

#271-13

STATE OF NEW JERSEY  
DEPARTMENT OF EDUCATION  
TRENTON, NEW JERSEY

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IN THE MATTER OF THE TENURE HEARING )

of )

GERALD CARTER, )  
SCHOOL DISTRICT OF THE CITY OF CAMDEN, )  
CAMDEN COUNTY )

AGENCY DOCKET NO. 369-12/12 )

) OPINION  
) AND  
) AWARD  
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Before: Prof. Robert T. Simmelkjaer, Esq.  
ARBITRATOR

APPEARANCES

FOR THE SCHOOL DISTRICT

Eric D. Milavsky, Esq., Brown & Connery, LLP  
Lewis R. Lessig, Esq., Brown & Connery, LLP

FOR THE RESPONDENT

Barbara Ann Johnson-Stokes, Esq., Michael A. Armstrong & Associates

## STATEMENT OF THE CASE

This case arises under the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ ACT" or "the Act"), N.J.S.A. 18A:6-117 which took effect on or about September 1, 2012.

Pursuant to the Act, the Camden City Board of Education (hereinafter "the Board" or "the Petitioner") filed tenure charges against Gerald Carter (hereinafter "Carter" or the "Respondent"), a tenured special education teacher.

On November 7, 2012, the Board by and through Reuben Mills, Interim Superintendent of Schools, charged Carter with inefficiency, insubordination and conduct unbecoming a teacher. A statement of evidence accompanied the charges.

On November 27, 2012, Carter filed a written position in opposition to the charges.

On December 18, 2012, the Board met in closed session to review the merits of the charges. After evaluating the charges, the statement of evidence, and Carter's position statement, the Board made the following determinations by a majority vote of its full membership:

- a. There is probable cause to credit the evidence in support of the charges;
- b. The charges, if true, are sufficient to warrant Carter's dismissal from employment with the Board;
- c. The charges shall be certified to the Commissioner of Education; and
- d. Carter shall be suspended without pay, effective January 3, 2013.

The Board certified the charges to the Commissioner of Education on December 20, 2012. Pursuant to the Act, on January 13, 2013, the Commissioner assigned the undersigned Arbitrator to the case.

### PROCEDURAL HISTORY

A hearing in the instant case was held on March 18, 2013, March 20, 2013, April 5, 2013, and April 12, 2013. The hearing was held in the offices of Brown & Connery, LLP, 360 Haddon Avenue, Westmont, New Jersey.

At the hearing, the parties were given ample opportunity to present their respective positions, including testimonial and documentary evidence. The parties were represented by counsel and the hearing was transcribed.\* The record consists of one (1) Joint Exhibit, forty (40) Board or Petitioner Exhibits, and forty (40) Respondent Exhibits. In addition, the parties submitted post-hearing briefs dated May 6, 2013. On May 13, 2013, the Board, with the Arbitrator's permission, responded to a procedural issue raised by the Respondent, for the first time, in his closing brief dated May 6, 2013. The evidence so submitted as well as the arguments of the parties has been considered by the Arbitrator in his award and accompanying opinion.

### STATEMENT OF FACTS

The Respondent, Gerald Carter, became a tenured teacher on November 4, 2001. He was certified in K to 12, special education. From December 11, 2001 through the 2006-2007 school year, Carter taught at the Pyne Poynt Middle School. He received satisfactory Teacher Evaluative Observation Reports during

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\* T1, will denote the transcript of 3/18/13; T2, the transcript of 3/20/13; T3, the transcript of 4/5/13; T4, the transcript of 4/12/13.

this period from Ms. Gallo, Ms. Moore, Dr. Kumar and Mr. Valentine. (R. Exs. D-N).

Mr. Tyrone Richards ("Richards") was the Respondent's Principal at the Pyne Poynt Middle School during the 2007-2008 school year. Mr. Carter taught special education students with behavioral disorders during that time. Mr. Richards testified that Carter had three main problem areas while at Pyne Poynt: (1) attendance, (2) lesson planning, and (3) classroom management. (T1 @ 18-25).

During the 2007-2008 school year, Carter was absent a total of eight (8) times and late a total of twenty (20) times. (R. Ex. #B). By memorandum dated December 11, 2007, Richards placed Carter on a Corrective Action Plan. (P. Ex. #3). By the middle of February 2008, Carter had accrued an additional 12 latenesses (on top of the previous 5) along with his pre-existing 7 absences. On February 21, 2008, Richards issued a reprimand to Carter. (P. Ex. #4). After the reprimand, Carter accumulated three (3) additional latenesses and one (1) additional absence. At the conclusion of the 2007-2008 school year, Richards recommended that the Board withhold Carter's increment for poor attendance – a recommendation that the Board adopted.

During the 2007-2008 school year, Richards placed Carter on a Corrective Action Plan for Instructional Planning and Implementation, primarily for his failure to timely submit lesson plans, submit them via the District's web-based program "Oncourse," and inconsistencies between the lesson plans taught and the curriculum.

On September 27, 2007, Richards issued a written reprimand to Carter for engaging in non-instructional activities during instructional time (i.e., playing 3D Space Cadet Pinball in math class). (P. Ex. #5). On October 30, 2007, Richards issued Carter another reprimand for a similar infraction.

At the conclusion of the 2007-2008 school year, Carter was transferred from the Pyne Poynt Middle School to Cramer Elementary School. Mr. Carter testified that he transferred because of "problems" he was having with the Pyne Poynt Vice Principal, Mr. Valentine. (T3 @ 326).

The Respondent worked at the Cramer Elementary School during the 2008-2009 school year. Ms. Andrea Surratt ("Surratt") was the principal. Ms. Surratt testified that Carter had various problems at the Cramer School, including but not limited to the following: (1) lesson planning, (2) classroom management, and (3) inappropriate and unprofessional behavior.

