#235-13

In the Matter of the **TENURE** Hearing	)	**OPINION and AWARD**
of	)	
ROBERT J. CARTER "Respondent"	)	
and	)	AGENCY DOCKET NO. 51-3/13
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON PASSAIC COUNTY "Petitioner"	)	

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein on April 4, 2013.

The hearings were held on May 8, May 9, May 14, May 17 and May 31, 2013 at the Board of Education offices, Paterson, New Jersey. The parties had full and fair opportunity to present evidence and argument, to engage in the examination and cross-examination of sworn witnesses, and otherwise to support their respective positions. The hearing was transcribed and the record was deemed closed on June 10, 2013 upon receipt of the parties' closing briefs.

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR RESPONDENT:

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APPEARING FOR PETITIONER:

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BACKGROUND:

The matter arose as a result of twenty-one Tenure Charges, Joint Exhibit J-1,[1] filed against Respondent, Robert J. Carter, including conduct unbecoming a teaching staff member, incompetency and other just cause.[2] According to a letter dated April 4, 2013 from M. Kathleen Duncan, Director of Bureau of Controversies and Disputes, the charges were reviewed and "deemed sufficient, if true, to warrant dismissal or reduction in salary."

POSITIONS OF THE PARTIES:

The State Operated School District's (District or Petitioner) position is that the language of Sections 14:3-2 and 14:3-3 of the Collective Bargaining Agreement between The Paterson School District and The Paterson Education Association, R-4, is preempted by statute and not enforceable; that the Grievance and disciplinary review procedures in the Agreement do not apply to tenure proceedings as a matter of law and that it has been decided that the section of the Agreement, which places a limit on documentary evidence, is not negotiable or enforceable in the context of tenure proceedings. Further, the law, N.J.S.A. 18A:17.1b(3), explicitly states that documents that would never be included in a personnel file, such as witness statements, may be presented at the hearing. Tenure Charges are entirely distinct from the grievance and disciplinary review procedures contained in the Agreement and any limitation on evidence used in disciplinary proceeding under the contract is not enforceable in a tenure proceeding.

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[1] Joint Exhibits are designated as "J" exhibits; Petitioner's Exhibits are designated as "P" exhibits and Respondent's exhibits are designated as "R" exhibits.

[2] The District withdrew Charge 15.

The District further asserts that hearsay is admissible in tenure hearings; that the residuum rule in N.J.A.C. 1:1-15-5 does not apply; that in reviewing Tenure Charges, the rules of the American Arbitration Association (AAA) prevail, which state that evidence is presented and "conformity to legal rules of evidence shall not be necessary;" that Courts have recognized the limitation of the residuum rule when an employee is charged with several acts of misconduct and that the District does not have to present direct evidence of every one of Respondent's transgressions but rather the Arbitrator should consider all of the evidence as a whole.

It is the District's position that while conduct unbecoming is not defined in the statute, teachers serve as a role model for students and are expected to adhere to a higher standard of conduct and to comport themselves with more restraint than those in other professions and that teachers have a special responsibility for exemplary restraint and mature self-control.

As for the Charges, the District's position is that the Grievant engaged in inappropriate and intentional misconduct; that he overreacts to situations; that he creates a classroom as a battleground rather than a supportive and nurturing environment; that he exaggerated student's behavior; that the Grievant had to be threatened with insubordination before he would give a student an accommodation; that he demonstrates his inability to empathize with students' needs and feelings; that he was unable to interact professionally with children or adults; that he follows his own rules and refuses to listen to others; that he retaliates against students; that he has a bad attitude and a bad temper; that he acted insubordinately when directed by a

supervisor; that he inflicted pain on a student by grabbing his sweatshirt causing an abrasion and slammed a chair to the floor; that teachers should never find it necessary to resort to physical force to maintain discipline; that he yells at fellow staff and administrators; that he has poor classroom management skills; that while he complained that others did not respect him, he did not speak respectfully to others; that he acted negligently and incompetently when students were able to access pornography on the computer as Respondent sat at his desk and that he uses profanity and calls the students names.

Further, the District contends that Respondent is utterly unable to improve his classroom management skills or his teaching skills, despite the fact that he has been provided with assistance with lesson plans, pacing and was provided mentor teachers to observe. Observations indicated that there was no improvement. Additionally, the District offered for a guidance counselor to work with Respondent to control his temper but he did not take advantage of this opportunity and he did not improve his interactions with students.

Moreover, Respondent offered little factual evidence that he should remain a tenured teaching staff member. He blamed the administrators for his troubles and he blamed other staff members and he blamed the students. Further, he expressed no remorse for his conduct and gave no indication that his conduct would improve. It is the District's position that Respondent is utterly incompetent.

Finally, the District complied with TEACHNJ's procedural requirements. It provided all of the documents upon which it intended to rely as part of the Sworn

Statement of Evidence in March 2013, which identified the District's witnesses. Further, it sent Respondent's counsel the witness list on April 25, 2013 and another one on April 26, 2013, ten days before the first hearing date of May 8, 2013. Respondent suffered no prejudice and did not raise any claim of prejudice at the hearing.

