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STATE OF NEW JERSEY
COMMISSION OF EDUCATION

In the Matter of the Tenure Hearing of

SCOT KING

and

THE SCHOOL DISTRICT OF THE BOROUGH OF FREEHOLD,
MONMOUTH COUNTY

Agency Docket No. 31-2/13

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the procedures established by the New Jersey Department of Education under P.L. 2012, Ch. 26 (TEACHNJ) ACT, 8., N.J.S.A.18a:6-16, having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the bases on which the District predicated its decision to file tenure charges did not rise to the level necessary to deprive the Respondent of his tenure. Respondent King is culpable for serious shortcomings in his teaching performance, but not for instances of racism or intentional humiliation of students.

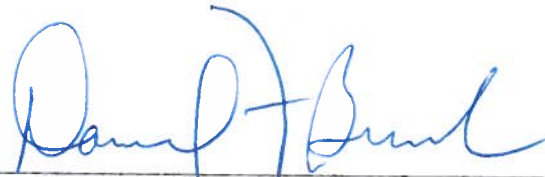
Consequently, the tenure charges filed against Scot King by the Freehold Borough School District at issue in the instant case are denied. The

Respondent shall be returned to his former teaching position, effective immediately, with uninterrupted seniority and length of service.

The District was entitled to impose discipline short of removal in order to communicate unequivocally that the Respondent must be more careful in expressing his personal opinions in the classroom setting. For this reason, the interval between the last day on which the Respondent was paid for teaching and the first day of the 2013-14 school year shall be deemed to be an unpaid suspension, and the reinstatement of the Respondent shall be without back pay. The Respondent's medical benefits shall continue uninterrupted throughout the interval of suspension.

The Arbitrator hereby retains jurisdiction to resolve any issue that may arise regarding the implementation of the remedy ordered pursuant to this determination of tenure charges.

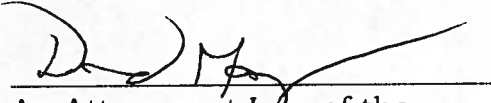
July 22, 2013



Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 22nd day of July, 2013 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

A handwritten signature in black ink, appearing to read 'D. M.', is written over a horizontal line. The signature is fluid and cursive.

An Attorney at Law of the
State of New Jersey

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Hearings were held in the above-entitled matter on April 4, 2013 at the New Jersey State Board of Mediation in Newark, New Jersey, and May 13, 2013 at the offices of the Federal Mediation and Conciliation Office in Iselin, New Jersey before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross examine witness and to present evidence and arguments. At the request of the parties, the Arbitrator obtained an extension of time from the Department of Education for the parties to file their post-hearing briefs, which were submitted on July 3, 2013, whereupon the record in the instant matter was declared closed.

APPEARANCES

For the School District of the Borough of Freehold, Monmouth County:

Bruce W. Padula, Esq., of Cleary, Giacobbe, Alfieri and Jacobs, Esqs.

Jodi S. Howlett, Esq., of Cleary, Giacobbe, Alfieri and Jacobs, Esqs.

For the Respondent Scot King:

Stephan B. Hunter, Esq., of Detzky and Hunter, Esqs.

ISSUE SUBMITTED

Should the tenure charges filed against Scot King by the Freehold Borough School District be upheld?

If not, what shall be the remedy?

RELEVANT STATUTORY LANGUAGE

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

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

* * *

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

* * *

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

* * *

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

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

***** * *

[23] 22 (New Section)

* * *

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

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

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NATURE OF THE CASE

On January 30, 2013, the Freehold Borough Board of Education (hereafter, the Board or the District) served sworn tenure charges on Respondent Scot King, who has been employed by the District as a classroom teacher since September, 1996. He began his career in Freehold teaching fourth and fifth grade science at the elementary school level, and thereafter transferred to the Freehold Middle School, where he taught eighth grade. During the 2011-2012 and 2012-2013 school years, Respondent King exclusively taught the social studies curriculum.

The Board certified the tenure charges against Respondent King, and thereafter filed a Certificate of Determination with the New Jersey Commissioner of Education on February 19, 2013. Daniel F. Brent was duly designated as Arbitrator by the New Jersey State Department of Education from its Panel of Teacher Tenure Arbitrators, and thereafter the matter was scheduled for hearing.