On January 5, 2007, Surratt issued Carter a written reprimand for "careless lesson planning after 'numerous' verbal requests" for lesson plans. (P. Ex. #7). Carter testified that despite the fact Surratt told him not to repeat lesson plans in the 1/5/09 reprimand, he continued this practice through the 2011-2012 school year. (T4 @ 561-562).

Mr. Surratt also documented Carter's classroom management problems, such as an incident dated May 22, 2009 wherein Carter "left his class during instruction to go to the main office to pick up his paystub [and] [a] fight broke out when he left the room." (P. Ex. #10). Carter was also issued a written reprimand dated December 8, 2008 for not appropriately using instructional time,

specifically when she walked into his room with visitors from the State. (P. Ex. #9).

The Respondent was also cited by Surratt for not having an appropriate behavior modification program in place.

He was also cited for unprofessional and inappropriate behavior such as confronting Surratt in the hallway about a write-up she had issued him regarding lesson plans. (T.1 @ 96-97). On another occasion, where Dr. Jonathan Ogbonna attempted to resolve some of the problems Carter was having with Surratt, Surratt testified that Carter had "inappropriate demeanor" in that he asked for her "personal" attention while "licking his lips." Ms. Surratt further recalled an incident on October 17, 2008 where she testified that she heard Carter play inappropriate music in his classroom, specifically the song "I Can't Believe It" by Lil Wayne and T-Pain." Ms. Surratt considered the lyrics to be "sexually suggestive and containing profanity." (P. Ex. #8). Carter testified that he played only the instrumental "hook." Surratt issued Carter a written reprimand for this incident. (P. Ex. #8).

At the conclusion of the 2008-2009 school year, Surratt wrote a letter to an Assistant Superintendent requesting that Carter be transferred due to the "havoc" he had created at Cramer School. She listed her reasons, which included "Mr. Carter has no respect for authority and has hindered the academic climate at Cramer School." (P. Ex. #10).

For the 2009-2010 and 2010-2011 school years, Carter taught at the Parkside Elementary School. Ms. Claudia Cream ("Cream") was the principal at Parkside during this period.

Ms. Cream testified that Carter frequently did not have his lesson plans posted or available online via Oncourse as required. The Board introduced as evidence eighteen examples of write-ups Cream issued to Carter for not having his lesson plans timely posted or available. (P. Ex. #11).

Ms. Cream also testified regarding classroom performance problems on Carter's part such as his non-adherence to homework policy. For each of the three (3) formal evaluations Cream conducted on Carter for the 2009-2010 and 2010-2011 school years, she rated Carter "unsatisfactory overall." (P. Ex. #12). She also deemed Carter inefficient for his "failure to timely submit required information" as well as noted his "unprofessional and insubordinate behavior."

Ms. Cream memorialized an incident that occurred on June 28, 2010. (P. Ex. #15). After she placed a note in Carter's mailbox about end-of-year form that Carter had not accurately completed, he allegedly "entered her office, threw the information on the table and yelled 'man, I'm sick of this,' 'I'm sick of these write-ups,' and 'I don't care, write me up.'" She also memorialized another incident that purportedly occurred on October 21, 2010. (P. Ex. #16). Another incident occurring on November 19, 2010 was similarly memorialized. (P. Ex. #17).

Mr. Carter recalled a fourth incident on February 3, 2011 wherein Carter missed a mandatory staff meeting to coach a girls' basketball game.

For the 2011-2012 school year, following his suspension at Parkside for the 2/3/11 incident, Carter was assigned to the Bonsall School. Within two weeks of the start of school on September 15, 2011, the Board suspended Carter for an incident where he allegedly ran after and physically restrained a student. "DFYS investigated the incident, confirmed that two witnesses observed that Carter had 'slammed' the child, but ultimately found that the child was not seriously injured and that 'the available information did not meet the statutory requirement for abuse.'" (P. Ex. #28). The Respondent was returned to work on January 25, 2012 with a letter warning him "to avoid future displays of unprofessional behavior and/or unbecoming conduct." (P. Ex. #29).

On March 5, 2012, the Respondent was involved in another incident with a child which DFYS investigated and found that the statutory criteria for abuse had not been met.

On April 30, 2012, Carter had a third incident with another child, J.M. Although DFYS found that Carter "yelled at J.M., pushed J.M. against the wall and kept J.M. from leaving the bathroom," DFYS again concluded that since J.M. was not injured, the statutory criteria for abuse had not been met. (P. Ex. #32) (T4 @ 552-553). Nevertheless, the Board suspended Carter for this incident and he has not returned to work since.

Due to his multiple suspensions for all but 3-1/2 months of the 2011-2012 school year, the Respondent was not formally evaluated for this period.

However, Ms. Myra Slacheteka, the Board's former Special Education Supervisor, reviewed the lesson plans Carter posted for the 2011-2012 school



year. (P. Ex. #23). Also, Ms. Melinder Aviles, a Training Facilitator for 20 years, testified that she visited Carter twenty times over the years and made findings with respect to: (1) inappropriate use of instructional time, (2) failure to implement a behavior modification plan, and (3) inadequate teaching practices.

### PRELIMINARY MATTER

Before the Arbitrator addresses the substantive charges preferred against the Respondent, it is necessary to consider a significant component of the Respondent's defense to the charges. The Respondent has relied extensively on N.J.S.A. 18A:6-11 where it addressed the dismissal of a teacher for inefficiency prior to the 2012-2013 school years as follows:

"[I]f the charge is inefficiency, *prior* to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and *allow at least 90 days in which to correct and overcome the inefficiency*. The consideration and actions of the board as to any charge shall not take place at a public meeting."

