

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

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In the Matter of the **TENURE** Hearing of:

JOHN CARLOMAGNO,

Respondent,

and

**SCHOOL DISTRICT OF THE TOWNSHIP OF HILLSIDE,
UNION COUNTY**

Petitioner.
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Before **MELISSA H. BIREN, Esq.**, Impartial Arbitrator

Agency Dkt. No.
180-8/13

**OPINION
AND
AWARD**

APPEARANCES:

For the Petitioner

Adams, Gutierrez & Lattiboudere, LLC
Adam S. Herman, Esq.
Julianne J. Navarrete, Paralegal

For the Respondent

Bucceri & Pincus, Esqs.
Sheldon H. Pincus, Esq.

Pursuant to *N.J.S.A. 18A:6-16*, as amended by *P.L. 2012, c 26* ("TEACHNJ"), the tenure charges brought by the School District of the Township of Hillside, Union County (the "District") against John Carlomagno ("Carlomagno") were referred to me for a hearing and decision. I conducted a hearing at the offices of the Hillside Board of Education on October 17, 2013, October 28, 2013 and October 31, 2013.¹

At the start of the hearing, the parties agreed that the issue to be decided in this tenure hearing is as follows:

Has the School District of the Township of Hillside, Union County, established that the Respondent, John Carlomagno, engaged in misconduct as alleged in the charges brought against him and, if so, what shall be the penalty?

¹ A request for additional time to conclude the hearing and to issue the Opinion and Award was timely made to the Commissioner, which request was granted on October 7, 2013.

Both parties were represented by counsel and had a full opportunity to adduce evidence, to cross-examine each other's witnesses and to make argument in support of their respective positions. A stenographic record was taken of each hearing. The parties submitted written closing memoranda, each citing legal authorities to support its position. Neither party has raised any objection to the fairness of this proceeding. The evidence adduced, the legal authorities cited and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Introduction:

The Respondent, John Carlomagno, is a tenured teacher in the Hillside School District, beginning his employment in the District in August 2003. Carlomagno was granted tenure for the 2006-2007 school year. (Respondent Exhibit 13.) During Carlomagno's first eight years teaching in the District, he primarily taught instrumental music to students in grades three to six at the Hurden Looker and Calvin Coolidge Elementary Schools. During Carlomagno's last two academic years in the District, i.e., 2011-2012 and 2012-2013, he was assigned to Walter O. Krumbiegel Middle School ("WOK Middle School") where he taught general and instrumental music to sixth, seventh and eighth grade students.²

By letter dated May 28, 2013, Carlomagno was provided notice that charges were filed against him. The Hillside Board of Education (the "Board") certified the charges on July 25, 2013 and forwarded them to the Commissioner of Education on August 6, 2013. The Statement of Charges include 12 charges alleging corporal punishment, insubordination, violations of District policy and New Jersey law and other willful misconduct constituting conduct unbecoming a tenured teacher and other just cause for termination. All but one of the alleged incidents of misconduct occurred while Carlomagno was teaching at WOK Middle School. The District seeks Carlomagno's termination. (Joint Exhibit 1.) On August 20, 2013, Respondent filed an Answer and Affirmative Defenses to

² Carlomagno's annual performance evaluations, observation reports and action plans were introduced into evidence and were reviewed as part of the record in this case. (Respondent Exhibits 14 to 42; Board Exhibits 3, 23 to 31.)

the Tenure Charges denying the charges. Thereafter, the Charges were referred to arbitration.

Under New Jersey statute, tenured teaching staff "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause..." *N.J.S.A.* 18A:28-5. In *I/M/O Tenure Hearing of Joseph Prinzo, Passaic County Technical Institute, Passaic County*, Agency Dkt. No. 424-11/00, the Administrative Law Judge summarized the various descriptions of "conduct unbecoming" as follows:

Conduct unbecoming a public employee has been described as an 'elastic' phrase that includes 'any conduct which adversely affects the morale or efficiency' of the public entity or 'which has a tendency to destroy public respect for ...[public] employees and confidence in the operation of ... [public] services.' *In re Emmons*, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted). *See Karins v City of Atlantic City*, 152 N.J. 532 (1998). Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation and may be based simply upon a violation of the implicit standard of good behavior. *City of Asbury Park v. Department of Civil Service*, 17 N.J. 419, 429 (1955); *In re Tuch*, 159 N.J. Super. 219, 224 (App. Div. 1978). In the context of a tenured teacher, the contours for dismissal set forth in *N.J.S.A.* 18A:6-10 have been found to provide a sufficient standard which, while 'general in terms,' when 'measured by common understanding ... fairly and adequately conveys its meaning to all concerned.' *Laba v Newark Board of Education*, 23 N.J. 364, 384 (1957). Succinctly stated, 'the touchstone is fitness to discharge the duties and functions of one's office or position.' *In re Grossman*, 127 N.J. Super. 13, 29 (App. Div. 1974), *certif. den.* 65 N.J. 292 (1974). Such unfitness to remain a teacher may be demonstrated by a single incident, if sufficiently flagrant. *In re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967); *Redcay v. state Board of Education*, 130 N.J.L. 369, 371 (Sup. Ct. 1943), *aff'd o.b.* 131 N.J.L. 326 (E&A 1944.)

The District has the burden of proving that Carlomagno engaged in conduct unbecoming a tenured teacher as alleged in these charges. It must do so by a preponderance of the credible evidence. For the reasons set forth below, the District has met its burden of proving that Carlomagno engaged in conduct unbecoming and that it has just cause for termination.

The Charges:

The District presented 10 witnesses at the hearing, including: Dr. Frank Deo, Superintendent; April Lowe, Principal at WOK Middle School from July 2010 to June 2013;³ Donna Veal, Secretary to the Principal at WOK Middle School; Lois Bohm, Instructional Supervisor; and six students. In addition to his own testimony, Respondent presented six witnesses, including: Lisa E. Dilts, Nurse at WOK Middle School; Kareema Gray, Keith Johnson and Corey Batts, all Security Officers at WOK Middle School; and two students.⁴ In addition, the District introduced 31 exhibits⁵ into evidence, Respondent introduced 43 exhibits and the parties jointly admitted one exhibit, the Statement of Charges.

Each of the charges is addressed below. The penalty will be discussed at the conclusion of this Opinion and Award.

The ES Incident – April 23, 2013:

Charges One, Two and Three all relate to an incident occurring on April 23, 2013 in a sixth grade general music class at WOK Middle School. The relevant evidence is summarized below.

ES, now 12 years old, was a student in the class. ES is a small boy, approximately five feet three inches tall and 110 pounds. ES testified that before the incident, the students in the class were loud and were not paying attention. Some students had thrown work sheets Carlomagno was distributing on the floor. He was among the students who were being disruptive, although he did not throw any papers. Carlomagno told the students, including ES, to sit down; ES complied. Carlomagno then told the students not to push their luck. ES got out of his seat and gave Carlomagno a “soft nudge” with his shoulder. (Tr. at 330.) ES testified he was joking around, having fun. Carlomagno laughed and told ES to sit down. Carlomagno also told ES that there was a huge size difference between them. ES responded that it did not matter, that ES could still “run [Carlomagno] over”. According to ES, Carlomagno responded: “Try me.” (Tr. at 327, 331.)

³ Lowe is currently the Principal of AP Morris Early Childhood Center.

⁴ Although the full names of all student witnesses were provided to Respondent and the arbitrator, for confidentiality purposes all students will be referred to in this Opinion and Award by their initials only.

⁵ Board Exhibit 19 was marked for identification but not admitted into evidence.

ES testified that he understood Carlomagno to be saying that he should run at him. At that point, therefore, with Carlomagno now in the rear of the room, ES ran towards Carlomagno from the front of the room. He had his arms crossed around his chest and that he was slightly bent over as he ran. ES testified that right before he was going to stop, Carlomagno grabbed him with one hand on the back of his belt and the other on his jacket at his shoulder. His feet were in the air and he was being turned around. Carlomagno threw him and he hit the teacher's desk located in the rear of the room, knocking things off the desk. He then landed on the floor. ES felt a pain in his upper left thigh, but got up from the floor and picked up the papers and other items that had fallen off the desk. The class was quiet. Carlomagno told him to go back to his seat and ES complied.

According to ES, he did not stumble when running. He also denied that he made fists with his hands, or that he was running at Carlomagno like he was going to jump, fight or attack him. He testified that he did not bounce off Carlomagno's stomach or his chest. ES stated that he planned to stop short, not to make any contact with Carlomagno. He thought Carlomagno was joking around. He did not expect that Carlomagno would grab him and "throw" him on the desk. (Tr. at 332, 334.) After the incident, ES told Carlomagno "Dang, Mr. Carlo, I was just kidding." (Tr. at 360.) Carlomagno appeared angry.

After ES went back to his seat, Carlomagno told ES that he drew "first blood," (Tr. at 339) showing ES that his wrist had been scratched and was bleeding. In his statement prepared for Lowe the next day, ES commented: "everybody saw that he cut himself on the desk while he was throwing me." (Board Exhibit 21.) ES testified that Carlomagno also commented: "you guys think that because you're kids you can attack somebody" and that "I don't care if you are 5 or 50, you don't have any business doing that." (Tr. at 357.) Other students in the class commented that what happened was child abuse and that ES should sue. Carlomagno did not send ES to the nurse or to the Principal's office.