Therefore, the District asks this Arbitrator to sustain the Tenure Charges against Respondent and to dismiss him as a tenured teaching staff member.

The Respondent's position is that the matter was referred to arbitration about March 22, 2013; that the District did not provide a witness list until April 25, 2013 and an amended list until April 26, 2013; that the District's mistake or ignorance of the law is not an allowable excuse for a party when failing to follow a statute and that the District's failure to provide all evidence upon the referral for arbitration mandates dismissal of the Tenure Charges.

Further, Respondent asserts that he is entitled to the benefits under the Agreement R-4; that because the District failed to include numerous documents upon which it relied at the hearing into his personnel file, he was not afforded industrial due process and that notions of fairness dictate that the Tenure Charges be dismissed with prejudice.

It is the Respondent's position that for many of the Charges Respondent had already received discipline, including two increment withholdings and official reprimands, and, therefore, a prior penalty cannot serve as a basis for a future Charge. In the instant matter, the District is attempting to re-impose discipline on actions for which it had already imposed discipline.

Respondent asserted that all the Charges must be dismissed for reasons including that the District's testimony was inconsistent and, therefore, not credible; that Respondent did not have an opportunity to cross-examine students, parents or teachers regarding their hearsay statements made at the hearing; that nothing in the record indicated that Respondent's conduct constituted conduct unbecoming a teacher; that testimony did indicate a teacher attempting to keep order in his class and an administration that allowed the students to get away with poor behavior if they complained about a teacher; that Respondent was never insubordinate and followed directives when given; that once Respondent was told that student A.G. could have the tape recorder in class, there was never an issue again; that there was no IEP in place in September 2010 regarding the use of a tape recorder; that there is no policy allowing students to use a tape recorder in class; that Respondent's actions regarding the flash drive and the backpack were clearly appropriate as was Respondent's action in not giving A.G. homework, which was not yet prepared; that firing a long term teacher because he stated that he could not hear the principal and because he did not decorate his room was ridiculous; that charges were never substantiated by outside agencies; that banging a chair to get students to stop misbehaving is not conduct unbecoming; that Respondent is guaranteed a prep period and expressing his displeasure is not insubordination as he did not refuse to do anything and did not violate any policy or procedure; that it was the students who misbehaved regarding the computer, not Respondent; that there was no evidence that Respondent endangered a student's welfare by taking away his video game and no proof that Respondent used profane language in the classroom; that students sometimes lie and that

the District did not present any evidence to contradict Respondent's testimony that he believed that the student assaulted him intentionally.

Finally, it is Respondent's position that the District did not provide any evidence that his students were not learning and did not do well on standardized tests and no outside agency found any wrong doing by Respondent.

Therefore, Respondent asks this Arbitrator to dismiss the Charges in their entirety.

OPINION:

The first issue to be addressed was Respondent's claim that the TEACHNJ Act was not followed in that Respondent or his representative did not receive the witness list and that, therefore, these Charges should be dismissed. N.J.S.A. A;6-17.1 states that

> Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to documents, electronic evidence, statements of witnesses, and a list of witness with a complete summary of their testimony, to the employee or the employee's representative.

District's Counsel addressed this claim and the Arbitrator made a ruling as demonstrated by the following excerpt from the transcript of day 1 of the hearing at pages 15 though 18.

> Mr. BAUCH: I will acknowledge that there was, due to the newness of the law, an inadvertence in the formal witness list getting to Mr. Ricci. And I think Mr. Ricci had e-mailed me and he apparently had also misread the statute, because he stated that he had ten days after the receipt of my witness list to provide his witness list and documents. And that actually, upon further reading of the law, that's not what the law provides, either. . .

Also, as to what the word "upon" means, it didn't say, "immediately upon." In retrospect, if Mr. Ricci had simply given me a call, I would have given it to him. I think it's – given that there are substantial charges that weigh heavily in the public interest that need to be heard on the merits, that they should be heard.

Additionally, since there is absolutely no prejudice . . . the initial dates that the arbitrator threw out were, I think, April 17th, April 18th, and that would have basically meant, under Mr. Ricci's reading of the law, I had to, that day, get it to him and he would have not even have had as much time as he ended up having.

. . . if the legislature had intended that there be a bright line, . . . they would have used something that's much more precise, more like . . . "Ten days before the hearing." . . .

So we wanted to give a witness list that made sense to Mr. Ricci. I provided it without him asking. It was substantially more than what ended up being the first day of the hearing. It lists just witnesses that were mentioned in the statement of evidence. The summaries of testimony that were given were thorough summaries, but frankly, even they pale in comparison to the detailed nature of the statements that previously were turned over.

. . .

The ARBITRATOR: . . . I'm fine with your explanation regarding the first issue . . . I would definitely not dismiss it on those grounds.

. . .

The law is new, we're all new to this process. I know that both parties are working in good faith to do the best they can to provide everything in a timely manner.

The list was presented to respondent in a timely manner. I would say certainly back in March and certainly now in April when you got it, and there's more days of hearings, so that there will be plenty – I do not feel it's –that the respondent is being hampered in any way. He will have and you will have sufficient time to present your case.

And if you feel you need more time, I'm willing to ask for an extension. I don't want to do it, but if I have to do it for fairness, it's always been my policy that I want to hear what the parties have to say.