"Under N.J.A.C. 6A:3-5.1(c), the specific steps that must be followed once a school board finds there are sufficient charges to dismiss or otherwise discipline a teacher include:

- (1) Filing the charges with the district board or state district superintendent complete with specific details of the nature of the inefficiency and supporting evidence;
- (2) Notifying the teacher with a statement of the charges that informs the teacher that the charges will be certified to the Commissioner unless the teacher cures the deficiency within the minimal 90-day period;
- (3) Modifying the Professional Improvement Plan for the teacher mandated by N.J.A.C. 6A:32-4.3 or -4.4 to address the specific charges of inefficiency and the timeline for their correction;
- (4) Once the period for correction expires, notifying the district board or state district superintendent of which charges, if any, have not been corrected; and
- (5) Within 30 days of the conclusion of the period for correction, the district board or state district superintendent notifying the

teacher whether the alleged inefficiencies have been corrected or have not been corrected.” (Emphasis added).

In addition to his reliance on the foregoing statute and regulations, the Respondent has also cited supportive case law such as In re Jones, 2008 WL 3892402 where a charge based on inefficiency – defined as the failure of the teacher to perform his/her duties – could be dismissed “if the Board could not show that it provided the teacher with a detailed written charge of the inefficiency claim, 90 days to correct the issues giving rise to the claim and assistance in becoming effective.” Also, in State Operated District of Paterson v. Rubin, 95 N.J.A.R. 2d (EDU) 13 (Sept. 12, 1994), it was held that “a teacher whose teaching effectiveness is called into question after years of meritorious service should be afforded an opportunity to demonstrate that he/she is still capable of effective teaching.”

Given the foregoing statutory and decisional law, the Respondent has argued that the Board not only did not comply with the requisite procedure that he should be provided written notice of the alleged inefficiency but also that he have 90 days to “correct and overcome the inefficiency.” Rather than address the alleged inefficiencies, Respondent contends that the Board continued to transfer him from one school to another while periodically suspending him for long periods of time. With respect to applicable law, the Respondent argues that “since the inefficiencies began after he was transferred from [Pyne] Poynt Middle School to Cramer Elementary School and Parkside Elementary School, this Board’s actions fall under the old statute and not the new law signed by the Governor on August 12, 2012 which removed the aforesaid ninety (90) day time

period.” The Respondent, while noting that “the recent amendments to the TEACH NJ Act removed the 90 days probation requirement in N.J.S.A. 18A:6-11” and effective with the 2013-2014 school year a new evaluation system eliminates “the common procedural defense of a failure to allow 90 days to correct the inefficiency,” nevertheless proceeded to argue and cite case law exclusively dependent upon the 90 day corrective period.

Pursuant to his contention that the 90 day rule is applicable in the instant case, Respondent maintains that insufficient evidence was adduced by the Board that he “was under extensive evaluations before the charges of inefficiency were filed against him” as was the case in Rowley v. Bd. of Educ. of Manalapan – Englishtown Regional School Dist. 205 N.J. Super. 65 (App. Div. 1985).

According to the Respondent, the Board neither provided proof that Ms. Aviles, who testified that she visited Carter’s classroom twenty times, was a “supervisor or superintendent qualified to evaluate Mr. Carter” nor that Ms. Aviles, Ms. Surratt or Ms. Cream developed a Professional Improvement Plan “as it is required in step three (3) of the ninety (90) day period...”

The Respondent further contends that since his evaluations were satisfactory for approximately 7 years while teaching middle school, Ms. Surratt did not evaluate him during the 2008-2009 school year (notwithstanding her negative comments), and Ms. Cream evaluated him only three (3) times in two (2) years (despite the requirement that teachers should be formally observed a number of two (2) times per year “unless there are concerns”), the inefficiency

charges are based on inadequate evaluations and the inefficiency charge should be dismissed on this ground alone.

The Board, on the other hand, has persuaded the Arbitrator that "the law applicable when the Board filed its inefficiency charge did not require it to provide the ninety-day corrective period." The Board correctly noted that the legislature in enacting the TEACH NJ Act, effective at the commencement of the 2012-2013 school year (i.e., on or about September 1, 2012), "eliminated the requirement of the 90-day corrective period in inefficiency cases."

With the exception of those cases still pending before the Office of Administrative Law as of September 1, 2012, those charges filed afterwards are not subject to the old procedures, including the requirement of the 90-day corrective period. Since it is undisputed that the Camden Board of Education filed the instant tenure charges on November 7, 2012 and certified them to the Commissioner on December 20, 2012, the Respondent's claim that the old law applies is misplaced. Inasmuch as the Commissioner referred the charges to the Arbitrator in January 2013, exercised his discretion under N.J.S.A. 18A:6-16 to determine whether the inefficiency charge was sufficient to warrant dismissal or reduction in compensation and, if not, s(he) "shall" dismiss the charge, the Respondent's position cannot be sustained. Given the fact the Board certified its inefficiency charge to the Commissioner only 43 days after filing the charge, as the Board correctly asserts, had the old procedures applied the Commissioner could have dismissed the inefficiency charge pursuant to the 90-day rule.

In accord with this Arbitrator's finding that the 90-day corrective period is inapplicable in the instant case is Arbitrator Tim Brown's decision in IMO Tenure Hearing of Chavez, Dkt. No. 269-9/12, Arb. Dec. No. 57 12 (Arb. Dec. Feb. 6, 2013). The arbitrator found that "[a]pplying well recognized principles of statutory interpretation, the failure of the legislature to do for charges referred after the effective date of the law what it did for charges referred prior to such date, supports a conclusion that the legislature did not intend that the procedures and standards existing prior to the effective date of TEACHNJ would apply to [in]efficiency charges, such as the instant charge, not already transmitted to the Office of Administrative Law as of the effective date of TEACHNJ."

The Arbitrator further concurs with the Board's position that "to whatever extent Mr. Carter's argument has merit, Mr. Carter has waived that argument." Since the Respondent had the opportunity to raise his 90-day defense with the Board directly and then with the Commissioner (See N.J.S.A. 18A:6-16), his decision to raise this defense for the first time in his post-hearing brief as opposed to during the hearing permits the Board to invoke a laches defense and argue that his argument has been waived.