Two other students who were in the class and observed the incident testified at the hearing. JW testified that Carlomagno was angry because ES was always talking in class. Carlomagno made a comment to ES that there was a size difference between them. ES got up and came at Carlomagno like he was going to fight him with his hands in a fist, but in a playful way; JW testified that ES was "play fighting." (Tr. at 408.) Carlomagno then

grabbed ES with both hands, picked him up off the floor and threw or flung him into the teacher's desk. ES' feet left the ground as he was thrown. Things were knocked off the desk. JW testified: "We didn't think that [Carlomagno] was that mad that he was going to do something like that." (Tr. at 408.) According to JW, ES had a surprised look on his face. He started laughing and told Carlomagno that he thought Carlomagno was playing. ES said he hurt his thigh, both in class and later when JW saw him after school. JW testified that someone in the class said that it was child abuse. She also testified that Carlomagno said something to the effect that whether you are five or two years old, he would do the same thing; it would not matter how old you were.

RB testified that the class was being disruptive, including ES. He recalled Carlomagno saying there was a huge size difference between himself and ES. He also testified that just before ES charged at Carlomagno, Carlomagno said: "Try me." (Tr. at 430.) Unlike ES and JW's testimony that ES was playing around, RB stated that ES was angry when he charged at Carlomagno. His testimony was consistent with ES and JW, however, in stating that when ES got close, Carlomagno picked ES up with both hands (Tr. at 432) and threw him towards the teacher's desk, knocking things off the desk. ES' feet were off the ground, at first a couple of inches and then about two feet. ES' body hit the desk. RB also recalled that Carlomagno said that ES drew first blood.

Lowe testified that on April 24, 2013, the math teacher whose desk was involved in this incident complained to the Math Supervisor that her desk was left in disarray after Carlomagno's class. As a result of this complaint, Lowe received a report of horseplay in the classroom. She was told that a student ran towards Carlomagno in class and that Carlomagno picked him up and threw him on the desk. Lowe began an investigation. She called ES out of class and asked him what happened. She sent him to see the nurse and called ES' mom. The nurse, Lisa Dilts, testified that she saw ES the day after the incident. Because checking his thigh required that he remove his pants, she contacted his mother for permission; ES' mother said she would check at home. ES was sent to the bathroom to check himself and he reported that there was no bruise. Dilts prepared an incident report. (Respondent Exhibit 43.)

Lowe interviewed ES and 13 other students on or about April 24, 2013. Lowe talked to each student alone. The students were then sent to different rooms to write statements

about what occurred. There was more than one student in each location writing statements but a staff member was present in each room and the students were told not to speak. ES, JW and RB each prepared a written statement at Lowe's request.⁶ (Board Exhibits 21, 9d and 9g.) Lowe also asked Carlomagno for a written statement. Carlomagno said he wanted to speak to his attorney and did not provide any statement regarding this incident. In addition, Lowe called Deo and, according to protocol, Lowe notified the New Jersey Department of Children and Families, Institutional Abuse Investigations Unit ("IAIU") and the local police. Deo confirmed that Lowe called him and that he instructed her to call IAIU and the police. He also confirmed that IAIU sent him a letter following its investigation indicating that it found no indication of child abuse. (Respondent Exhibit 4.)

Carlomagno testified that this sixth grade class was difficult as there were several students who were disruptive, some more than ES. The class was scheduled right after lunch and recess. ES frequently engaged in horseplay in class and Carlomagno counseled him. On April 23, 2013, ES was loud in the back of the room and was not following directions. Carlomagno went to the back to ES and others, directing them to sit down. He passed out a worksheet and ES got up again, challenging Carlomagno and bickering with him. ES told Carlomagno that he could knock him down. Carlomagno admitted that he commented, in a playful manner, on the large size difference between them. ES then said something to the effect that "you ain't nothing, I can knock you over." (Tr. at 506.) According to Carlomagno, he told ES that he "wouldn't recommend that you try me." (Tr. at 506.)

Carlomagno testified that he turned to go back to the front of the room when he saw ES charging him, like a football player, from the front of the room. He stated that he did not get a good look at where ES' hands were, but denied that they were crossed over his chest. Carlomagno testified that he tried to move to get out of the way, but ES ran into him, with his shoulder hitting his chest. On cross-examination, he stated that when ES made contact with him, ES knocked the wind out of him. (Tr. at 584.) ES was grabbing him and scratched him. According to Carlomagno, ES was out of control with a lot of momentum. Carlomagno

⁶ All students' written statements were introduced into evidence as Board Exhibits 5-8, 9a-g, 21 and Respondent Exhibits 1 and 2. The purpose of admitting the statements of students who did not testify at the hearing was solely to establish that the investigation was done.

testified that he put his hands on ES and "kind of pushed him off" because ES was scratching him. (Tr. at 512.) He angled ES away so that ES would not knock him over. ES stumbled and fell downward. He did not go over the desk and was not flipped on his back. ES made contact with the desk "incidentally." (Tr. at 515.) ES then got up laughing. Carlomagno testified that ES appeared fine.

Carlomagno stated that ES' behavior was so erratic that he did not know what ES was going to do. He did not, however, notify security or the principal. Nor did he ask ES if he was hurt or send ES to the nurse. Carlomagno told ES to return to his seat and he did. Some students commented that ES should sue and that it was child abuse. ES then started faking an injury. At that point Carlomagno showed ES his wrist and, intending it as a joke⁷, said that ES drew first blood. ES responded that Carlomagno scratched himself on the desk. According to Carlomagno, ES was still not admitting he did anything wrong. Carlomagno told the class that it doesn't matter if you are five or 50, if you run at someone, you could scratch or hurt them. Carlomagno denied that he said anything to ES to encourage ES to run at him. He stated that he was surprised, but not angry, by the incident. He denied that he grabbed or threw ES.

On this record, the District argues: (a) that the credible evidence establishes that Carlomagno made the comments as alleged in the charges, encouraged ES to run at him and then grabbed ES, lifted him in the air and threw him on the teacher's desk; (b) that Carlomagno's testimony as to what occurred was inconsistent with prior statements and is not credible; (c) that by his words and conduct, Carlomagno engaged in conduct unbecoming, corporal punishment in violation of law and District policy and the common law torts of assault and battery; and (d) that the charges should be sustained with the penalty of termination.

The Respondent, on the other hand, contends: (a) that the District has not proved the facts by a preponderance of the credible evidence; (b) that the evidence supports that Carlomagno did not engage in the misconduct as charged; (c) that the students were disruptive in class; (d) that ES inappropriately charged at Carlomagno; (e) that under both the law and District policy, Carlomagno had the right to self-defense; (f) that Carlomagno

⁷ Carlomagno testified that the line was from "Rambo" but conceded that the students were too young to get the joke.

used reasonable and necessary force to defend himself against ES who was out of control and charging at him; (g) that the IAIU investigation concluded that Carlomagno had not engaged in child abuse; (h) that under these circumstances, Carlomagno did not engage in conduct unbecoming, corporal punishment or assault and battery.

Discussion:

On the entire record, including my assessment of witnesses' credibility and the probative value of evidence, I find that Carlomagno violated the District's policy and law prohibiting corporal punishment and that his actions constituted conduct unbecoming a teacher. I reach these conclusions for the following reasons.

As to factual allegations, the District has proven by a preponderance of the credible evidence that when ES ran towards him, Carlomagno grabbed ES with two hands, lifting him off the ground and throwing him onto the teacher's desk. Indeed, except for Carlomagno, all witnesses, including those called by the Respondent, confirmed these facts, describing that ES' feet were off the ground and that he was thrown or flipped onto the teacher's desk, knocking items off the desk. ES then fell to the floor.⁸ The weight of the credible evidence also supports that ES was playing around and intended no harm, but that while Carlomagno had been laughing initially, he became angry.

The District has also proven that Carlomagno made certain comments to ES before and after the incident. All witnesses testified that Carlomagno told ES there was a huge size difference between them. Moreover, both ES and RB credibly testified that after ES responded he could still knock Carlomagno down, Carlomagno responded: "Try me" thereby encouraging ES to run at him. After the incident, Carlomagno admitted telling ES that he drew first blood. Further, JW credibly testified that Carlomagno said words to the effect that he doesn't care if you are two or five years old, he would do the same thing.⁹

In reaching these conclusions, I have rejected Carlomagno's version of events. Carlomagno's testimony as to what occurred was not credible. It was inconsistent not only with the testimony of the other witnesses who personally observed what occurred that day, but also with his prior statements. At the hearing, Carlomagno testified that he saw ES

⁸ There is no evidence, however, that ES' head narrowly missed a metal pole adjacent to the teacher's desk.

⁹ I do not find, however, that Carlomagno said he would do the same thing to the Vice Principal.

running towards him and tried to get out of the way but could not completely avoid ES. He testified that ES grabbed him and was scratching him¹⁰ and, therefore, that Carlomagno “kind of pushed [ES] off of me”. (Tr. at 512.) He admitted that he put his hands on ES in the chest area. In his statement to IAIU, however, Carlomagno denied that he put his hands on ES and claimed that ES simply bounced off of him, lost his footing and fell on the desk.¹¹ (Board Exhibit 22.)