So I am okay with proceeding regarding the witness list situation.

In the opinion of this Arbitrator, there was no harm done as a result of Respondent not getting the witness list "upon referral," which did not include a specific time frame. There were five hearing days with the first day of hearing not until May 8, 2013, which gave Respondent every opportunity to know who the District's witnesses would be and to present his case. Of interest was that there was no claim from Respondent that he did not receive the other information listed in the statute that included the names of witnesses in multiple documents and clearly indicated who would be testifying.

Another issue raised by Respondent was that many of the documents entered into the record of the hearing were not in Respondent's personnel file and that, therefore, he was not afforded due process. In support of his position Respondent cited Article 14 of the Agreement, Employee Evaluation, specifically 14:3-3.3, Personnel Records, No Separate File, which states that

> Only material contained in this file may be used as documentary evidence in any proceeding dealing with said employee.

As stated above, one of this Arbitrator's main concerns in any arbitration hearing is that the employee receives a full and fair hearing and is afforded full due process. Further, this Arbitrator is a creature of the Agreement and must apply all negotiated language. However, in the instant matter, there are two reasons that this Arbitrator cannot agree with Respondent on this point. A tenure hearing is a separate matter and is not governed by the grievance procedure. In fact, N.J.S.A. 34:13A-5.3 specifically states that when negotiating disciplinary procedures that

> Public employers shall negotiate written policies setting forth grievance

> and disciplinary review procedures . . . Except as otherwise provided herein, the procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure . . . laws.

Further, N.J.S.A. 18A:6-11 provides that the documents that the District might include in support of the Charges could be "documents, electronic evidence and statements of witnesses," which confirms that the statute provides that other documents, not necessarily included in the personnel file, can be relied upon in a determination of Tenure Charges. Therefore, it must be concluded that the language of the Agreement does not apply to a hearing on Tenure Charges.

Additionally, an important factor was that Respondent was given most of the documents entered into the record of the hearing at the time of each incident despite the fact that many of them were not contained in his personnel file. In each instance when Respondent's behavior was under review the record established that the District wrote a memo detailing the incident, handed the document to Respondent, asked him to sign the document and asked him if he wanted to submit a rebuttal. In fact, the record established that Respondent signed these memos indicating receipt, noted that a rebuttal would follow but, time after time, it was confirmed that he did not actually submit a rebuttal to the District at the time of the incident.

Finally, as to the issue of which documents were to be relied upon in a determination in this matter, some of the documents entered into the record of the hearing were in Respondent's personnel file and others were internal memos used to remember incidents even though they did not involve discipline at that time. Therefore,

this Arbitrator must conclude that the District's exhibits were properly entered into the record of the hearing.

The District presented six witnesses, who were subjected to direct and cross-examination, in support of the Tenure Charges. Additionally, many instances between Respondent and staff members and parents were referred to during the hearing. While the rules of hearsay are more relaxed in an arbitration hearing, this Arbitrator is mindful of the fact that Respondent did not have the opportunity to cross-examine some of the statements made by people who were not called to testify. In this unique situation of a school setting it is understandable that parents and students would be more than reluctant to appear to testify. However, in this matter, there was a good variety of District witnesses, who were subjected to direct and cross-examination, including principals from different school years, a vice principal, a parent and a student.

Of significance to this matter, in Re Tenure Hearing of Cowan, 224 N.J. Super. (App. Div. 1988) the Court stated that

> There need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as 'the combined probative force of relevant hearsay and the relevant competent evidence' sustains the Commissioner's ultimate finding of unbecoming conduct.

Similarly, while this Arbitrator will rely mostly on the direct testimony of the witnesses who were also subjected to cross-examination, the totality of the evidence presented will be taken into consideration in making this determination.

One last point before the Charges are discussed. This Arbitrator cannot agree with Respondent that the District attempted to re-impose discipline for actions for which Respondent had already received discipline. As stated by Respondent, "prior disciplinary

action can serve as a basis for an increased penalty," which is exactly what happened in this matter. The District invested time and extreme effort to counsel Respondent, to support him, to offer any assistance to make him a better teacher and to discipline him but his poor and inappropriate behavior continued even when he was transferred to a new school. After awhile, an employer has the right to say, enough is enough.

As to the Charges, this Arbitrator will not recount every detail of every incident involving students/parents/administrators/teachers and Respondent but will group similar types of behavior or lack thereof in an examination of the appropriateness and sustainability of the Charges. Additionally, this Arbitrator will first address the witnesses who actually testified at the hearing and then will tie in the statements made outside the hearing.

INTERACTING WITH STUDENTS

One student, K.G., testified at the hearing.[3] He recounted two incidents with Respondent. In one incident K.G. tried to get Respondent's attention while the desks were arranged is a circle before homeroom. He raised his hand and called Respondent's name numerous times as Respondent was standing with his back to the class. When Respondent would not respond, K.G. walked up to Respondent and tapped him on the shoulder. According to K.G., Respondent said, "Don't touch me" and gave K.G. ten demerits for "assault." In reviewing the situation, while the Principal agreed that a student should not touch a teacher, she reduced the discipline to one demerit.