Based on the foregoing analysis, the Arbitrator, while he acknowledges the relevance of the Respondent's defense to the inefficiency charge predicated on insufficient evaluations/observations and/or the lack of Board professional assistance to correct his alleged deficiencies, dismisses his 90-day procedural claim as null and void pursuant to the enactment of the TEACHNJ Act, effective September 1, 2012.

### Charge I: Inefficiency

Considering the evidence in its entirety, the Arbitrator is persuaded that the Board has proven its inefficiency charge against Mr. Carter by a preponderance of the credible evidence.

Inefficiency has been defined as "a charge against an employee that...[he] has failed to reasonably perform the duties of his title." IMO Antonio Lewis, 2004 WL 812758 (N.J. Adm. April 6, 2004). Inefficiency has been found to include: "an inability to maintain classroom decorum and discipline," IMO Tenure Hearing of Ashe-Gilkes, 2009 WL 246266 (N.J. Adm. Jan. 2008); "an inability to teach a prescribed curriculum"; and "a failure to submit required information on time, even after constant written reminders." See In re: Margaret Sidberry, 2006 WL 869441 (N.J. Adm. 2000); Board of Educ. of Twp. of Teaneck v. Wilburn, 91 N.J.A.R. 2d 48, 58 (N.J. Adm. 1991).

#### A. Lesson Planning

In the instant case, the Board has documented a pattern of performance deficiencies on Carter's part that, in the Arbitrator's opinion, constitute a preponderance of evidence sufficient to sustain the charge of inefficiency. In order of prevalence, the problems identified by the Board included his failure to timely post lesson plans, his failure to formulate lesson plans that were conducive to effective classroom instruction, his failure to competently deliver classroom instruction, his problems in implementing a viable behavior modification program, and his problems with lateness and attendance at the Pyne Poynt School. Among these problems, Carter's failure to provide quality

instruction to his students is the most serious deficiency because it goes to the essence of the teaching profession. In many respects, the Respondent's inefficiencies were interrelated and recurring to the point where a pattern was discerned that Carter made minimal effort to rectify over six school years..

Beginning with the 2007-2008 school year at the Pyne Poynt School, the Board provided testimonial and documentary evidence that Carter displayed lesson planning problems that continued unabated. Mr. Tyrone Richards, the principal, testified that Carter's lesson plans were often late and not posted on the District's web-based program "Oncourse." Despite "one-on-one" talks with Carter regarding the importance of accurate, timely lesson plans, Richards testified that Carter failed to submit timely lesson plans on time between 12 and 18 times. Moreover, Richards testified that Carter would often repeat the same lessons so that instructional progression was not evident. He would also submit a lesson plan that was not the same lesson he taught in class, or use a lesson plan that was inconsistent with the curriculum. Although Richards generally declined to issue reprimands to Carter for his various deficiencies, in accordance with his attempt to allow Carter, a then-young teacher, to develop and improve, he did issue a reprimand directing Carter to provide a "Corrective Action Plan for Instructional Planning and Implementation."

The Respondent's deficiencies in lesson planning and production persisted during the 2008-2009 school year at the Cramer Elementary School. Ms. Surratt testified credibly that Carter frequently missed the deadline for posting his lesson plans. She further testified that he would turn in his lesson

plans late 2-3 times per month, and for two weeks he did not turn in any lesson plans. She further testified that even when he timely turned in lesson plans, the plans were often not correct for the subject and grade level or not correlated with the curriculum. Rather than differentiate the plans for the third through fifth grade levels he taught, Surratt testified that they would contain "rote work" such as writing spelling words eight times each. (T1 @ 77). As noted above, Surratt issued Carter a reprimand dated January 5, 2009 for careless lesson planning. She further noted that he had been provided assistance by the Special Needs Facilitator, the Literacy Coach, and Ms. Slachetka. (P. Ex. #7).

In this regard, it is noteworthy that Carter admitted, on cross-examination, that despite the 1/5/09 reprimand, he continued to submit unacceptable lesson plans throughout the 2011-2012 school year. (T4 @ 561-562).

Following Carter's transfer from Cramer to Parkside, Ms. Cream, the principal, confronted Carter about his lesson planning. For the two-year period Carter was under her supervision, 2009-2010 and 2010-2011, Cream, as had her predecessor supervisors, observed that Respondent did not timely post his lesson plans online via "Oncourse." Moreover, he would not have them available in the classroom, and on several occasions he did not submit any lesson plans. In addition to late and missing plans, Cream testified about his substantive lesson planning issues as follows:

I observed that the areas that ... the pre-class [activity], the objectives, they were not complete, they did not reflect the curriculum, they did not include the various component parts of the lesson planning, they were not individualized to the performance level for the students in the room, they did not include homework. There were a number of areas that were not specific ... So, there



were a number of areas that I observed on his lesson plans that did not follow the format. (T1@120).

Although Carter correctly pointed out and the Board acknowledged that he should have been excused from submitting lesson plans while absent due to health problems from December 2009 to January 2010 and for the periods of his suspensions, the Arbitrator notes that several "non-submittal" weeks remain and the bonafide absences do not excuse the problems identified regarding the content of the lesson plans submitted.

With respect to the Board providing Carter with assistance to correct his lesson planning deficiencies, Cream testified credibly that she gave him one-on-one individual assistance, referred him to master teachers, provided him with a written outline usable as a template for proper lesson planning, and reinforced lesson planning during grade level meetings.

The problems manifested by Carter's inefficient lesson planning were illustrated during the testimony of Ms. Slachetka ("Slachetka"). After reviewing Carter's lesson plans for the 2008-2009, 2009-2010, 2010-2011, and 2011-2012 school years and visiting his class on three (3) occasions, she identified "three recurring, blatant problems." Those problems, as the Board correctly derives from her testimony, were: "(1) repetition of lesson plans for a week or periodically throughout the year, (2) a failure to specify teaching procedures, and (3) the sequence of the lessons was illogical."