Statements that Carlomagno made for the first time on cross-examination embellishing ES’ actions that day further impact credibility. Carlomagno claimed that when ES made contact with him, he “knocked the wind out of me” (Tr. at 584), that ES was out of control and that ES’ behavior was so erratic that he did not know what ES was going to do. He testified that he thought ES might try to run at him again. Carlomagno, however, took no steps to address these issues. He did not call security despite his alleged apprehension that ES would act again. He did not report ES to the Principal notwithstanding that he now claims that he needed to act in self-defense and that ES was out of control. His failure to take any action at the time is inconsistent with his testimony as to what occurred and his claim of self-defense.

Carlomagno’s conduct constituted corporal punishment in violation of both New Jersey law and the District’s Use of Corporal Punishment Policy as alleged in the charges. *N.J.S.A. 18A:6-1* provides:

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

1. To quell disturbance, threatening physical injury to others;
2. To obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
3. For the purpose of self defense; and
4. For the protection of persons or property;

And such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section.

¹⁰ Contrary to Carlomagno’s testimony, it is more likely than not on these facts that, as ES indicated in his statement and as he said to Carlomagno at the time, Carlomagno received the scratch when he threw ES on the metal desk, not from ES scratching him.

¹¹ While he claims that ES lost his footing and fell on the desk, it is unclear how after stumbling in this manner, ES could physically have wound up on the desk if not lifted up and thrown.

The District's policy on Corporal Punishment is similar. (Respondent Exhibit 10.) The policy provides that "[t]he Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open defiance of authority" and that "[t]eaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law..." Finally, the policy notes that a teacher who uses corporal punishment "[w]ill be subject to discipline by this Board and may be dismissed." As with the law, there are exceptions, including permitting the use of such force as "may be necessary" for self-defense.

By grabbing ES with both hands, lifting him off the floor and throwing him onto a desk, Carlomagno used physical force against a pupil to maintain discipline or compel obedience. Under the policy and law, such conduct is not permitted even if a student is acting in open defiance of authority. While Respondent maintains that he acted in self defense and, therefore, that there can be no finding of corporal punishment, I am not persuaded that Carlomagno honestly believed that he was in imminent danger as a result of ES' actions. Indeed, as Carlomagno conceded, there is a huge size difference between him and ES. ES is a slight boy, at five feet, three inches tall and weighing about 110 pounds. Carlomagno is a large man, at about five feet, ten inches tall and 240 pounds. Further, as ES stated and JW confirmed, ES was playing around; he was not trying to harm Carlomagno. Finally, as noted above, if Carlomagno truly believed he was in physical danger from ES, it defies common sense that he would not have called security or sent ES to the office, particularly if he believed that ES was out of control and erratic as he testified at the hearing.

Even if he felt he needed to act in self-defense, however, the policy and the law provide that a teacher may only use such force as may be "reasonable and necessary." Carlomagno's conduct went well beyond that which was reasonable to address the situation. As Deo testified, a teacher should avoid physical confrontations with students at all costs. He noted that Carlomagno could have moved behind the desk. He could have moved out of ES' way. If neither was possible, he could have simply stopped or restrained ES as he approached, before ES ran into him. Particularly given ES' size relative to Carlomagno, it was not reasonable or necessary for Carlomagno to grab ES with both

hands, lift him in the air and throw him on the desk. Contrary to Carlomagno's testimony, therefore, his conduct did not indicate appropriate restraint under the circumstances but rather was a violation of policy and law regarding corporal punishment. As Deo testified, while there may be circumstances where a teacher may use physical force, such as for self-defense and other reasons set forth in the Corporal Punishment Policy (Respondent Exhibit 10), none of the exceptions apply to this case.

Respondent maintained that ES (as well as the students in the other incidents discussed below) was misbehaving and that ES' conduct was inappropriate. That students act in an inappropriate manner, however, cannot excuse his conduct. Teachers must be able to manage the classroom environment and students without resort to physical contact or inappropriate or unprofessional language. As the Commissioner of Education stated in *I/M/O Tenure Hearing of Juan Cotto (School District of the City of Newark, Essex County, Agency Dkt. No. 210-6/97, 2000 WL 679185 (2000)*, quoting from *I/M/O Tenure Hearing of Thomas Appleby, 1969 L.S.D. 159*:

While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A. 18A:6-1*) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. [*In re Ostergren, supra*] The Commissioner said further, [*In re Fulcomer, supra*]

'that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience....While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self control.'

Thus, when teachers resort to 'unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty. (citations omitted.) *Id. at p. 5.*

Based on the proven facts, therefore, the District has met its burden of proving conduct unbecoming. Not only did Carlomagno engage in corporal punishment, but as

further alleged in the charges, Respondent demonstrated poor classroom management skills and poor judgment, failed to exercise self-restraint and controlled behavior required of a teacher, and acted in an unprofessional and inappropriate manner, placing a child at risk of physical and emotional harm. The fact that IAIU did not conclude that Carlomagno was guilty of child abuse does not require a different result. Whether or not Carlomagno's conduct met IAIU's definition of child abuse, it was nonetheless unprofessional and inappropriate conduct for a teacher.

Accordingly, I find that Carlomagno's conduct constituted corporal punishment and conduct unbecoming as alleged in the charges.¹²

The AN Incident - March 6, 2012:

Charges Four and Five involve allegations that on or about March 6, 2012, Carlomagno made inappropriate comments to AN, a student in his seventh grade instrumental class, in front of the entire class. Those comments included calling AN "stupid", an "idiot", telling her to "shut up" and that AN should either throw or take the first punch and that he would punch her back. AN did not testify. Two other students in the class, however, DC and TC, testified as to what they observed and heard in class that day.

DC testified that AN would often talk back to Carlomagno and would give him "attitude," which she described as "just a regular teenager giving an adult attitude" such as rolling her eyes, ignoring him, and saying "smart" things. (Tr. at 231.) Sometimes AN was late to class and would be disruptive, along with two of her friends, GO and TC. On this particular day, AN was not behaving in class and Carlomagno became angry. He yelled at AN and "got in AN's face" (Tr. at 217.) DC testified that Carlomagno told AN to "shut up" and called her "stupid" and an "idiot." He also told AN she should throw the first punch and that he will hit her back. DC stated that she was nervous because she did not know what Carlomagno was going to do; he was "yelling like crazy." (Tr. at 220.) Lowe or the Vice Principal asked DC to write a statement, which she did on March 6, 2012. She was not told what to write. She wrote the statement in a room with other students who were all talking

¹² Having found that Carlomagno's conduct violated District policy and law prohibiting corporal punishment and constituted conduct unbecoming as set forth above, it is not necessary to decide whether his conduct also constituted an assault and battery against ES as alleged in Charge Three. Whether or not all the elements of an assault and battery can be established, the penalty in this case would be the same.

about what happened. She testified that this did not influence what she wrote. (Tr. at 226.)

TC also testified that AN would give Carlomagno "attitude" (Tr. at 258-259) and would not listen to Carlomagno when he told her to stop talking. On the date of this incident, TC testified that she, AN and GO came into class talking. When AN kept talking, Carlomagno became frustrated and started to yell at her. He called her "stupid" and an "idiot" and told her to "shut up" in an aggressive manner. He seemed to be angry. TC said she had never heard a teacher tell a student to shut up before. Carlomagno also told AN if you punch me, I will punch you back. AN then told Carlomagno that she wanted to go to the guidance office and she got up and walked out. TC said that she and GO went with AN. TC testified: "[a]t that time, I felt it was necessary to get an adult involved with the situation." (Tr. at 264.) TC also provided a written statement. (Board Exhibit 18.) On cross-examination, TC denied that Carlomagno used the word "idiotic" insisting he said "idiot". Similarly, she denied that Carlomagno said anything about a "stupid thing to do"; rather, he called AN stupid.¹³

Carlomagno testified that AN, TC and GO were in his instrumental music class, an elective. AN, who was assigned to play the flute, routinely did not bring her instrument to class, talked, texted and engaged in other disruptive conduct. On March 6, 2012, AN was eating chips in class. Carlomagno told her to finish and throw it in the garbage. Instead, she finished the chips and threw the package on the floor. AN, TC and Go were laughing. Carlomagno testified that he commented to AN that coming to band class without her instrument is stupid and idiotic; there is no point. AN responded that he should get out of her face. She then asked to go to guidance and Carlomagno told her to go. TC and GO left as well. The rest of the class was happy that they were gone, although they returned to the class that same day. He denied making any comment to AN to the effect that she should throw the first punch. Carlomagno provided a written statement to Lowe regarding this incident. (Respondent Exhibit 7.) As confirmed on cross-examination, and as set forth in that statement, Carlomagno admitted that he told AN to "shut up", stating it was something

¹³ TC testified that Carlomagno also told her that he does not know why she is in the class when she can't even play an instrument. Carlomagno denied making this statement. There is, however, no charge regarding this statement to TC.

that "I rarely do." He also admitted that when AN told him to get out of her face, he responded: "what are you going to do, beat me up." (Respondent Exhibit 7; Tr. at 610.)