[3] Each student mentioned at the hearing will be referred to only by initials.

The second incident occurred when K.G. was at his locker, was asked multiple times to return to his seat but when he attempted to return, K.G. testified that Respondent blocked his way and kept saying, "get to your seat." K.G. very clearly testified that while most times the desks are in a circle, this day they were in rows. K.G. demonstrated how he attempted to get to his seat and whichever way he moved, Respondent blocked him and then the right side of Respondent's body bumped into K.G.[4] At that point, K.G. grabbed his hand and pushed Respondent out of the way and got to his desk.

In contrast, Respondent stated that the desks were in a circle and demonstrated that the desk was between KG. and himself so that he was not blocking K.G.[5] However, this Arbitrator was not convinced. K.G. was very clear to distinguish the arrangement of the chairs from the first incident. He stated that during this incident the desks were arranged in rows and that Respondent was blocking his way. He admitted that he did not follow the directive immediately when he was at his locker but once he approached the seat, he was blocked. K.G. further admitted that when he was continually blocked, he pushed Respondent out of his way so that he could ultimately get to his seat. K.G. was a credible witness. He admitted his errors but was clear on the facts of the incident. Principal of Alexander Hamilton Academy, Virginia Galizia, acknowledged that K.G. had behavioral problems because of his disability but that Respondent's interaction with K.G. escalated rather than deescalated the behaviors and that once Respondent

[4] Vice Principal Cisneros and A.G. testified about similar behavior, which will be addressed later in the Opinion. However, Principal Galizia acknowledged that K.G. did not initially mention that Respondent bumped into him.

[5] Respondent claimed at the hearing, but not before, that he was hit by a crayon.

was removed from the school, while strategies had to be in place, K.G.'s behavior was controllable.

While A.G. did not testify, his mother Silka Cruz, a very involved and concerned parent, credibly recounted several incidents with Respondent: the use of a tape recorder, a flash drive, a backpack and homework. In all incidents, a common thread was recognized. Respondent did not want to comply with a student's needs or a parent's request even when directed to by the child study team and the principal. Further, Respondent denied that he wrote on the smart board "The boy asks for his flash drive a thousand times" and "The boy forgets his backpack." However, this Arbitrator was not convinced. The record was replete with incidents when Respondent embarrassed students in front of the class. Finally, an incident took place on the stairs when A.G. believed that Respondent pushed him from behind. Respondent denied the incident and asserted that he was in the front on the stairwell and that another student pushed A.G. into him as Respondent was going up the stairs. This Arbitrator could not conclude with any assurance regarding this last incident but an overall assessment was that Respondent was not a credible witness and, as demonstrated later in this Award, this action of bumping/pushing was part of Respondent's inappropriate behavior.

It was very clear to this Arbitrator that Respondent was not able to control his class. He claimed a student threw a crayon at him, another student threw a paper ball at him, another threw gum at him and that one student even stomped on his feet and spat on him.[6] This Arbitrator is not disputing that some of his students were disciplinary

[6] E.R.'s parent complained about Respondent's behavior, D-33. While Respondent rebutted the parent's contention, the complaint is the same pattern of embarrassing a student in front of the class, yelling at a

problems by virtue of the fact that Respondent was an In-School Suspension (ISS) teacher for part of his tenure. However, a teacher has a responsibility to control his class so that things do not get out of control. One way Respondent testified he controlled the class was by throwing a chair to the ground to distract them.[7] In the opinion of this Arbitrator, this was a totally unacceptable response from any teacher let alone a seasoned teacher and clearly conduct unbecoming a teacher.

Even if Respondent asserted that the kids were extremely disruptive and that there were no kids in the area when he threw the chair, this is clearly not the way to get attention. Further, it was curious that Respondent claimed that he could not discipline the students in his ISS class because by virtue of the fact that they were in this class, they had already been disciplined. However, this Arbitrator could not agree. A teacher has the right to properly discipline for actions in his class even if they had been disciplined before.

Regarding K.S., her mother asked Respondent for an accommodation for her child who had a broken foot. Galizia's unrefuted testimony was that Respondent denied the accommodation; that he gave her all kinds of reasons that it was not feasible and that it was not until she told him that this was a directive that he complied. At first

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student, using improper language and exhibiting anger. Students, of course, should not be permitted to act disrespectfully toward a teacher, but these are additional examples of Respondent's inability to control his class. Further, Principal Rodriguez's testimony that Respondent did not submit a write-up regarding Respondent's claim that E.R. stomped on his feet and spat at him was unrefuted. Certainly, Respondent would have been within his rights to have disciplined E.R. for this behavior, if it occurred. Further, Respondent admitted that when he wrote his rebuttal to D-33, he did not mention his assertion that E.R. spat at him or stomped on his foot but he did admit that these actions would constitute an assault, would be a serious matter and that he would have written that down. Respondent made no note of this alleged incident.

[7] See D-40 for Principal Rodriguez's memo he gave to Respondent on December 2, 2009 regarding this incident.

Respondent testified that he "did not refuse to accommodate the student" and then he stated that he did not remember refusing to accommodate K.S. This Arbitrator was convinced that Respondent did not accommodate K.S. until he was ultimately directed to so do. His behavior was inappropriate.