The tenure charges preferred against Respondent Scot King were predicated on a series of events in which the Respondent was charged with misconduct for making statements to students that were deemed by the Board as grossly inappropriate or manifestly improper and for foisting his personal political opinions on his students. More particularly, the Respondent was cited in the tenure charges as having told a female African American student that her “people have come a long way busting out of those chains” and on another occasion making comments directly to a student, LP, that were perceived as so severe that they precipitated LP’s absence. The Employer further asserted that the Respondent made disparaging remarks to his class in the context of current events discussions expressing that states adopting legislation legalizing same-sex marriage were guilty of “bastardizing marriage” as well as derogatory comments regarding Latino immigrants and children of single parent households. Both these groups are represented in significant numbers among the students served by the Freehold Borough School District.

According to the Board, Respondent’s pattern of inappropriate classroom commentary caused several of his students to report that they felt uncomfortable and offended. Furthermore, the Board asserted, the Respondent has been unable or unwilling to rectify his behavior despite receiving prior specific warnings admonishing him to do so, professional

sensitivity training, and the withholding of two prior increments based on similar conduct. The Board contended that Respondent's "unprofessional conduct jeopardizes not only the reputation of the school district, but the safe learning environment of his students."

The Respondent did not deny making several of the comments attributed to him, but contended that the comments were not only misconstrued by the Superintendent and the Board, but also were unfairly taken out of context. Respondent further asserted that he had no intention of disparaging any of his students or creating discomfort. He contended that, rather than engaging in any conduct to humiliate or denigrate the students, he was attempting to build up self-esteem in the instance where he referred to an African American student's heritage as a reason to assert herself confidently in a particular classroom confrontation precipitated by a fellow student and in the instance when he expressed how pleased he was that a struggling student had fortuitously been granted an opportunity to demonstrate her improved essay writing before her classmates.

DISCUSSION AND ANALYSIS

The primary incident precipitating the filing of tenure charges in the instant case involved an incident in which the Respondent countermanded a directive given by a male student to CE, an African American female student, that she pick up his pencil that had been confiscated by the Respondent because the male student had interfered with a lesson by persistently using his pencil to obscure a computer screen around which Respondent and a group of students were clustered for a lesson. After several warnings by the Respondent to desist, the Respondent took the pencil from the student and tossed it toward an equipment cart located nearby. The pencil either hit the edge of the cart or bounced after hitting the cart and landed on the floor. When the male student went to retrieve the pencil, the Respondent told him to desist, whereupon the student turned and demanded that CE pick up his pencil.

According to the testimony offered by the Respondent during the arbitration hearings, he intervened verbally in order to counteract what he perceived to be the offensive, overbearing, and sexist demand by the male student that the female student, CE, respond to his beck and call and pick up the pencil. In the context of telling the female student that she was not obligated to follow the male student's directive, the

Respondent unfortunately made reference to the female student's status as a person of color. Respondent acknowledged saying, in sum or substance, that her "people have come a long way busting out of those chains." In so doing, he bruised CE's feelings, apparently by indicating that he viewed her as a person of color rather than simply as an individual student. CE's reaction was understandable. However, neither the description offered of this incident by the Board's witnesses, none of whom were present during the incident, nor the version of the incident offered by the Respondent in his testimony created any basis to construe this statement as an overtly racist or intentionally demeaning comment.

The Respondent testified credibly that he sought to emphasize the parity of power between the female and male student and to encourage her to be proud of her heritage, rather than subservient to an obnoxious request by a student peer. The Grievant testified credibly that his statement was intended to bolster CE's confidence and to give her pride in her status as both a female and as an African American. Whether viewed in or out of context, the statement was not reasonably construed by the Board as intended to humiliate CE publicly. However, the unintended consequence of the Respondent's intemperate remark created a valid basis to impose discipline, especially when evaluated in

the context of the Respondent's history of professionally unacceptable remarks to students.