As to the allegation that Carlomagno left the school building without authorization while the administration was addressing these issues, Carlomagno denied doing so. He testified that Lowe came to his class with Corey Batts while he was teaching an 8th grade class and told him to take the class to the auditorium. He did so. They stayed in the auditorium the entire time. At the end of the day, he went home. Lowe called him at home and directed that he meet with the Superintendent the next day.

On this record, the District argues: (a) that the preponderance of the credible evidence demonstrates that Carlomagno is guilty of conduct unbecoming by making inappropriate comments to AN; (b) that Carlomagno's comments frightened students; (c) that Carlomagno admitted telling AN to "shut up"; (d) that Carlomagno's testimony was not credible; (e) that using demeaning language towards students is inappropriate and unprofessional; (f) that by his conduct, Carlomagno was verbally abusive; and (g) that the charges should be sustained with termination the appropriate penalty.

Respondent, on the other hand, contends: (a) that the District has not proven the allegations by a preponderance of the credible evidence; (b) that AN did not testify; (c) that Carlomagno credibly denied calling AN stupid, an idiot, or making any comment about a first punch; (d) that while Carlomagno admits telling AN to "shut up", he did so only after his attempts at counseling were unsuccessful; (e) that AN was disruptive and refused to play her instrument; (f) that the evidence demonstrates that Carlomagno did not leave the building; and (g) that the charges must be dismissed.

Discussion:

On the entire record, including my assessment of witnesses' credibility and the probative value of the evidence, I find that Carlomagno made inappropriate and unprofessional comments to AN as alleged and that this conduct constitutes conduct unbecoming a teacher. I do not find, however, that Carlomagno left school early on March 6, 2012. I reach these conclusions for the following reasons.

Two students who were present in class that day testified credibly that Carlomagno called AN stupid and an idiot, told her to shut up and said that if she threw the first punch,

he would punch her back. Their testimony was consistent with the written statements provided at the time of the incident.¹⁴ (Board Exhibit 17 and Respondent Exhibit 11.) Both DC and TC testified that Carlomagno was angry and was yelling. He was speaking in an aggressive tone. DC testified that Carlomagno was getting “in [AN’s] face.” (Tr. at 217.) Carlomagno’s conduct made DC nervous and frightened. Both DC and TC testified that they were surprised or shocked that a teacher would use such language. That AN did not testify does not require that I discredit the testimony of the two students who did testify as to what they heard Carlomagno say to AN in front of the entire class.

Carlomagno’s testimony does not require a different result. He admits telling AN to shut up. He also admits to using the words stupid and idiotic, although he claims that what he said was that her behavior, i.e. coming to class without her instrument, was stupid and idiotic. The student witnesses were clear that he called her stupid and an idiot; he did not make the comment he claims. His reframing of the words used is not persuasive. Even in this context, however, using these words towards a student is inappropriate.

As both Lowe and Deo testified, it is inappropriate for a teacher to use language such as Carlomagno used in this incident. This is true even if a student is misbehaving in class. A teacher is expected to set rules for the class and if a student is breaking the rules, to seek appropriate discipline. Both administrators testified that the language Carlomagno used in anger towards AN was disrespectful, rude, derogatory, damaging to student self-esteem and damaging to the professional relationship between a teacher and student. It is conduct unbecoming a tenured teacher. I agree.

Finally, the District has not produced any evidence to support the allegation that Carlomagno left the school early that day. Accordingly, there is nothing in the record to dispute Carlomagno’s claim that he was told to take his class to the auditorium and that he did so. This allegation, therefore, must be dismissed.

Accordingly, I find that the District has established that Carlomagno engaged in conduct unbecoming in his interaction with AN on March 6, 2012, but did not prove that Carlomagno left school early that day.

¹⁴ Although TC did not recall doing so, she provided two statements. Respondent 12 addresses the statement Carlomagno made to her, but does not reference what was said to AN. Respondent Exhibit 11 references both what was said to TC and to AN. The two are not inconsistent.

The GO Incident - March 6, 2012:

Charge Six also involves allegations of misconduct on or about March 6, 2012 involving the same seventh grade instrumental class as in Charges Four and Five. This charge alleges that Carlomagno grabbed GO by the arm. GO did not testify at the hearing. TC, however, testified as to what she saw that day in class.

According to TC, the incident with GO occurred prior to the day of the incident described above regarding Charges Four and Five. TC testified that GO was asking to go to the bathroom and was talking with her hands; her hands were chest level. TC testified that "I guess [Carlomagno] thought she was putting her hands in his face, so he took GO's arm and pushed it down." (Tr. at 239.) Nonetheless, TC testified that GO did not in fact put her hands on or near Carlomagno's face. She provided a written statement to Lowe. (Board Exhibit 18.) AN and GO were together when they wrote their statements.

Carlomagno testified that GO, like AN, never brought her instrument to class, was often late and made negative comments about how he ran the class, including statements that they do not do anything in this class. On direct examination, he testified that GO told him that when the students were coming into class, he "sort of ushered her into the class and [he] grabbed her arm." (Tr. at 536.) He testified that he did not recall grabbing her arm and that if he did, it was incidental. Nonetheless, GO said if he apologized, she would apologize for disrupting the class. He apologized. He spoke to her separately that day about the "whole grabbing arm thing" and said to GO "we don't have a problem here, do we?" She responded that they were "cool". (Tr. at 535.)

On cross-examination, after being shown his written statement regarding this incident (Respondent Exhibit 8) Carlomagno testified as to what he claimed was a second incident where GO put her hands up "sort of" towards Carlomagno. (Tr. at 623.) He backed up and "knocked," "removed," or "slapped" her hands out of his face, directing her hand out of the way. (Tr. at 626.) He conceded that GO did not touch him. He testified that he apologized for anything that might have offended her - "slapping her, any imaginary thing you want to make up." (Tr. at 628.)

In Carlomagno's written statement regarding this incident, he said that GO came to class late and was bickering with him. He wrote that she "continued to make an issue about the fact that when she put her hand in my face, I removed it." (Respondent Exhibit 8.) GO

wanted him to apologize for touching her hand and he agreed to do so if she would apologize for putting her hand in his face. They both apologized. GO then sat down and said they were "cool". He stated that the class was more cooperative and relaxed at this point. GO remained in the class, playing the drums. He had no further problems with her.

On this record, the District argues: (a) that the District has proven by a preponderance of the credible evidence that Carlomagno engaged in inappropriate physical contact with GO; (b) that TC's testimony establishes that GO was talking with her hands by her chest and that Carlomagno took her arm and pushed it down; (c) that even though GO did not testify, she provided a written statement supporting the allegation; (d) that Carlomagno's testimony is not credible particularly given the inconsistencies in his direct and cross examinations; (e) that by his actions, Carlomagno engaged in conduct unbecoming; and (f) that the charges should be sustained with termination the appropriate penalty.

Respondent, on the other hand, contends: (a) that the District has failed to prove this charge by a preponderance of the credible evidence; (b) that GO did not testify; (c) that GO shoved her hand into Carlomagno's face; (d) that Carlomagno moved GO's hand out of his face in order to avoid imminent contact; and (e) that the charge should be dismissed.

Discussion:

On the entire record, including my assessment of witnesses' credibility and the probative value of evidence, I find that Carlomagno grabbed or pushed GO's arm and that such conduct constitutes conduct unbecoming a teacher. I reach this conclusion for the following reason.

The evidence supports the conclusion that Carlomagno grabbed GO's arm as charged. TC credibly testified that she observed Carlomagno take GO's arm and push it away while GO was talking with her hands. She testified that GO's hands were not touching Carlomagno's face.¹⁵ More importantly, Carlomagno's testimony supports the conclusion that he engaged in the conduct as charged. While on direct examination, he testified that he touched GO's arm when she arrived to class and that such contact was incidental, when

¹⁵ Because GO did not testify, I do not give any weight to her written statement. (Respondent Exhibit 6.)

shown his written statement on cross-examination, Carlomagno testified that there was, in fact, as second incident, not as described on direct, where he "backed up" and "knocked," or "removed," "slapped" (Tr. at 626) her hand out of his face. Yet he also admitted that GO had not touched him. She had not put her hand on his face. As Deo again testified, a teacher should avoid confrontation at all cost, finding other ways to address a student who is not behaving in class. (See also discussion at pp. 11-12.) If her hand had been on his face, Deo and Lowe both conceded that it would be appropriate to remove it from his face. That is not, however, what occurred. Under the circumstances described, taking GO's hand and pushing it, or slapping it or knocking it down is conduct unbecoming as charged.

Accordingly, notwithstanding that Carlomagno and GO apologized to each other and GO said they were "cool", the District has proven the allegations in the charges regarding GO.

The AD and Lowe Incidents - December 5, 2012:

Charges Seven and Eight involve comments allegedly made by Carlomagno in an eighth grade music class on December 5, 2012 and a discussion with Lowe following the incident.