The next student is L.M., a student with diabetes. L.M. needed his snack and needed to finish his lunch but with each incident the record established that Respondent lacked sensitivity toward this child and that he scolded L.M. on both occasions. On direct examination on the fourth day of this hearing, Respondent testified that he did not remember either incident, did not remember scolding L.M. and, therefore, could not rebut this accusation.

However, on cross-examination two weeks later, Respondent denied scolding L.M. or yelling at him but acknowledged that he spoke to L.M. about not finishing his lunch in front of all the students. Respondent admitted that he did not take L.M. aside and talk to him but spoke to him about getting in line in front of the group of students. Once again, Respondent's response to a situation was unacceptable and not in keeping even with his own contention that he was sensitive to student's needs. Finally and of significance, Respondent did not rebut the following testimony by Galizia. When L.M. had not finished with his lunch, Respondent left the cafeteria with the students. L.M. did not go with them but rather went to the nurse's office.[8] This was despite Respondent's testimony that he knew it was his responsible to bring all the students to the cafeteria and back to the classroom after lunch.

Further, the record established that in June 2009 Respondent was sitting at his desk when students in his class were on an inappropriate sexually oriented web site. He testified that a student told him it was happening and that he told the kids to get off the computer. However, Respondent's own account of this incident, R-10, contradicted this testimony. R-10 stated that "Mrs. Yasin came into the classroom stating that she has to check the computers because her students informed her that some children were on the computer without permission. . . she found some obscene pictures." On cross-examination, when it was brought to his attention that he gave conflicting statements, Respondent stated that both a student and Mrs. Yasin told him. He further admitted that it is his responsibility to know whether students were misusing the computers.

On June 12, 2009, Principal Steven Rodriguez handed Respondent a memo, D-36, recounting Respondent's statement that he "saw nothing" and was not aware that the students were crowding around the computer and viewing sexually related sites. For Respondent to be sitting at his desk, not supervising his students was totally inappropriate behavior for any teacher but especially for a longtime teacher like Respondent. Once again this incident supported the District's position that Respondent did not have control of his class and that his credibility was questionable.

SCHOOL #24

Respondent, a teacher in this District since 2000, was a teacher in school #24 during the 2008-2009, 2009-2010 and 2010-2011 school years when the principal was Steven Rodriguez and the vice principal was Jill Cisneros. Respondent started in the fall

[8] According to the nurse's statement, though she did not testify, it corroborated Galizia's testimony that when she spoke to L.M. he was a mess; that it was traumatic for L.M. and that after this incident and he

of 2008 as a 2nd grade literacy teacher and was transferred mid-year, November or December, as a 5th grade literacy teacher. He continued as a 5th grade literacy teacher in the fall of 2009 and was transferred to ISS. Finally in the 2010 school year, he was teaching 6th grade literacy. The record established that Rodriquez and Cisneros often worked as a team when presenting Respondent with memos regarding his behavior, teaching skills and guidance on how he could improve his performance.

It was undisputed that in addition to the regular in-service training offered to all teachers, the District suggested to Respondent that there were resources available to him to improve his teaching skills and interpersonal relationships. In particular, Cisneros testified that she spoke to Respondent regarding complaints she had received from parents about the way Respondent spoke to the students and handed him D-50, dated February 12, 2009. She counseled him regarding how he spoke to students and suggested that if he needed help he could see Mrs. Berzak, the guidance counselor, or Mrs. Johnson or Mrs. Bussy, social workers. When another parent complained to Cisneros, she again counseled him on February 16, 2009, D-51, about how he talked to students and how he disciplined them. For example, D-51 indicated that Respondent yelled at students and raised his hand in a motion as if he was going to hit the student.[9] However, the unrefuted testimony was that Respondent did not seek advice from these professionals.

The swearing and inappropriate language continued. According to D-55, Cisneros heard commotion from Respondent's class on March 19, 2009 and when she went to

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could not even go back to Respondent's class.

[9] Yelling at students was a recurring complaint from parents and students.

the class, the "students began screaming" that Respondent had said to a student, "with your bad ass." The next day, according to Cisneros's memo, D-54, E.R.'s parent complained that Respondent was "always swearing" at the students. Rodriguez advised Respondent on March 20, 2009 through D-33 that this parent expressed extreme concern regarding Respondent yelling, using improper language, exhibiting anger and threatening students. Further, on March 23, 2009, Cisneros handed Respondent a memo, D-55, regarding his comment ("your bad ass") and what she had observed on March 19, 2009. This action of yelling at students is a recurrent theme as evidenced by Respondent's interaction with L.M.

In addition to working with Respondent on interpersonal skills, Cisneros testified that she arranged for teachers to help Respondent improve his teaching skills; that Ms. Krill, a literacy coach, was in Respondent's class as early as October or November 2008 modeling lessons for Respondent and that Cisneros, herself a former literacy coach, worked with Respondent on keeping students engaged and on classroom management issues.

