.

The Respondent's self-serving characterization of his statement concerning doing homework as more valuable than being in the play was unable to overcome the more persuasive version offered by the student witness describing the remark differently. That a statement was made about homework can readily be inferred because this conversation was the reason that the Respondent disclosed to the three students that he had listened in to the rehearsal the night before. The District was understandably concerned about the import and impact of the Respondent's statement to the student who sang "Suppertime" during the rehearsal. That comment had no valid relationship to the problem solving for his PA Tech students that ostensibly motivated Respondent's imprudent intrusion into the rehearsal. Thus the Respondent is culpable for the impact of his remark.

Although this sequence of events technically constituted a violation of the Settlement Agreement, it was not sufficiently egregious to justify terminating the Respondent's tenure. The parties contemplated that the Respondent would be disqualified from taking a leadership role in, and be precluded from interfering with, the staging of a dramatic or theatrical enterprise. The parties did not mutually contemplate that the Respondent could not utilize such a production as material for discussion in his PA Tech Class sessions. The Respondent's unauthorized use of a camera and microphone to listen in to the rehearsal for pedagogical purposes without authorization constituted grounds for discipline, but not grounds to sever his employment.

The second offense, in which the Respondent is accused of having facilitated the ridicule of a student who had been arrested for misconduct while on a senior class trip to Florida, is more serious. The Respondent testified that he was approached by a student who "bounded into the class" and asked if the Respondent could guess which of his students had been arrested on the senior class trip. The Respondent testified that he tried to divert this student, whose personal circumstances often require special attention or extraordinary effort to control and enable him to focus on class activity. However, even if the Respondent's version of this class session were accepted as entirely accurate, the Respondent made a critical error of judgment by not simply foreclosing any further

discussion. His admission that he sought to deflect the student's enthusiasm to control the class was less persuasive than the explanation conveyed by student testimony offered at the arbitration hearing describing a much more flagrant dissemination of information regarding the student who was arrested. Once again, Respondent may have acted without any malice and without due regard for the consequences of his actions, but he cannot escape liability for his exercise of poor professional judgment. Even if the decision to handle this situation was made in a momentary evaluation of the best way to control the overly ebullient student, his decision turned out disastrously. By using his tablet device to access the Internet and explore "Violence-Disney", the Respondent rendered himself vulnerable to the unintended consequences of this action.

Furthermore, the circumstances described by a student witness, albeit one who was admittedly a friend of the student who was arrested, portrayed a very different sequence of events. Even if the Respondent's assertion that the student witness probably accessed the Internet and mugshot.com on other occasions, her straightforward and credible testimony that she saw the nature of the charges and other identifying information about KM, the student who was arrested, on the Respondent's tablet undermined the Respondent's benign depiction of this event. The student witness displayed no evident animus toward the

Respondent, and is returning to Buena Regional High School as a student. Therefore, her recollection of, and description of, the class session and the nature of the discussion ridiculing KM cannot be completely discounted.

The District would have been entitled to rely on the student's description of the class session if the District had conducted an adequate investigation. However, the evidentiary record demonstrated unequivocally that the District failed fully to investigate this serious allegation. Not only did the District fail to interview the Respondent about either of the two events cited in the tenure charges, but the District also failed to ask the Respondent for a written statement of his version of the events.

The District's failure to interview the Respondent after each of the two major incidents that precipitated the tenure charges in the instant case was not a material factor in the outcome of the instant case. However, had the failure to interview the Respondent and to ascertain both sides of the story before taking action inured to the detriment of the Respondent, such inadequacy of investigation could have altered the outcome or affected the penalty imposed. In the future, the District would be well advised to utilize more thorough investigatory practices by soliciting oral or statements from teachers who are accused of

misconduct, subject to appropriate access by such teachers to appropriate advice from their certified bargaining representative.

Respondent's actions were likely not the sole source of disseminating this personal information in the school community. It is likely that the notoriety of the arrest spread throughout the high school's student population independently of Respondent's actions. At least one of his PA Tech students knew of the arrest before the excited student brought the news to Respondent's classroom. Moreover, the mugshot.com information was easily accessible by students using smart phones or the school's computer system. Therefore, any adverse consequences, including the ire of the KM's mother and KM's subsequent withdrawal from Buena Regional High School and transfer to another school for the balance of the school year, cannot be attributed solely to the Respondent's conduct. Nevertheless, the Respondent cannot completely avoid responsibility and culpability for having failed adequately to divert the insistent student, regardless of his special personality or other attributes, from exploring an irrelevant and inappropriate topic during a classroom session.

Even by the Respondent's own testimony, he failed to exercise good judgment, to control a small class of students, and to direct his class. Simply poring over incidents of violence or other unusual occurrences at

Disney World fell well outside the scope of his teaching duties, even while the majority of his class was away on the senior class trip. Notwithstanding that Respondent sought to employ what he expected would be a successful technique for dealing with this particular student, Respondent admittedly failed to divert the student's agitated state.

Respondent has previously been suspended without pay for the first semester of the 2012-2013 school year. His return to teaching duties pursuant to a Settlement Agreement was predicated on his adhering to applicable standards of good teaching and exercising sound professional judgment. The evidentiary record does not support the District's characterization of the troubling circumstances surrounding the disclosure of the arrest of KM on the senior class trip. While the circumstances are undoubtedly less benign than portrayed by the Respondent, the Respondent's role is less sinister than described by the District. Nevertheless, the District need not and should not ignore this serious lapse in judgment. Although the evidentiary record established persuasively that neither of the two incidents on which the tenure charges were predicated was as egregious as the District alleged, Respondent must consistently exercise more prudent judgment in the future if he is to retain his position in the long term.

An employee with a clean disciplinary record might have received a more sympathetic response from the District. Having recently concluded settlement negotiations that returned the Respondent to his teaching duties in January 2013 after a full semester of unpaid suspension, the District was understandably reluctant to impose another substantial suspension only weeks later. Nevertheless, based on the credible evidence submitted in the instant case, the instances of demonstrated poor judgment exercised by the Respondent can justify only a substantial penalty short of revoking tenure. Therefore, the dismissal of the Respondent shall be reduced to a suspension without pay for the 2013-2014 school year. The terms of the Settlement Agreement entered into on November 2, 2012 shall apply for the 2014-2015 school year, and the Respondent is hereby placed on notice that further proven serious misconduct will result in the revocation of his tenure.

August 28, 2013 Daniel F. Brent, Arbitrator