AD, a student in Carlomagno's class testified that on this particular day, Carlomagno was giving a quiz. She objected, telling Carlomagno that he did not teach anything so how could he give a quiz. She testified that Carlomagno was talking about something, but she was not listening. According to AD, that is when he told her "I'm going to meet with your parents, if you have parents." (Tr. at 272.) AD testified that the statement was directed at her, not to the entire class. AD was offended, as her father had passed away. She began to cry and walked out of the class. A few of her friends followed her soon after. AD testified that she went to the auditorium and sat in the back. After her friends joined her, a security officer, Keith Johnson, asked why they were in the auditorium and they explained what happened in class. He took them to see Lowe. AD did not return to Carlomagno's class stating that she did not want to be in his class because of the comment. Her schedule was changed.

AJ, another student in the class and a friend of AD's, also testified that comments were made about the quiz and Carlomagno's teaching. Carlomagno responded that they

never listen. After some back and forth, Carlomagno said he was going to call AD's parents. AD said you can't call my mom, at which point Carlomagno responded that he would "call her Dad, even if she had a Dad." When shown the statement she had written for Lowe later that day (Board Exhibit 20), AJ testified that what Carlomagno said was that he would call her parents, if she had any. According to AJ, Carlomagno's statement was directed to AD, not to the entire class. AD started to cry and left the class. After AD left the class, AJ testified that everyone started to yell at Carlomagno that AD's father had passed away. Carlomagno said "he doesn't care about his father. His father is dead too." (Tr. at 307.) Carlomagno then told AJ that she could leave too, so she did. AJ testified that she went to the office. She and AD spoke to Johnson and to Lowe. Lowe asked who else heard what was said and they identified two other students, HM and AB. Lowe called them from class. They all went to the auditorium to write the statements. They had to sit separately in the auditorium while they did so.

Johnson testified that he knows AD, who is a cheerleader with his daughter. AD approached him and another security officer (possibly two other security officers) on the first floor. She was crying and upset. AD told them that Carlomagno was explaining something about death, or somebody's parents died. He could not recall exactly what she said. Johnson and the other security officer(s) told her that she was taking his comments out of context, that they were general comments that were not directed at her. He thought that it was all done at that point. He did not take her to see Lowe or another administrator, as it was not anything to report. Corey Batts, another Security Officer, testified that while with either Gray or Johnson but not both, he saw AD. AD explained that Carlomagno made a comment about calling her parents, not knowing that her Dad had died. Once she realized that he did not mean it personally, she acknowledged that it was a misunderstanding and she walked away happy. Gray, the other Security Officer, did not provide relevant testimony regarding this incident.

Carlomagno testified that AD was not doing her work and was eating sunflower seeds, something that AD denied. He told her to put the seeds away and do her work, but she did not comply. On direct, Carlomagno testified that he then told AD that he had tried to call her Mom but was unable to reach her and asked if it was all right to call her Dad. On cross-examination, he testified that he told the group that he would call their parents; he

did not say anything directed to AD regarding her parents. According to Carlomagno, AD responded that her Dad had passed away. He then said that he understood how she felt, as his own Dad had recently passed away. AD became indignant, telling him that he did not teach anything. He told AD if she would not take the quiz, she should go to the office. She left the class. Three other students asked to leave as well and he said yes. AD did not return to class. Carlomagno admitted that he also told the class that he was a musician, but denied saying that teaching was a fallback.

Lowe testified that the security officers brought a group of students to her office. AD was upset and crying. AD told her that Carlomagno made a remark that he was going to call her parents, even if she had parents. Her Dad had passed away. Her friends were upset that this happened to AD. The students were visibly shaken. She asked them all to write statements. Later that day, Lowe went to see Carlomagno in his classroom. He was with a class. After finding someone to cover his class, she asked Carlomagno to step out to talk to her. According to Lowe, Carlomagno was aggressive and loud in his tone. She did not raise her voice. She was holding a radio with an antenna and he became upset claiming that the antenna was pointed at him. She asked Carlomagno if he was okay to teach because a student had reported a disturbance. He said yes. She asked him to write a statement but he did not do so.

Carlomagno testified that Lowe came to his class and they spoke in the hall. According to Carlomagno, Lowe was "animated, pointed, aggressive, accusatory, waving the walkie-talkie, upset and angry" (Tr. at 548-49); she was "going into a sort of rant." (Tr. at 549.) She told him that several students left his class and that one was crying. She kept asking him if he was okay and he smiled and said fine. He testified that while he was a little loud at first because he was surprised, he then "went into what I call a controlled mode. I was smiling at her because I realized I wasn't getting anywhere with her, so I tried to make the best of the situation." (Tr. at 550-51.) He denied that he was speaking aggressively. He did not give Lowe a statement.

Lowe testified that after reading the statements that had been provided to her, she determined that the allegations were true. She wrote a memorandum to Carlomagno addressing both his statements to students on December 5, 2012, as well as his aggressive and loud tone and response to her later that day. The memorandum provided that:

"Your behavior towards the students and me was improper and unprofessional, and must not be repeated.

This letter serves to underscore the importance of complying with the Hillside Public School District's policies, rules and regulations. In the future, should you have a question concerning your responsibility as an employee, the school administration is willing to help. *I must inform you that further instances of this type of behavior will be grounds for more severe disciplinary action.*" (Emphasis added.)

(Board Exhibit 1.)

On this record, the District contends as to Charge Seven: (a) that AD and AJ credibly testified that Carlomagno told AD that he would call or conference with her parents, if she even had parents; (b) that AD became very upset; (c) that Carlomagno's comment to AD was inappropriate and unwarranted and constitutes conduct unbecoming. With respect to Charge Eight, the District argues that Lowe credibly testified that when she spoke to Carlomagno about this incident later in the day, he addressed her in an aggressive tone.

As to Charge Seven, Respondent maintains: (a) that the credible evidence does not support that Carlomagno made the comments attributed to him; (b) that Carlomagno credibly testified as to his comment to AD; (c) that this comment was not inappropriate; (d) that the security officers' testimony supports that there was a misunderstanding; and (e) that a misunderstanding does not support a finding of conduct unbecoming. With respect to Charge Eight, Respondent contends that because Lowe placed a memorandum in Carlomagno's personnel file (Board Exhibit 1), the District is barred by the principles of industrial double jeopardy from making these allegations against Carlomagno. Thus, Respondent argues that these charges should be dismissed.

Discussion:

On the entire record, including my assessment of witnesses' credibility and probative value of evidence, the allegations of inappropriate comments to AD in Charge Seven are properly dismissed. As to Charge Eight, while the Board has proven the allegations of unprofessional conduct, the charge is dismissed under principles of industrial double jeopardy. I reach these conclusions for the following reasons.

As to Charge Seven, the testimony presented is inconsistent in several respects, including what precisely was said, where the students went after leaving the class, how many left at what point, who spoke to which security officer and what was said in those discussions. Indeed, even the charge reflects that there were inconsistencies. Although AD and AJ testified that Carlomagno's comments were directed at AD, the charges allege that they were made to the entire class. Given these inconsistencies, the District has not established that it is more likely than not that Carlomagno made the comments as alleged. Indeed, in this instance, I find that Carlomagno's testimony as to what he said to be more credible. On this record, I find it unlikely that Carlomagno laughed when told her father passed away, or that he said that he did not care because his father passed away too. Even AD testified that Carlomagno may have said words to the effect that he did not want to have to call her parents because of the difficulty in making contact. While she did not recall that he said that, she conceded that it might have happened. (Tr. at 288-89.) I am persuaded, therefore, that there was a misunderstanding. While there is no doubt that AD was upset and crying, this alone is insufficient to sustain the charge.¹⁶

As to Charge Eight, the weight of the credible evidence supports that Carlomagno spoke to Lowe in an aggressive and unprofessional manner. Lowe credibly testified that he had done so. Moreover, Carlomagno's description of Lowe's conduct makes clear he was angry. He admitted that he was a little loud at first because he was surprised, although he then said he went into a "controlled mode" smiling at her because he wasn't getting anywhere. I am persuaded that his conduct with Lowe that afternoon was loud and unprofessional.

Notwithstanding the above, however, on this record Charge Eight must be dismissed as Carlomagno was previously disciplined for the same conduct.¹⁷ The December 12, 2012 memorandum provides that "further instances of this type of behavior will be grounds for more severe disciplinary action." (Board Exhibit 1.) This language supports Respondent's

¹⁶ It is also not logical that Carlomagno would have followed these statements with a comment that he is a musician and that teaching is a fall back plan, a comment he denies.

¹⁷ It is unclear why Respondent argued that double jeopardy applies to Charge Eight, but makes no similar argument with respect to Charge Seven, as both incidents are addressed in the December 12, 2012 memorandum. (Board Exhibit 1.) Double jeopardy would apply equally to Charge Seven requiring its dismissal on that basis as well.

claim that the memorandum was disciplinary in nature. Having been disciplined for this incident in December 2012, double jeopardy principles preclude imposing discipline a second time for the same offense.

While the concept of industrial double jeopardy is similar to the prohibition against double jeopardy in criminal matters in that it provides that an employee should not be disciplined twice for the same incident, the principle is not derived from any Constitutional guarantee¹⁸ but rather from basic elements of due process and fairness that are inherent in any just cause analysis. As stated in *Discipline and Discharge in Arbitration, Second Edition* (Norman Brand and Melissa H. Biren, BNA 2008) at p. 54:

Fundamental concepts of justice and fairness require that once an employee has been disciplined for misconduct, the employee will not again be subject to discipline for the same offense. Double jeopardy is a basis for invalidating the discipline. Double jeopardy concepts also preclude increasing the penalty for a violation after discipline has been imposed. This is particularly true when all of the facts are known to the employer at the time the initial discipline is issued.