Observations and evaluations were conducted regularly on all teachers and specifically on Respondent in March of 2009. This Arbitrator can agree with Respondent that during those few weeks he was not given an opportunity to improve his teaching skills. However, it must be noted that Respondent was a longtime teacher and that nine years after he started teaching in the District, he should have known how to teach a lesson and handle a class.

On March 12, 2009, Rodriguez conducted an observation on Respondent, D-23, which stated that

> Mr. Carter has yet to demonstrate or establish a classroom routine, which is effective to meet the many needs of his students.

and

> Mr. Carter teaching teachniques (sic), are lacking greatly in the areas of pacing and proper lesson planning. Student (sic) have too much down-time causing bordum (sic) and leading to disciplne (sic) problems.

and finally

> Mr. Carter despite being a seasoned teacher finds the most minial (sic) task over whelming (sic) and claims to have no experience in the area. This administration will continue to offer Mr. Carter guidance and assistance, but without the full cooperation on his part, nothing can be accomplished. At this point this administration is making a recommendation to the Department of Personnel, for the continued withholding of increment.

Cisneros testified that on March 18, 2011 she conducted a scheduled observation, D-42, which means that Respondent knew she was coming to the class and that he picked the day and the time for the observation. However, despite this forewarning, Cisneros indicated on the observation form that the room was a disaster, word wall not up to date, not inviting, students don't have notebooks, period began and students still not in the room, too much wasted time and no variety of activities at all. Cisneros testified that Respondent's pacing was still off and that despite the fact that teachers were working with him, there wasn't any improvement and there was no classroom management. While Respondent indicated when he signed the observation that a rebuttal would follow, none did.

On March 26, 2009, Respondent signed receipt of his evaluation completed by Rodriguez on March 20, 2009, which included comments like, "unable to demonstrate

the skills needed," "great difficulty with pacing," "unable to demonstrate organization or manegerial (sic) skill," and "unable to take full advantage of all the resources and personel (sic) . . . for assistance to achieve success." Although Respondent indicated on the evaluation that he disagreed with it and that a rebuttal would follow, the District did not receive a rebuttal. There was another evaluation on March 26, 2009, D-25, with similar comments.

Based on Respondent's poor level of performance, a Corrective Action Plan (CAP) was implemented and a meeting was held with Respondent, a Union representative, Rodriguez and Cisneros on March 25, 2009, D-35. The CAP included following discipline procedures; keeping detailed record of discipline; keeping log of parent calls/contacts; following pacing chart and 6-day schedule; attending all conferences and adhering to any further directives.

Further, on April 8, 2009, Cisneros conducted an unannounced observation, D-48, and gave Respondent an unacceptable rating. Students were still sitting doing nothing at 8:50 A.M. though the class period started at 8:20 A.M. Further, while Cisneros wanted to observe a literacy lesson, Respondent was talking to the students about class rules and this was in April when the rules should have been known to everyone. Cisneros conducted another drop-in observation on April 23, 2009 when she observed that the pacing was much better, the students were more involved, when Respondent was actually doing a lesson and was not reviewing rules or wasting time. However, she also noted that this was the same lesson he had given before and if a

teacher is teaching the same lesson a second time, it would be reasonable for it to be better.

On April 11, 2011, Cisneros conducted an observation. Her comments included: Room is a disaster, students sitting with no books, kids chewing gum, hoodies/jackets on, which is not allowed, and students sleeping. This Arbitrator must conclude that despite the assistance given to Respondent, he did not improve his teaching or his classroom management skills.

Following directives is a key requirement for teachers. In the instant matter, it was undisputed that the District requires substitute plans, which is information that should be in the main office for when a teacher is absent to keep the students engaged. All teachers are asked to submit such plans and teachers are contacted if the plans are not submitted. D-53, a Faculty/staff non-compliance note, was issued to Respondent because his "emergency plans not in the office and updated after absence." Cisneros stated that she gave this note to Respondent personally and signed the document on March 13, 2009. Respondent's response was that he had trouble writing the sub plans, which was surprising to Cisneros because Respondent had been in the District for many years. While Respondent did submit some sort of substitute plans during the 2008-2009 school year, Cisneros testified that they were certainly not sub plans but were merely handwritten notes introducing himself to the students, notes for himself for the first few days of school. Cisneros offered to help him with this task but he did not seek her help.

Another example of not following directives involved the required logs for ISS students. The record established that when Respondent was assigned to ISS, Rodriguez and Cisneros met with Respondent to explain his role and responsibilities. He needed to keep clear and precise records of all disciplinary procedures; to contact parents to tell them that their child was in ISS; to contact the classroom teachers to secure work for the student and he was supposed to assist students with their assignments. Further, Respondent was to keep phone logs of parent and teacher contacts. Cisneros corroborated that Rodriguez and she met with Respondent and told him that they wanted him to maintain logs to see if there were any patterns of students being assigned to ISS and what they were doing. However, when Respondent was asked to produce them, he did not. D-27, memo to Respondent dated December 11, 2009, indicated that the fact that he was unable to produce the logs when requested was a "blatant disregard of procedure" and was seen as insubordination.