In addressing the first recurring problem, Slachetka described five different examples of repetition such as during the 2011-2012 school year. She testified

“there was a repetition of lessons each day or the same lessons for a week or the same lessons periodically repeated throughout the year, the same group of lessons.” (Tr. T2 @ 223).

As for the second recurring problem, Slachetka testified that Carter did not provide a teaching procedure in the lesson. Whereas Slachetka described a lesson plan as a “road map” where “the objective in your plan tells you where you’re going and the design of the lesson itself tells you how you’re getting there,” she testified that in Carter’s lesson plans “the meat of the lesson is not there.” “There was no ‘I do, we do, you do’ in the lesson.” Having reviewed four years of the Respondent’s lesson plans, Slachetka found the absence of a teaching procedure was “pervasive.” (P. Exs. 20-23).

Regarding the third recurring problem, Ms. Slachetka gave examples of lessons that did not follow a logical sequence, were unrelated or “jumped around” such as a lesson that moved from “properties of matter, to proteus and fungi, to living things, to animal hormones and eventually back to properties of matter.” In a math lesson, Carter purported to teach in a single day, single and double division, flat surfaces, vertices and edges and rounding.” As another example drawn from his April 2009 lesson plans in the area of social studies, she testified:

Q. Thank you. Proceed, Miss Slachetka.

A. These were really interesting because they were repetition in a group, that on Monday, April the 6<sup>th</sup>, Mr. Carter’s social studies plans reflect that he was going to teach about the middle colonies.

And I’m not going to go into those except that on Tuesday we went to China. He took the class to China and they talked about the factors that made China difficult to govern. And it goes on and on.

Wednesday we come back to the French and English come to America. And on Thursday there's just something else about the plains states.

The following week on Monday, April the 20<sup>th</sup>, we're back to the middle colonies, and it's the exact same plan. If you want me to scroll back up, it's the exact same plans as Monday of April the 6<sup>th</sup>.

Do you want me to?

MR. SIMMELKJAER: I think not. (T2 @236-237).

For his part, Respondent reiterates his reliance on the repealed 90-day corrective period, by arguing that Ms. Slachetka "could have been assigned to him any time prior to the (90) day period prior to certification to help him become effective." With respect to the specific problems she identified in his lesson planning, Respondent argues that "the Arbitrator is left with only some examples of defective lesson plans out of the hundreds of plans put into existence. The true number of defective lesson plans is unknown."

In the Arbitrator's opinion, the lessons excerpted by Ms. Slachetka constituted a representative sample of Carter's inefficient lesson planning. Evidence of his unabated failure to submit timely lesson plans, the repetition of lessons over time, the failure to specify a teaching procedure, and his submission of lessons that failed to follow a logical sequence are deemed sufficient to support the charge. To the extent Respondent contends that the lessons selected by Ms. Slachetka were atypical of his submissions, he had the opportunity to submit lesson plans that conformed to the expectation of his supervisors, namely Ms. Surratt, Ms. Cream and Mr. Richards.

It is also noteworthy, notwithstanding the inapplicable 90 day corrective period, that even in the satisfactory evaluations Carter received, he was rated unsatisfactory in "maintains and has available all written lesson plans." (See

Respondent's Teacher Evaluative Observation Report dated 12/11/01, 4/10/02, and 2/3/09. (R. Exs. C, D, N).

Insofar as Ms. Cream's critique of Carter's lesson plans is concerned, the Respondent argues unconvincingly that Cream was biased against him in all respects, and her assignment of Slachetka to observe Carter via walk-throughs fall short of a "proactive" approach "to improving his teaching performance prior to the certification of inefficiency by the Board."

B. Classroom Performance/Management Problems/Inappropriate Use of Instructional Time

In further support of its inefficiency charge, the Board provided a preponderance of evidence that Respondent compounded his poor lesson planning with a plethora of classroom management deficiencies. Mr. Richards observed Carter playing a computer game during instructional time. When asked for an explanation by his attorney, Carter testified: "I was just on the computer, just relaxing with the rest of the kids. [I] was pretty much waiting for the class period to end." (T3 @ 308). Despite offering Carter the opportunity to "shadow" more experienced teachers, Richards did not notice any improvement. In his walkthroughs, Richards estimated that Carter's class "was not truly on task on more than a half dozen occasions."

Similarly, Ms. Surratt observed classroom management problems. She testified that Carter had a tendency to let the students leave the classroom and wander the hallway without following the proper protocols in place for student safety. As she testified, "if [Mr. Carter] got angry with a student or felt like they weren't complying, he would just tell them to get out."

The Arbitrator finds troubling evidence that Carter, whose skill set ostensibly included behavior modification strategies for students with behavior disorders, would resort to inappropriate exclusionary methods

Ms. Surratt also observed Carter squandering instructional time either by playing games, unauthorized music, or doing nothing. In the December 8, 2008 reprimand, Surratt described an incident where Carter “was [sitting] behind his desk [while] his students were not doing anything” when she walked into his room with visitors from the State. (T1 @ 90)(P. Ex. #9).

Ms. Cream testified that Carter left his students unsupervised on several occasions, such as when she observed him “addressing a student from another class in the hallway while he left his own students unattended in his classroom.” (T1 @ 16-23).

During her walk-throughs, Ms. Cream determined that Carter’s classroom “was not an inviting educational environment,” lacking good housekeeping, bulletin boards, and on one occasion emanating “a foul odor in his room.” He also failed to follow the curriculum, assign mandatory homework, and engage in teacher-student interaction.