See also, *Elkouri & Elkouri, How Arbitration Works, 7th Edition*, Ch. 15.3.F.vi-vii (“The key to this arbitral [double jeopardy] doctrine is not the Constitution but rather fundamental fairness, as guaranteed by the contractual requirement of ‘just cause’ for discipline.”)

In a recent tenure case, *I/M/O Tenure Hearing of Jill S. Buglovky* (Arbitrator Joseph Licata, Esq., December 21, 2012), Arbitrator Licata held that the issuance of a prior reprimand precluded retrying the teacher a second time for the same conduct that was dealt with in that reprimand citing arbitral and administrative law decisions incorporating the principle of double jeopardy in “removal cases under a just cause or good cause standard.” (Pages 54-57.) Likewise, Respondent cited various other cases in which principles of double have been recognized and applied by arbitrators, courts and the Merit System Board to preclude imposition of discipline when an employee has been previously disciplined for the same offense.¹⁹ As Respondent argues, therefore, having already been

¹⁸ The District’s argument that protections of the doctrine of double jeopardy are not applicable to civil and administrative proceedings relies on the Constitutional guarantees of double jeopardy, which apply to criminal proceedings. None of the cases cited by the District address the concept of industrial double jeopardy as applied to employee discipline under a just cause standard. Those cases, therefore, are inapplicable in this case.

¹⁹ See *Local Union No. 1 v. Interstate Brands Corp.*, No. 99-C-2522, 2000 WL 12678 (N.D. Ill. 2000); *Dean Foods Co. v. United Steelworkers of America*, 911 F. Supp. 1116, 1129-30 (N.D. Ind. 1995); *Aluminum Workers Int’l*

disciplined for the specific conduct described in Charge Eight, it is inappropriate to impose discipline a second time for the same incident.

That said, double jeopardy principles do not preclude consideration of prior discipline in assessing the appropriate penalty to be imposed in connection with other proven misconduct. Indeed, consideration of prior discipline is necessary for purposes of progressive discipline, another element of a just cause analysis. As stated in *I/M/O Tenure Hearing of Frank Flood (Cumberland County Technical Education Center, Cumberland County, Agency Dkt. No. 97-5/13 (Arbitrator Timothy Brown, July 29, 2013)*, “although application of progressive discipline principles thereby considers the past discipline of an employee, it does not, contrary to Respondent argument here, result in repeated discipline of any employee for conduct already the subject of prior discipline... An employee’s disciplinary history is a legitimate consideration in determining the propriety of discipline.” (Decision at p. 16.) Therefore, while Charge Eight is dismissed on double jeopardy grounds, the prior discipline, *i.e.*, the December 12, 2012 memorandum regarding this misconduct, is properly considered in assessing the appropriate penalty to be imposed in connection with the remaining charges proven in this case.

Accordingly, Charges Seven and Eight are dismissed.

The Veal Incident, Leaving School Early and Subsequent Absences - December 2012:

Charges Nine and Ten involve allegations relating to Carlomagno leaving school early on December 6, 2012 and absences on the following three school days.

The day after the events described in Charges Seven and Eight, Carlomagno left school in the middle of the day. Donna Veal, the Principal’s Secretary, testified that Carlomagno approached her in the office at approximately 12:15 PM. His coat was already on. He told Veal that he had to leave to see his attorney. He did not ask Veal for permission to leave; Veal testified that she does not have authority to approve a teacher’s request to leave in the middle of the day. Appropriate protocol for the teacher is to contact the Principal if he or she has to leave school early and to then let Veal know so she can arrange for coverage.

Union v Chromalloy Am. Corp., 489 F. Supp. 536, 542 (N.D. Miss. 1980); *In the Matter of Ricky Porter* (MSB, decided March 16, 2007); *In the Matter of Victor Onwuzuruike* (MSB, decided August 9, 2006).

Veal testified that she asked whether he had work prepared for his classes that afternoon. He did not respond to her question but reiterated that he had to leave. Veal described Carlomagno as appearing "agitated" and being "very abrupt." (Tr. at 114.) She followed him out to the hall. She was at the top of the stairs and he was at the door. She told him that she did not deserve to be spoken to in that manner and that she was just trying to cover the classes. He responded "sarcastically" that he "was sorry, now am I satisfied?" (Tr. at 117.) She checked his sub folder and found that there was insufficient work. She did not know whether Carlomagno had received permission to leave. She did not recall if Lowe was in her office at the time of these events. Veal prepared a written statement. (Board Exhibit 19.) She noted that she had a medical issue and had been checking her blood pressure. It went up significantly after the incident with Carlomagno.

Lowe testified that she was in the building but not in her office at the time of the incident. When she returned to the office, Veal was upset and told her that Carlomagno had spoken to her in a rude manner and that he left the building to meet with his attorney. Lowe testified that teachers must get the Principal's approval, or the approval of another administrator in her absence, if they need to leave the school for an emergency; teachers cannot just leave. She did not authorize Carlomagno to leave that day, nor did he seek authority from the other administrators.

Carlomagno was absent from school for the following three days.²⁰ The District maintains that he did not call the SubFinder system to report his absence, as required. That system automatically contacts substitute teachers to cover the absence. Teachers were all advised to use this system. Information was in the welcome packet at the start of the school year, and reminders had been sent out. (Board Exhibit 11.) Lowe testified that Carlomagno's absence on Friday, December 7, 2012 was discovered when another teacher called the office to report that his class was unsupervised. The administrators had to quickly arrange for coverage. He was absent again on December 10 and 11, 2012. Again, he did not call SubFinder, nor did he have an approved personal day. When he returned to school, Lowe spoke to Carlomagno. She did not recall Carlomagno telling her that

²⁰ Carlomagno claimed that he was out on the following Friday and Monday, but returned to work on Tuesday. The District maintains he was out the following three days, as reflected in Board Exhibits 2 and 14.

SubFinder would not take the information because he had exhausted his sick days.²¹ She also did not recall Carlomagno saying that he had called his supervisor, Vice Principal Winston. Lowe issued a memorandum to Carlomagno (Board Exhibit 2) and Carlomagno was required to see the Superintendent.

Carlomagno testified that on December 6, 2012, after the incident with AD, Lowe had "summoned" him to speak about the prior day's incident and that he "was already familiar with her, you know, her whole scene." (Tr. at 553.) He felt that it would be a derogatory conversation that was not positive in any way. At that point, he received a call from his lawyer; he was trying to get advice on certain matters and so he went to the office and requested time to see his lawyer. He testified that he went to Ms. Diaz and Ms. Johnson who directed him to Veal. He heard Lowe on the telephone in her office, but testified that he did "not think it was a big deal so I just asked Veal to tell Lowe -- to ask -- if I could leave." (Tr. at 554.) He was unsure whether Veal had authority to let him leave early, but testified that she is the person to go to in this situation. He did not want to talk to Lowe as it did not want to inflame the situation.

Carlomagno testified that he told Veal that he had to go and she objected and bickered with him saying that it would be difficult to get coverage. Carlomagno testified that he left anyway and that he believed he followed proper protocol. According to Carlomagno, his tone with Veal was not inappropriate, but he was "pretty firm." (Tr. at 558.) He was determined to leave and they were giving him a hard time about it. He denied it was the second time he left the building early, noting that the prior time he had taken his class to the auditorium.

Carlomagno testified that he did call SubFinder on Friday morning but did not know if it accepted his call or not. Although he thought he still had sick days remaining, he did not. The system took his information but it did not register. Because he was unsure if the system took the information, he called his supervisor, Winston, on Friday afternoon to tell him he would be out on Monday.²² He claims that he worked on Tuesday and does not know why the District says he was absent. Carlomagno testified that he met with Deo on

²¹ Carlomagno had used all of his sick days when he was absent for a work related injury.

²² On direct, Carlomagno testified that he told Winston he would be out a couple of days.

his return and received the December 12, 2012 memorandum (see below) regarding these events. He was suspended for three days.

Deo testified that he met with Carlomagno upon his return to work on December 12, 2012, along with his Union representative. After reviewing Lowe's memoranda regarding the December 5 and 6, 2012 incidents and Carlomagno's absences (Board Exhibits 1 and 2) and meeting with Carlomagno, Deo issued a memorandum to Carlomagno providing:

These unauthorized absences and inappropriate comments to students are a dereliction of duty. As such, I am suspending you for three days with pay December 12th, 13th and 14th, 2012.

Since these are repeated incidents, I am again requesting that you seek a clearance that you are fit for duty from a medical professional. I expect you to present documentation to that effect by January 2, 2013. *Any incidents of a similar nature will result in additional discipline up to and including termination.* (Emphasis added.)

(Board Exhibit 14.)