Even if the Respondent's recounting of this incident were to be substantially discounted as self-serving, and even if his prior history of intemperate or ill-considered remarks to students were to be considered in determining the appropriate penalty, the interaction portrayed by the Board as a material basis for its decision to institute tenure charges does not justify terminating the employment of a person who is, by all accounts, a stellar educator who works tirelessly not only for his students to provide energetic and creative teaching, but also for the Board to improve curriculum. Respondent has engaged in a series of unfortunate and inappropriate choices of words when interacting with students, but the utterances underlying the filing of tenure charges were not hostile, intentionally demeaning, or racist.

Furthermore, the District's conclusion, following an investigation, that the Respondent committed an act of HIB (Harassment, Intimidation, and Bullying) as defined by N.J.S.A. 18A:37-14 (Joint Exhibit 1-F) is invalid in the context of the instant case. According to the credible evidence presented at the arbitration, HIB is intended to apply for student-on-student interactions, not faculty-student interactions. In addition, the Board's conclusion that the Respondent's behavior

constituted “insulting or demeaning comments” resulting in the public humiliation of a student was not supported by the evidentiary record.

Although the Board has established that CE, the student to whom the Respondent addressed his comments regarding the pencil, stated that she was upset by this verbal interaction, and further accepting that the credibility of other students who told the Board’s investigator that they were upset by the Respondent’s comment concerning slavery was reasonably relied upon by the Board, the Respondent’s testimony established credibly that his behavior was not intended to insult or demean CE or any other students. In hindsight, the Respondent realizes that these words were easily susceptible to being misconstrued and should not have been uttered. His intention to bolster CE’s self-esteem and confidence unfortunately went awry.

Respondent King was also charged with having made a remark to or about a student, LP, that caused her such distress that she ran out of the school building. The District’s description of this event distorted Respondent’s role in the sequence and tenor of this event. Because LP was absent from school when a random computer program selected her to read an essay that students had written in class, Respondent chose the next student on the computer generated list, a female student who had been struggling in class, especially with her writing assignments.

After she read her essay aloud to the class, Respondent praised the improvement in her work and the success of her essay. In doing so, he stated that he was happy that LP was unavailable so that this student's name was selected to read her essay aloud to the class. The next day, LP was told by a mischievous male student that Respondent had told the class that he was happy LP had been absent. She became upset by the distorted version conveyed by the young man, and left the building.

Respondent did not make the comment in the form or with the meaning that the male student apparently conveyed to LP. Consequently, Respondent should not be penalized for his enthusiasm in praising the improved performance of the female student, even if he might have chosen his words more carefully had he anticipated that another student would malevolently twist the words of encouragement to cause pain to LP the next day. Thus, this incident did not create a compelling basis for rescinding Respondent's tenure.

Respondent King acknowledged in his testimony that he had been pulled into a current events debates about civil unions or same sex marriages in which, regrettably, he lost his professional objectivity and injected his personal views into the discussion. The evidentiary record also established that Respondent had managed student discussions about illegal immigration and single parent families in a far less than

ideal manner. These fleeting professional lapses justified the imposition of significant discipline. However, the Board has not established that the immoderate statements attributed to Respondent upon which the tenure charges were predicated were racist or intentionally disparaging of his students or the community that the Freehold District services.

The Respondent received laudatory evaluations throughout his teaching career. But for the instances for which he was disciplined or for which increments were withheld, the parties did not dispute the Respondent's status as a talented and dedicated teacher. At issue in the instant case is whether the multiple instances of unprofessional verbal conduct cited by the Board are sufficient to justify terminating his employment as a tenured teacher in the Freehold Borough School District. When weighed against a persuasively established and clearly documented record of excellence in classroom teaching and demonstrated extra-curricular involvement on behalf of the District, these transgressions do not sufficiently demonstrate or necessarily predict a persistent inability to conform to the high professional standards that the District demands of its teachers. Nor do these statements rise to the level of culpability that the Respondent's tenure should be rescinded on the basis of these incidents and for the rationale cited by the District in filing tenure charges.

Respondent has not engaged in actions that intentionally humiliated or denigrated any student. Nor did Respondent's expressions of controversial political views in the context of current events discussions in a social studies class so taint his ability to teach his students in the future that revocation of his tenure can be justified as an appropriate penalty for this conduct.