Ms. Melinder Aviles, Training Facilitator, testified that during the approximately 20 times she visited Carter’s class, she observed inappropriate use of instructional time, inadequate teaching practices, and his failure to implement a behavior modification program. Ms. Aviles testified that on several occasions she caught Carter on his cell phone when he was supposed to be teaching. At other times, she observed him doing college homework during

instructional time. According to Aviles, when she would visit Carter's room, "I just didn't see actual teaching going on, the process of teaching. What I would see was him handing out a workbook or a worksheet and, you know, instructing the kids to do it with no real instruction behind it." (T2 @ 183-184).

Moreover, she saw no evidence of a behavior modification program that would entail "rules, rewards or consequences." (T2 @181). Her efforts to assist Carter by modeling a behavior modification program were of no avail. Generally speaking, Aviles testified that Carter was resistant to assistance, seemed "annoyed" and "insulted" by Ms. Aviles' modeling, and unreceptive to her suggestions on how to structure a lesson. (T2 @182 -183).

The Respondent argues that Aviles' lack of documentation that she visited him 20 times – a situation she explained was caused by a flood and resultant asbestos contamination 3 years ago – renders her testimony incredible given Carter's recollection that she only assisted him twice at Pyne Poynt.

The observations of Aviles were corroborated by Slachetka, who also testified that there was no behavior modification program in place, there was a lack of instructional materials on the classroom walls, a failure to display the student's good work,<sup>\*</sup> a lack of learning stations, poor classroom organization, and spelling and punctuation mistakes on the board. Moreover, Slachetka noticed that Carter failed to effectively utilize his instructional aide. She also corroborated Cream's observation in that "there was no interaction that gave the

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\* The bulletin board in Mr. Carter's room labeled "Awesome Work" had just one student paper on it...

students the opportunity to learn something.” She described a lesson she observed as follows:

He did bring students up to the board. They did problems and they sat back down. But they appeared to be problems that they already could do, so that there was nothing new. There was no teaching. (T2 @207-209).

In her post-observation meetings with Carter, in December 2008, November 2010 and December 2010, she reviewed “each piece of the report.”

#### C. Failure to Submit Timely Required Information

Ms. Cream testified credibly that Carter failed to submit various documents in a timely fashion such as weekly assessment forms and student intervention forms, causing her to constantly issue verbal and written reminders. (P. Exs. #13, #14). During the two years she supervised Carter, this aspect of his performance did not improve.

#### D. Attendance Problems

Although the Arbitrator finds that a nexus exists between chronic absenteeism and lateness, and inefficiency, this problem was apparently limited to the 2007-2008 school year at Pyne Poynt. Undoubtedly, Carter had a serious attendance problem at that time, which led to his placement on a Corrective Action Plan (“CAP”) and subsequently the withholding of his increment for “poor attendance” and “chronic lateness.” After the implementation of the CAP on February 21, 2008, the Board documented no additional attendance dates. Since there is no evidence that Carter’s attendance problems continued after 2007-2008, and given the fact the problem arose at the beginning of the 7-year

period the Board has considered for the inefficiency charge, the Arbitrator accords this specification or component of the charge minimal weight.

### Summary

Considering the evidence in the aggregate, the Arbitrator is persuaded that the Board has met its burden of proving that the Respondent has been an inefficient teacher for a seven (7) year period (2007 – 2013) (six (6) school years) beginning with the 2007-2008 school year. The performance of the Respondent was deficient along the continuum of duties required of a competent teacher. The Board provided clear and convincing evidence that in the areas of lesson planning, classroom instruction, classroom management, behavior modification and receptivity to assistance, Mr. Carter did not meet the reasonable and expected standard for a special education teacher.

Although the Arbitrator credits the Respondent's contention that the number of formal evaluations/observations conducted by his supervisors was limited given the six school year period covered by the inefficiency charge, in the final analysis, the lack of formal observations was supplemented by comparable and reliable measures of performance. Whereas Ms. Cream evaluated Mr. Carter as unsatisfactory three (3) times in the two (2) years he was under her supervision, she and his other supervisors conducted numerous walkthroughs during which the same performance problems were identified and documented. The range of instructional problems observed by Ms. Cream during her walkthroughs were documented and reinforced in her formal observations. (P. Ex. #12). These problems included but were not limited to inadequate lesson



planning, instructional objectives that were not individualized, non-adherence to the curriculum, poor classroom management techniques, dereliction in utilizing technology and other resources, and misspelled words and errors on the board.

Unlike Respondent, the Arbitrator does not find that Ms. Cream was biased against him and considered him "only good for 'dressing nice and talking sports with children.'" In the Arbitrator's opinion, Ms. Cream had high standards and expectations which Mr. Carter was unable to fulfill. Her constant reminders of his deficiencies caused him to react defensively and occasionally, with hostility. Whereas Mr. Richards gave Mr. Carter more latitude in his development as a new teacher to no avail, Ms. Cream had less patience, but also little success in changing Mr. Carter's performance.

Similar deficiencies were observed during the walkthroughs or visits of Richards, Surratt, Aviles, and Slachetka. Clearly, had formal evaluations been conducted by Richards and Surratt, or if Aviles' visits were documented, the evidentiary record would have been enhanced. However, in the Arbitrator's opinion, the evidence provided by the Board is sufficient to meet its preponderance burden as distinguished from the higher evidentiary standard the Respondent has sought.

These instructional/classroom deficiencies were compounded by evidence that Carter was occasionally observed in non-instructional activities during instructional times, such as playing video games, talking on his cell phone, or talking to co-workers.

Finally, in terms of the inefficiency charge, the Arbitrator discerns no basis to mitigate his finding that the charge must be sustained. Although the Respondent has argued repeatedly – again in the context of the 90-day corrective period – that he was entitled to a Professional Improvement Plan mandated by the now inapplicable N.J.A.C. 6A: 32-4.3 or 4.4, the Arbitrator credits the substantial evidence adduced that several efforts to assist Carter were futile. In this regard, the Arbitrator refers to the documentary evidence that Mr. Richards placed Carter on a Corrective Action Plan for Instructional Planning and Implementation during the 2007-2008 school year and on June 28, 2010 Mr. Carter and Ms. Cream mutually agreed to a Professional Development Plan. (P. Exs. #6, #40).