On this record, the District argues: (a) that the credible evidence, including Veal's testimony, supports the Charges; (b) that Carlomagno was agitated and very abrupt in his interaction with Veal; (c) that Carlomagno left the school early on December 6, 2012 without authorization from Lowe or any other administrator; (d) that Carlomagno was absent the next three school days without following instructions to use SubFinder; (e) that Carlomagno's conduct was unacceptable, insubordinate and a dereliction of duties and constitutes conduct unbecoming; and (f) that the charges should be sustained.

Respondent maintains that both Charges Nine and Ten must be dismissed based on principles of industrial double jeopardy. In the alternative, Respondent argues: (a) that this was not the second time that Carlomagno left the building early as he did not leave early on March 6, 2012; (b) that because Lowe was on the telephone in her office, Carlomagno left a message with Veal, who was the person responsible for arranging coverage, that he had to leave; (c) that Lowe, who was in her office, did not tell Carlomagno that he could not leave; (d) that Carlomagno made every effort to ensure that coverage was provided for his classes and had ample work for his students; (e) that Carlomagno needed to meet with his attorney; (e) that Carlomagno's tone throughout his interaction with Veal was normal and conversational; (f) that Carlomagno did call SubFinder but while the

system took the information, it did not officially record the absence because he had used all of his sick days; (g) that as a result, Carlomagno called Winston, his supervisor, to advise that he would be absent; and (h) that these charges should be dismissed.

Discussion:

On this record, although the District has proven the charges by a preponderance of the credible evidence, Charges Nine and Ten must be dismissed based on double jeopardy principles. The memoranda written by both Lowe and Deo (Board Exhibits 1, 2 and 14) specifically addressed Carlomagno's conduct with respect to his interaction with Veal, leaving school early on December 6, 2012 without authorization and his subsequent three-day absence without calling SubFinder. Carlomagno was suspended for three days as a result of this conduct. That the suspension was with pay does not require a different result – it was still disciplinary. That is made clear by the last line in Deo's memorandum which provides that "[a]ny incidents of a similar nature will result in *additional* discipline up to and including termination." (Emphasis added; Board Exhibit 14.) Accordingly, for the reasons discussed above with respect to double jeopardy principles, Charges Nine and Ten are properly dismissed. Once again, however, double jeopardy does not preclude consideration of this prior discipline in assessing the appropriate penalty in connection with remaining charges that are proven in this case.

The Bohm Incident - March 14, 2011:

Charge Eleven is the only allegation of misconduct at a prior school. The incident took place on March 14, 2011 when Carlomagno was assigned as an instrumental teacher at Hurden Looker.

Lois Bohm, then an Instructional Supervisor assigned to AP Morris Early Childhood Center and Hurden Looker, had supervisory duties that included approving lesson plans for specials teachers, including Carlomagno's lesson plans for music. Teachers were to submit lesson plans twice a month electronically on a system called eChalk. Bohm testified that she spoke to Carlomagno in January 2011 because Carlomagno's lesson plans had not been submitted. He indicated that he was having problems with the computer in his room. She met with him in the classroom and communicated with the technology personnel about the

situation. She told Carlomagno if he still had a problem, to let her know. He did not communicate that he had any further problem but she still was not receiving his lesson plans.

In February, she wrote a memorandum to Carlomagno regarding the lesson plans and she asked him to sign the document to acknowledge receipt. (Board Exhibit 12.) She sent it interoffice mail. He did not return it. She sent a second notice at the end of February and asked him to sign, leaving it in his mailbox at school. He still did not do so. At one point, she talked to him in the office and said he has to sign the memorandum; he laughed and said he had quite a few to sign. On March 14, 2011, she printed a third copy of the memorandum. She went to the faculty room before classes started and found him on the couch. She asked him to sign to acknowledge receipt. Bohm testified that Carlomagno became angry. When she slid the paper across the table to him, Carlomagno ripped it up and threw it towards her. She was taken aback and must have pointed her pen at him and said don't ever do that again. He responded that she should not point at him and called her an asshole. She left the faculty room, called the principal and provided a written statement. (Board Exhibit 13.)

Carlomagno testified that because he was having problems logging into the eChalk system, he checked with technology and learned that they were misspelling his name. In fact, he noted that Bohm also misspelled his name of the memoranda she sent to him. According to Carlomagno, Bohm wanted him to sign the memorandum to admit that he was remiss in submitting his lesson plans. He did not do so. On Monday morning March 14, 2011 at 7:30 AM, while he was drinking coffee in the faculty room, Bohm "flung" open the door, "storming" into the room, "slammed" the paper and "screamed" sign this, you are going to sign it. (Tr. at 567.) Although Carlomagno testified that he was shocked, he also testified that this was not the first time she did something like this. Carlomagno told Bohm that she was not his supervisor and that he would not sign if she was going to talk to him that way. She kept yelling. He finally stood up and told her to get lost and called her an "asshole." (Tr. at 568.) He testified that if he "didn't say something like that, I would never get rid of her. She was quite annoying." (Tr. at 568.) He further testified that "I tolerated her" but because of other things happening, he was "sick of it." (Tr. at 568-69.) He admits that he ripped the memorandum and threw it, but not at her.

On this record, the District argues: (a) that the credible evidence supports that Carlomagno engaged in the conduct charged; (b) that by his actions, including his refusal to acknowledge receipt of the memorandum on several occasions, ripping up the memorandum and throwing it, and calling Bohm an "asshole," Carlomagno was insubordinate and engaged in conduct unbecoming; and (c) that the charges should be sustained.

Respondent again maintains that double jeopardy principles apply to bar this charge given that an increment was withheld for the 2011 - 2012 school year. In the alternative, Respondent contends; (a) that Carlomagno did not submit his lesson plans through eChalk due to technical difficulties, including the misspelling of his name in the system; (b) that Bohm acted inappropriately when she approached Carlomagno in the teacher's room; (c) that Bohm was not Carlomagno's supervisor; (d) that Bohm had treated Carlomagno in a similar manner on prior occasions and admitted she had raised her voice with Carlomagno previously; (e) that while Carlomagno admitted calling Bohm an "asshole" and ripping up the memorandum, he did not throw it in Bohm's direction; and (f) that the charge should be dismissed.

Discussion:

On the entire record, including my assessment of witnesses' credibility and the probative value of evidence, the District has proven the allegations of conduct unbecoming in connection with Carlomagno's unprofessional conduct with Bohm on March 14, 2011. Nonetheless, the Charge is dismissed on double jeopardy grounds. I reach these conclusions for the following reasons.

Bohm testified credibly that Carlomagno did not sign the memorandum on three occasions, that he became angry with her, ripped up the memorandum and threw it and called her an "asshole." Significantly, Carlomagno admitted these allegations in his testimony. While both may have been speaking in raised voices, however, I am not persuaded by Carlomagno's testimony that Bohm flung open the door, stormed in and slammed the paper on the table, demanding he sign. Nor am I persuaded that Bohm had no supervisory authority over Carlomagno; she credibly testified that she was charged to

review lesson plans for the "specials" and Carlomagno testified that he understood that he was required to submit lesson plans to her starting in January that year.

Calling Bohm an "asshole," ripping up the memorandum and throwing it (whether or not thrown directly at Bohm) is conduct unbecoming and insubordination. His claim that if he had not done so, he would not have been able to "get rid of her," that she was "annoying," that he "tolerated her" but that he was "sick of it" is further evidence of his unprofessional attitude and interaction with Bohm in this instance. Indeed, his testimony and his demeanor at the hearing when questioned about this incident – laughing -- further demonstrates that to this day, Carlomagno does not understand that his conduct was inappropriate.

The issue of double jeopardy is a more difficult one in connection with this charge. Unlike the prior charges where discipline was issued specifically in relation to the conduct being charged, in this case, the withholding of the increment was not specific to the incident with Bohm. Rather, the May 13, 2011 letter advising that the increment was being withheld stated that it was "as a result of your unsatisfactory performance and failure to meet the requirements of the Hillside Board of Education and the Hillside Education Association's contract, appendix A-2, 11.A.i, 'obtaining a minimum of fifteen approved credits within five years of attaining tenure.'" (Board Exhibit 15.) In my view, this document alone is insufficient to establish that Carlomagno was disciplined in connection with his interaction with Bohm regarding lesson plans.

An evaluation that recommended that the increment be withheld, however, identified various concerns with Carlomagno's performance that led to that recommendation, including problems with "Teacher-Staff Relationships." (Board Exhibit 27.) One of the four separate incidents under this heading states as follows: "2/10/11 stated about Lois Bohm, Instructional Supervisor - 'Bohm is asking me for lesson plans. She is a pain in my neck too. She questions me about E-chalk. She doesn't understand my plans.'" (Board Exhibit 27.) While this incident is not the same as the one occurring on March 14, 2011, it does relate to his unprofessional conduct with Bohm regarding the lesson plans. Moreover, while the front page of the document is dated March 10, 2011 (prior to the incident referenced in Charge Eleven) it appears to have been signed and dated by Sharon Festante, Principal, and given to Carlomagno in May 9, 2011, after the

incident with Bohm occurred; by that time, the principal had been advised of the March 14, 2011 incident.