Counsel for the Respondent submitted an In Limine Motion seeking to bar the Board "from presenting any evidence that related to the issuance of a written reprimand to Respondent on or about October 31, 2001 and moreover, should also be prevented from presenting any substantive evidence relating to the withholding of the Respondent's employment and adjusting increments on two prior occasions because of the application of the equitable principles of waiver, laches, and estoppel." The Arbitrator ruled during the hearings that reference could be made to these events for the purpose of establishing that the Respondent was on notice that he was vulnerable to discipline for intemperate or unprofessional comments to students in his classroom. The withholding of two increments was admissible as relevant at least to establish that the District had taken steps to alert the Respondent that his employment could be jeopardized if he failed to reform his conduct, particularly his verbal interactions with students.

The Respondent has not established that any potential prejudicial impact of disclosing that two increments were withheld for ostensibly similar events outweighed the probative value of disclosing that the Board had previously expressed its dissatisfaction to the Respondent concerning the nature of certain remarks. Therefore, the Arbitrator properly considered the prior notice to the Respondent to be careful in his remarks as a factor in assessing an appropriate penalty for the Respondent's proven conduct that precipitated the tenure charges filed in the instant case.

The evidentiary record contains substantial credible evidence supporting the Respondent's contention that he was deemed to be a highly satisfactory and competent educator, who developed strong classroom relationships with his students. Such exemplary teaching skills do not, however, excuse demonstrated misconduct that adversely affects students.

The Respondent acknowledged in his testimony that he had been intemperately drawn into a social studies discussion of several sensitive or controversial topics. The District reasonably expected that the Respondent would conduct such discussions without injecting his personal opinions, even if students asked for his personal views or, as apparently occurred in the instant case, goaded him into declaring his

personal views by mocking and attacking the same viewpoint as without any redeeming merit. These shortcomings merit the imposition of substantial discipline. They do not, however, justify ending Respondent's tenure, as no single act or group of his acts outweigh his success as a teacher in engaging his students to think about and discuss controversial issues within the parameters of the social studies curriculum he was assigned to teach. Respondent may have spoken injudiciously on several occasions, but he has not so transgressed the parameters of discussion within a social studies curriculum or violated the propriety of student teacher relationships that his employment as a tenured teacher can be terminated.

But for the prior disciplines and increment withholdings, the response to the statements distorted by a male student that caused a female student to leave the building and the District's erroneous invocation of the HIB offenses under N.J.S.A. 18A:37-14, the District may not have filed tenure charges as the next stage in a sequence of progressively severe discipline. The inapplicability of HIB standards under this statute for remarks by teachers to students, the absence of persuasive evidence that the Respondent intended to intimidate or humiliate CE or LP or any other students, and the insufficient nexus between the remarks that precipitated a prior increment withholding and the Respondent's conduct as delineated in the tenure charges, mandate

a finding that there is insufficient basis in the evidentiary record before the Arbitrator to sustain tenure charges in the instant case either independently or as the culminating phase in a series of progressively severe discipline for similar prior conduct.

Based on the evidence submitted, the bases on which the District predicated its decision to file tenure charges included instances of intemperate or regrettable choices of phrasing, but this misconduct as established by the evidentiary record did not rise to the level necessary to deprive the Respondent of his tenure. Consequently the tenure charges filed against Scot King by the Freehold Borough School District at issue in the instant case are denied. The Respondent shall be returned to his former teaching position, effective immediately, with uninterrupted seniority and length of service. Because Respondent King is culpable for serious shortcomings in his teaching performance, but not for instances of racism or intentional humiliation of students, the District was entitled to impose substantial discipline short of removal in order to communicate unequivocally that the Respondent must be more careful in expressing his personal opinions in the classroom setting. Respondent is hereby admonished to temper his remarks with greater prudence to avoid future discipline for interjecting his personal and political opinions into his teaching relationship with his students.

For this reason, the interval between the last day on which the Respondent was paid for teaching and the first day of the 2013-14 school year shall be deemed to be an unpaid suspension, and the reinstatement of the Respondent shall be without back pay. The Respondent's medical benefits shall continue uninterrupted throughout the interval of suspension.

The Arbitrator hereby retains jurisdiction to resolve any issue that may arise regarding the implementation of the remedy ordered pursuant to this determination of tenure charges.

July 22, 2013

Daniel F. Brent, Arbitrator