Mr. Richards offered Mr. Carter the opportunity to “shadow” other teachers and had one-on-one talks, but did not notice any improvement. Ms. Surratt gave Mr. Carter assistance with his behavior modification program and assigned coaches and supervisors to assist him with instruction, but testified “When you’re unreceptive, it doesn’t matter how many people [are] put in place.” She also described him as “angry, accusatory [and] defiant” while resisting constructive criticism. As noted supra, Ms. Cream gave Mr. Carter individual assistance, written material and access to master teachers without seeing any improvement. Ms. Aviles found him to be unreceptive to assistance as well as “annoyed” and “insulted” by her modeling efforts. And, Ms. Slachetka, over the 2-year time span of her three observations of Carter’s class, saw no improvement in his recurring problems with lesson plans.

Based on the foregoing analysis, the Arbitrator sustains the inefficiency charge.

Charge 2: Unbecoming Conduct

The Board has charged the Respondent with “unbecoming conduct,” which has been broadly defined as any conduct “which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services.” City of East Orange Bd. of Ed. v. Lewis, 2012 WL 569414 (N.J. Adm. Feb. 11, 2012).

The Board maintains that Carter’s conduct was unbecoming when he played inappropriate music in his elementary school classroom on October 17, 2008, specifically, the song “I Can’t Believe It” by Lil Wayne and T-Pain. The Respondent admitted that he did not obtain Principal Surratt’s permission to play the music, which includes the following excerpt:

She hit the main stage she make the people say yeahh, (she make the people say) yeah  
 Now I can put your ass out, ohhh  
 Keep running your mouth  
 And if yo brothers come trippin I’ma show ‘em what these teardrops ‘bout  
 Shawty I was just playing  
 Ohh but I can take to the Caymen...Islands  
 Have you screamin’ and hollerin’  
 We gon’ be making... Love on the beach  
 The people see what we doin’  
 Awww they pointin’ and ooo’in  
 Ohh but we gon’ keep on doing... it  
 Like it’s just me and you and no one else around  
 It went down on the balcony,  
 And her legs are open how sweet,  
 Shawty like a model out da Penthouse Sheets. (P. Ex. #7).

Ms. Surratt testified credibly that she heard the foregoing lyrics playing in Carter's classroom – and not the instrumental version, with only the “hook” as Carter testified. (T4 @ 533). At the hearing, Carter testified that he obtained the instrumental version that he played in class from “my own personal CD I made.” He further testified that the CD had been “destroyed,” possibly by rain.

The Board argues that “the ‘version’ Carter claimed he played in class was not uploaded onto youtube.com until December 28, 2008, over 2 months after Carter played it in class.”

The Arbitrator sustains this specification of the conduct unbecoming charge based on the testimony of Ms. Surratt. She testified credibly that she “positively” heard the lyrics and not the instrumental version, a recollection which she documented in the reprimand she issued, with the lyrics attached. (P. Ex. #8)(T1 @ 89). In the Arbitrator's opinion, the lyrics are sexually suggestive and totally inappropriate for elementary students.

The Board further charges that Carter engaged in conduct unbecoming a teacher on April 30<sup>th</sup> when “he verbally and physically mistreated J.M.” – a student at the Bonsall School in April 2012. J.M. testified that Carter “pulled him into the bathroom, screamed at him from two feet away, grabbed him by his shirt, pushed him against the wall and told J.M. he wanted to punch him.” J.M. recalled Carter repeating, in reference to Ms. Lumpkin, “You just can't disrespect people like that.” The entire episode took approximately 4 minutes. (T2 @ 265-271).

On cross-examination, J.M. denied running around the gym that day, ignoring Ms. Lumpkin when she asked him to sit down, or using a curse word in response to her directive. (T4 @ 286-287).

Ms. Lumpkin contradicted J.M.'s denials when she testified that J.M. was running around in the gym on April 30, 2012, refused to sit down, and "cursed me and disrespected me." She recalled the curse words used by J.M. as: "Fuck you, don't get in my fucking face, leave me the fuck alone, somewhere in that order." (T4 @ 635). Ms. Lumpkin testified that Carter intervened, but she did not see him take J.M. away.

In the absence of corroboration, the Arbitrator cannot credit J.M.'s version of the incident. J.M.'s testimony, particularly his denials regarding his disrespect toward Ms. Lumpkin, diminishes his credibility with respect to what occurred afterwards. In this instance, it appears that Carter was attempting to instill respectful behavior in J.M., without intending to inflict corporal punishment. Although there is some evidence that Carter took J.M. into the bathroom and pushed him against the wall, without corroboration or credible testimony in support of the misconduct allegation, the Arbitrator dismisses this specification of the conduct unbecoming charge. Moreover, the DYFS investigation into this matter, which concluded that the criteria for child abuse had not been met, constitutes hearsay evidence devoid of sufficient weight to sustain the conduct unbecoming charge in the instant case.

Assuming that playing the inappropriate music and the J.M. incident each constitute fifty (50%) of the conduct unbecoming charge, the Board has not met its burden of proof.

Considering the case law cited by the Respondent, his single act of playing inappropriate music or grabbing J.M. would not constitute sufficient grounds for dismissal. However, conduct unbecoming, if proven, along with a proven inefficiency or insubordination charge could suffice as grounds warranting removal or revocation of tenure.

#### Charge 3 Insubordination

The Arbitrator finds that the Board produced a preponderance of credible evidence sufficient to establish that the Respondent has been insubordinate to his superiors over several years. Insubordination can be defined as either a "willful refusal to comply with a supervisor's [lawful] directive" or "acts of disobedience to proper authority."