An incident occurred between Respondent and L.R. in January 2010. According to Respondent, there was a fight in his ISS class and he admitted that he grabbed L.R. by the sweatshirt/arm to break up the fight. However, Rodriguez testified that he spoke to the student right after the event; that the student told him that Respondent grabbed him by the shirt and pulled him off his chair and that Rodriguez saw burn marks on the student's neck and arm corresponding to the location of the garment. Further, Rodriguez's unrefuted testimony was that he spoke to Respondent immediately after the incident and Respondent did not respond to the allegations. L.R.'s parent filed a

police report and Respondent was removed from the building because he was charged with simple assault.

The fact that the charge was determined to be unfounded by DYFS did not convince this Arbitrator that Respondent did not display inappropriate behavior. The student did not testify and it was Rodriguez's testimony verses Respondent's. Of interest was that Respondent was counseled on classroom management and whether it was a fight or whether Respondent pulled L.R. out of his chair the incident demonstrated that he did not have control over his students. It was undisputed that Respondent did not return to school #24 after the incident until the next school year.

Respondent reported to school #24 again in September 2010 and the record established that during an auditorium on September 1, 2010, Respondent called out that he could not hear the principal, which Respondent did not deny. Respondent claimed that Rodriguez was not using a microphone but Rodriguez clearly testified that not only was he using a microphone but also that it was working and that no one else complained about not hearing him. When one is in a meeting with 60 people, it would have been reasonable for Respondent to have raised his hand if he could not hear the principal. Rodriguez gave Respondent D-28 indicating that Respondent's behavior was insubordinate. Respondent signed for the document, wrote that a rebuttal will follow but no rebuttal was received. While this alone would certainly not have been a terminable offense, it is evaluated together with all the other Charges and shows disrespect for Rodriguez.

Another incident took place at the beginning of the 2010-11 school year. Rodriguez reasonably testified that he expected all teachers to make their rooms inviting for students or student-friendly and teachers were given time to complete this task. The record established that Rodriguez spoke to Respondent on September 2, 2010 regarding his room but that by the end of the day there was nothing up in Respondent's room. Teachers were given an additional two days, September 6 and 7 but by September 8 when Rodriguez checked Respondent's room, the room was completely barren, nothing up. Rodriguez issued a memo, D-29, which indicated that Respondent was being insubordinate, and advised Respondent that he was continuing last years' unprofessional behavior.

Respondent's response to this incident at the hearing was that he wanted the students to be involved in the decorating. However, there was no evidence that Respondent relayed this response to Rodriguez at the time and, in the opinion of this Arbitrator, was not a reasonable response. Of interest was that Respondent did not deny that Rodriguez directed him to "decorate" his room for the students. He simply had his own reason for not complying. If a teacher is directed to complete a reasonable task, it is the teacher's responsibility to fulfill that directive in a timely manner. While Respondent might have wanted to have student involvement, that did not preclude him from starting the process, making the room inviting when the students arrived and then having them add to the displays.

Respondent acknowledged that he had a horrible relationship with Rodriguez and while Respondent claimed that Rodriguez was out to get him, it was clear that

Rodriguez was not the only administrator who had difficulties and problems with Respondent, his attitude and his work performance. Respondent testified that he did not have a problem with Cisneros and there was no testimony that Galizia was out to get him. In fact, the record established that Galizia made every effort to welcome Respondent to the new school in the 2011-2012 school year and gave him support and guidance with his teaching and interpersonal skills. However, Galizia had the same frustrations dealing with Respondent. For example, Back to School Night.

It was undisputed that a number of parents registered complaints to the school where Respondent taught regarding his behavior. One such incident occurred on Back to School Night in September 2011. No parents testified regarding the events of this evening. However, Galizia's testimony was clear and confirmed some of the same attitudes displayed by Respondent through other interactions with students and staff.

Galizia testified that at Back to School Night teachers are expected to provide parents with a flyer or pamphlet outlining the grading and homework policy and the topics to be studied during the school year. Parents contacted Galizia asking about the grading packets, which they did not receive, and complaining that Respondent was aggressive, evasive and defensive and inappropriate when he referred to a student as "the dark one" with gestures as to his girth. When Galizia met with Respondent to find out his side of the story, he denied all the charges and stated that there were no altercations. Additionally, Respondent denied having received the memorandum indicating that he was responsible for handing out a pamphlet outlining the requirements of the class. Galizia stated that all teachers signed for receipt of the folder

with the information at the beginning of the school year but that it was Respondent's claim that the particular piece of paper telling teachers to prepare a pamphlet for parents was not in his folder.

Further, during the meeting on September 21, 2011 to discuss the events of Back to School Night, Galizia, as reflected in D-16, spoke to Respondent about building positive relationships with parents; that he must avoid using harsh language with parents and students and being careful not use unkind words when disciplining students. In addition, she discussed with him the fact that he failed to give parents the brochure on grade level expectations and grading procedures. Of interest was that during that meeting, Respondent's excuse was that the "classroom printer was not working" and that he was not able to comply with the directive.[10] However, on direct examination during the arbitration, Respondent presented R-5 and R-6 as examples of what he prepared and distributed to parents on Back to School Night in September of 2011. These documents were exactly what was expected of Respondent but this Arbitrator was not convinced that he handed them out at Back to School Night.[11] If he had, there would have been no reason for parents to have complained to the principal about not receiving the information and no reason for his explanation about the printer not working.