Contrary to the District's argument, the fact that only one bullet point in the entire evaluation references Carlomagno's incident with Bohm does not require a finding that discipline was not imposed in connection with his interaction with Bohm. Even if it is only one of the reasons for discipline, if discipline was imposed in whole or in part for this specific conduct, double jeopardy principles prohibit imposing discipline a second time for the same incident. The administrators who were directly involved in recommending that the increment be withheld for 2011-2012, then Superintendent Dr. Thomas Kane and Principal Festante, did not testify. Carlomagno, however, testified that it was his understanding that the increment withholding was due, in part, to his interaction with Bohm on March 14, 2011. (Tr. at 569-570.)

Based on the documents and Carlomagno's testimony as to his understanding, and in the interest of assuring due process and avoiding any claim that Carlomagno was twice disciplined for the same misconduct, under the circumstances presented in this case, I will err on the side of dismissal of the charge at this time. As noted above, however, double jeopardy does not prohibit consideration of prior discipline in assessing the appropriate penalty for the remaining charges in this case given progressive discipline principles.

Accordingly, Charge Eleven is dismissed on double jeopardy grounds.

Charge Twelve:

Charge Twelve does not contain any separate allegations of misconduct. Rather it asserts that due to the willful and intentional misconduct as alleged in the prior charges, there is "other just cause" sufficient to warrant dismissal. The issue of penalty is discussed below.

Penalty:

The District seeks Carlomagno's termination from employment. Whether termination is appropriate must be decided on the facts and circumstances of each case. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record, the effect of such

conduct on the maintenance of discipline among students and staff, and the likelihood of such behavior recurring. *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967). Having considered all of the evidence in this case, and all of the arguments, dismissal is the appropriate penalty.

Termination of a tenured teacher has been found to be appropriate based on a single incident if sufficiently egregious.²³ In this case, while Carlomagno's conduct in connection with the ES incident on April 23, 2013, *i.e.*, grabbing ES, lifting him off the ground and throwing him on the teacher's desk, may itself justify dismissal, it is not the only misconduct proven in this case. Indeed, as discussed above, Carlomagno also engaged in conduct unbecoming in connection with his inappropriate and unprofessional comments to AN and grabbing or pushing GO's arm in March 2012. This proven misconduct must be considered along with his prior disciplinary record, which includes discipline for inappropriate and unprofessional conduct towards Bohm (and others) in 2011, towards Lowe on December 5, 2012 and towards Veal on December 6, 2012, establish a continuing pattern of inappropriate and unprofessional conduct raising serious concerns regarding Carlomagno's ability to control his anger and to act in an appropriate and professional manner towards supervisors, staff and students alike and, therefore, his fitness to continue as a teacher in the District. Despite receiving prior discipline for his conduct and the opportunity to improve, Carlomagno's conduct did not change, as evidenced by the ES, AN and GO incidents in this case.

Consistent with the concerns Deo expressed in his testimony, the evidence demonstrates that Carlomagno's inability to control his temper and his inappropriate interactions, initially directed towards adults, has now also been directed to students. (Tr. at 173.) Despite having his increment withheld for the 2011-2012 school year, in part as a result of Carlomagno's interactions with his colleagues and administrators, including

²³ See, *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967), *In re Tenure Hearing of Juan Cotto*, 2000 WL 679185; *I/M/O Tenure Hearing of Rogelio Hernandez and the State Operated School District of Newark*, 1999 WL 259634. See also, *Matter of Tenure Hearing of Maren Sugarman*, Agency Dkt. No. 140-6/13 (Arbitrator Joyce M. Klein, September 17, 2013) (a single act of corporal punishment, *i.e.*, unprovoked slapping a student in the face, in front of the entire class, warranted dismissal, notwithstanding a prior good record, acceptance of responsibility for her actions and efforts to obtain treatment.)

Bohm,²⁴ in March 2012 Carlomagno again displayed his anger on two separate occasions, this time against students. Carlomagno grabbed GO's arm and pushed, slapped or knocked it down, yelled in anger at AN, calling her "stupid" and an "idiot" and telling her to "shut up" and that if she threw the first punch, he would punch her back. DC, a student in the class who observed Carlomagno's conduct, testified that she was nervous and that she did not know what Carlomagno was going to do. Carlomagno was again disciplined on December 12, 2012 for his aggressive and unprofessional interactions with Lowe and then with Veal. Notwithstanding the discipline he received for the December 2012 incidents, including notice that "[a]ny incidents of a similar nature will result in additional discipline *up to and including termination*" (Emphasis added; Board Exhibit 14), on April 23, 2013, a little more than four months later, Carlomagno engaged in serious misconduct against ES.

Contrary to the Respondent's arguments, the misconduct proven in this case cannot be considered "at most a lapse in judgment" (Respondent Closing Memorandum at p. 46) warranting a lesser penalty.²⁵ Rather, it is serious misconduct that justifies termination of employment. Carlomagno's words and actions in the ES, AN and GO incidents were intentional and willful. By these actions, he engaged in repeated behavior constituting conduct unbecoming a tenured teacher. Further, despite prior discipline providing notice that this conduct was unprofessional as well as opportunities to improve, Carlomagno has demonstrated that he is either unwilling or unable to do so. Indeed, his demeanor while testifying, including repeatedly being argumentative with counsel particularly on cross-examination and making inappropriate comments,²⁶ as well as his hearing testimony

²⁴ In considering Carlomagno's prior disciplinary record, I note that Carlomagno's increment was also withheld for 2012-2013 as "a result of [Carlomagno's] unsatisfactory performance and failure to meet the requirements of the Hillside Board of Education and the Hillside Education Association's contract, appendix A-2, 11.A.i, 'obtaining a minimum of fifteen approved credits within five years of attaining tenure.'" (Board Exhibit 16.)

²⁵ The cases cited by Respondent are distinguishable. Unlike *In re Tenure Hearing of Joseph Prinzo, Passaic County Technical Institute*, OAL Dkt.No. EDU 10324-00, Agency Dkt. No. 424-11/00, this case does not involve a single incident that transpired over a relatively de minimis period of time and that was not cruel or vicious. Similarly, unlike *I/M/O the Tenure Hearing of Poston*, OAL Dkt No. EDU 3876-05 Agency Dkt No. 78-3/05 Carlomagno's conduct over a period of time is far more egregious than a teacher using an expletive in an exchange with a student in front of the class, where mitigating factors were found to exist.

²⁶ For example, when Carlomagno laughed when asked about calling Bohm an "asshole," ripping up a memorandum and throwing paper and was asked if he found it amusing, Carlomagno responded to counsel and the arbitrator that he found "this whole discussion to be unamusing, but I am trying to be nice about it." (Tr. at 656.) I also note that his demeanor during his testimony was consistent with his description of his demeanor with Lowe on December 5, 2012, where he testified that after being a little loud, he "went into

indicate that he has no remorse for his actions and accepts no responsibility for his inappropriate conduct. He continues to blame others, both adults and students, for his misconduct. His testimony also evidences a continued lack of respect for supervision.²⁷ I am persuaded on this record, therefore, that Carlomagno is likely to repeat this conduct if returned to the classroom.

Teachers hold positions demanding public trust, with significant influence over the students in their classrooms. They must serve as role models for young students. See, *In re the Tenure Hearing of Juan Cotto*, 2000 WL 679185; *I/M/O Tenure Hearing of Joseph Prinzo, Passaic County Technical Institute, Passaic County*, Agency Dkt. No. 424-11/00 ((June 29, 2001). By his conduct in the ES, AN and GO incidents, Carlomagno has breached the public trust. Considering his prior disciplinary record, along with the serious nature of the charges sustained in this proceeding, the appropriate penalty in this case is termination of Carlomagno's employment.

By reason of the foregoing, I issue the following:

AWARD

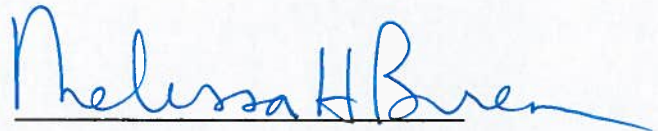
a) The School District of the Township of Hillside, Union County has proven that Respondent, John Carlomagno, engaged in willful misconduct constituting conduct unbecoming a tenured teacher, as alleged in Charges One, Two, Four, Five and Six, relating to ES, AN and GO and that it has just cause for termination. These charges are sustained to the extent consistent with this Opinion and Award. Termination of employment is the appropriate penalty for these violations.

what I call a controlled mode...smiling at her because I realized I wasn't getting anywhere with her, so I tried to make the best of the situation." Carlomagno appeared to have a "controlled smile" with clenched teeth throughout his testimony in this case.

²⁷ For example, in testifying about his decision to leave early on December 6, 2012 notwithstanding that Lowe had "summoned" him to meet with her, Carlomagno testified that he "was already familiar with her, her whole scene...in terms of what we were going to get into, the manner in which she was going to speak to me." (Tr. at 553.) In speaking about Bohm, Carlomagno testified that if he had not called her an "asshole", he would never "get rid of her," "she was quite annoying" and that he "tolerated her." (Tr. at 568.)

b) All other charges are dismissed for the reasons set forth in the Opinion and Award.


Dated: December 20, 2013


Melissa H. Biren, Arbitrator

AFFIRMATION

I, Melissa H. Biren, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Dated: December 20, 2013


Melissa H. Biren