Although the Arbitrator considers certain of the insubordination claims of the Board, such as Carter's failure to submit lesson plans, follow protocols, and come to work on time more accurately encompassed under inefficiency, the Respondent did clearly display unequivocal insubordinate behavior on at least three (3) occasions.

Mr. Carter admitted that he was insubordinate during one of his "altercations" with Mr. Valentino, the Pyne Poynt Principal during the 2007-2008 school year. The Respondent testified as follows:

It was near the end of the school year, and it was Fun Day in which all the kids are allowed to pretty much run supervised, there's a lot of activities going on, kids, you know, just have freedom, painting and things of that magnitude. So, I'm sitting down watching, observing the kids run around, and a female co-worker of mine was talking to me, like probably where you was at, and [Mr. Valentino] just cuts in front of me and like, excuse me, where your kids at? I said, they're with my IA, you know, they're being observed. Well, you need to go get them. I just sat there calm. I finished my – he did it again. He didn't even let me finish my conversation. I'm like – he said, come on, let's go. As soon as I walked in, I said, yo, he's disrespecting me, he's just all in my face like, not even talking – all right. And that was the little altercation we had. (T3 @ 326-327).

In the Arbitrator's opinion, Carter's refusal to supervise his students after being asked to do so by Mr. Valentino constituted a defiance of authority and therefore insubordination. Carter's insistence upon continuing his conversation with a female coworker had a higher priority to him than attending to his job duties as a teacher.

During the 2008-2009 school year at the Cramer School, Carter was insubordinate during a meeting with Ms. Surratt and Dr. Jonathan Ogbonna, who was trying to resolve some of the problems he was having. Ms. Surratt testified credibly that the meeting was terminated when Carter kept saying he wanted Ms. Surratt's "personal" attention while licking his lips. Notwithstanding Carter's incredible explanation for his disrespectful behavior, namely, "My lips stay dry; I always lick my lips," the Arbitrator finds that he was insubordinate. (T3 @ 356).

He also yelled at Ms. Surratt in the hallway in the presence of others and accused her of picking on him, after she had issued him a write-up. The Vice Principal had to intervene. ( T1 @ 96-97).

The most blatant example of insubordination occurred at the Parkside School on June 28, 2010 and involved Ms. Cream. After Ms. Cream had placed new end-of-year forms in Carter's mailbox, she testified that he later entered her office, threw the information on the table and "yelled 'man, I'm sick of this,' 'I'm sick of these write-ups,' and 'I don't care, write me up.'" In her write-up of the incident, Ms. Cream described "the gross disrespect shown to me as the Principal," the "belligerent manner" in which he questioned her, and his "demeanor and tone [that] was confrontational." (P. Ex. #15).

The Respondent had additional confrontations with Ms. Cream that constituted insubordination, including an incident on October 21, 2010 when Carter told her in front of his students, "Man, I don't want to hear that" when she questioned him about taking his students to the restroom at their scheduled time; an incident on November 19, 2010 when Carter became explosive during a meeting when Cream questioned Carter and one of his coaches about the lack of improvement in Carter's ability to implement the math and reading program; and an incident on February 3, 2011 when Carter defied a directive to report to a staff meeting in order to coach a home basketball game, despite claiming it was an away game for which he was excused. His response when confronted was "They didn't tell me so I am leaving"; "I don't care do what you need to do," "I'm not going to any staff meeting," "I got a game." (P. Ex. #34).

In the aggregate, the foregoing incidents document a pattern of insubordination spanning a five year period (2007-2008 through 2011-2012),



which require the Arbitrator to sustain the insubordination charge by a preponderance of the evidence.

### **Conclusion**

Having sustained both the inefficiency and insubordination charges and finding no grounds to mitigate either charge, the Arbitrator is compelled to dismiss Mr. Carter's employment with the Board. His record is replete with evidence that his performance as a teacher, his unwillingness to improve, and his negative interactions with supervisors warrant dismissal. Mr. Carter's pattern of recurring teaching deficiencies combined with his resistance to assistance present an unacceptable prognosis for success that the Board should not be required to tolerate.

The Arbitrator discerns no evidence that if Mr. Carter continued to teach his performance would improve over the level he has displayed over the past seven years or that his deficiencies would decline. The fact that Respondent called no witnesses from any of the schools where he has taught, who could attest to his competence as a teacher, compels the inference that he has not been positively viewed by his colleagues. The Respondent's career has been problematic in all of the schools where he has taught. Clearly, the special education students of Camden deserve a teacher who is dedicated to his profession, is willing to provide them with a quality educational experience, and can utilize the knowledge, skills and resources of his colleagues and supervisors in their behalf.

There is ample case law supporting the dismissal of a teacher with a record comparable to that of the Respondent. In Gilmer v. State Operated School Dist. of the City of Newark, 2011 WL 2237628 (N.J. Admin 2011), a charge of inefficiency was sustained and the teacher dismissed where the evidence established a pattern of multiple unsatisfactory performance reviews, inadequate lesson plans, failure to improve on performance problems, and a failure to keep accurate student records.

Accordingly, the Arbitrator finds that the Respondent, Gerald Carter, is unfit to teach, and therefore shall be dismissed from his position as a teacher with the Camden School District.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

AWARD

- 1) The Board proved Charge 1, Inefficiency and Charge 3, Insubordination by a preponderance of the evidence.
- 2) The Arbitrator dismisses Charge 2, Conduct Unbecoming a Teacher.
- 3) The Respondent, Gerald Carter, shall be dismissed from his position as a teacher in the Camden School District.

July 18, 2013

  
Robert T. Simmelkjaer

STATE OF NEW JERSEY }  
COUNTY OF BERGEN } SS:

I, Robert T. Simmelkjaer, affirm that I have executed this instrument as my Award in Agency Docket Case No. 369-12/12 sustaining tenure charges as set forth above.

July 18, 2013

  
Robert T. Simmelkjaer