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[10] Galizia's unrefuted testimony was that she gave Respondent the five pages contained in D-16; that, as in the past, Respondent signed for the documents; that he wrote that a rebuttal will follow but that he never submitted a rebuttal.

[11] The District correctly pointed out that the information on R-5, Grade Level Expectations, did not match the proper grade levels on R-6. However, the more important issue was that this Arbitrator was convinced that these documents were not even distributed at Back to School Night.

During the September 21st meeting Galizia also gave Respondent guidance as to preparing lesson plans, classroom management and, similar to efforts made at school #24, she offered assistance from teachers and a Union rep to act as peer mentors.[12] The fourth page of D-16 outlined the expectations regarding lesson plans and the fact that his lesson plans were not acceptable. However, despite these clear directives, expectations and assistance, Galizia issued a Written Warning, D-17, to Respondent on October 3, 2011 for failure to do lesson plans. D-17 clearly stated that "failure to complete your lesson plans on the day they are due will result in disciplinary action." According to Galizia, at first Respondent submitted one lesson plan on a general topic, which did not meet the standards, but after that she did not receive any lesson plans and that after the written warning and before October 20, 2011, Galizia counseled Respondent regarding lesson plans.

Finally, after incidents in September through mid-October 2011, as stated above, and after Galizia received complaints from parents, Galizia determined that it was actually Respondent who was confrontational and antagonistic toward students. Further, he was unable to maintain classroom management, unable to do lesson plans and there was no instruction in the classroom. The last incident when Respondent accused K.G. of calling him "your fat self," D-20, led Galizia to speak to her immediate administrator and it was decided to ask Respondent to leave Alexander Hamilton Academy.

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[12] The record established that Ms. Abbood, a Union Representative, was assigned to help Respondent and that after awhile, she told Galizia that could no longer help him because he was not listening to her. Other mentors complained that he was not complying or even trying to work with them.

Cisneros testified about an incident when she was trying to exit the auditorium. She was seven months pregnant and Respondent was standing at one of the doors. Cisneros described how he bumped her with his shoulder as she tried to get past him and get out the door. In fact, she testified that as this happened she said to herself, this is what the kids were describing, Respondent blocking and then bumping. Of interest is how it relates to Respondent's behavior in other instances. A similar incident happened with K.G. According to K.G., Respondent blocked him and then the right side of Respondent's body bumped into K.G. While K.G. did not mention this when he first reported the incident, the similarity of Respondent's behavior led this Arbitrator to conclude that Respondent bumped into K.G. The final similar incident occurred on the stairs with A.G., when A.G.'s mother testified that Respondent bumped into A.G. In each instance, Respondent claimed that the other person bumped into him. This pattern of behavior cannot be ignored as coincidental or fabricated.

It is undisputed that a teacher is to be given all benefits negotiated by the parties. The issue with this incident was the unprofessional way Respondent spoke to Cisneros in early October 2009. According to Cisneros, Respondent was yelling at her in a loud voice,[13] was very close to her in her personal space and that she wrote him up, D-59. Respondent denied being angry at that meeting and merely wanted his prep period. However, this Arbitrator was not convinced.

Finally, Respondent called and left a message that he was taking a bereavement day for Whitney Huston's passing. The Agreement allows employees to take a

[13] Yelling at administration, yelling at students, yelling at parents – it was a constant, unacceptable theme and evidence of consistent unprofessional conduct unbecoming a teacher.

bereavement day for relatives but the District was skeptical that Respondent was related to the singer. Executive Director of School Security James Smith spoke to Respondent and he acknowledged that he was not a relative but "a fan." According to Smith, Respondent then asked to take the day as a personal day but Smith testified that Respondent could not take a personal day for something that happened a week before.

When evaluating all the evidence and the documents entered into the record, whether it was from a witness who actually testified or whether it was from documents and testimony given by the witnesses of events involving other people who did not testify, it must be concluded that the testimony from District witnesses was so compelling and consistent as to believe that the other incidents, which were of a similar nature, occurred also.[14] Respondent's disruptive, unprofessional and inappropriate behavior unbecoming a teacher was consistent.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator must decide that the District met its burden and proved that the Charges were sufficient to warrant termination.

In consonance with the proof and upon the foregoing, the undersigned Arbitrator

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[14]Charges 11, 12 and 18 involved Respondent's volatile behavior toward students and a fellow teacher but despite the fact that the teacher and the students did not testify, Respondent's aggressive, unprofessional and inappropriate behavior was reaffirmed. As for Charge 18, Respondent did not deny that K.P. apologized. The memo, D-31, was issued because of Respondent's inappropriate reaction and yelling at a student.

hereby finds, decides, determines and renders the following:

A W A R D

1. All Charges were proven by the District.[15]

2. The Tenure Charges are sustained and Respondent shall be dismissed as a tenured teaching staff member.

Mattye M. Gandel

Mattye M. Gandel

Dated: June 19, 2013

State of New Jersey)
:SS
County of Essex)

On the 19th day of June 2013 before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Manuela Barros

Notary Public

MANUELA BARROS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 27, 2018

[15] The District withdrew Charge 15.