#192-13

In the Matter of the Tenure Hearing of Mr. Nelson E. Evans, Jr.

Agency Docket Number 6-1/13

Appearances:

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Date of Arbitrator's Decision, Award, and Order: May 24, 2013

Introduction and Background

Mr. Nelson E. Evans, Jr. (Respondent) was charged on or about December 7, 2012 with Incompetence, Insubordination and/or Conduct Unbecoming a Teacher. On January 9, 2013, the certified tenure charges were forwarded to the Commissioner of Education for the State of New Jersey. On February 14. 2013, the Commissioner's Office referred the matter to me.

The Gloucester Township Board of Education (Petitioner) seeks Respondent's dismissal via these proceedings pursuant to law. There had been prior disciplinary initiatives dating back to June, 2010 against Respondent, morphing in part into this proceeding.

Respondent has significant service of more than a decade with Petitioner. Respondent is a special education teacher of primary grade children with special needs, ranging from unpredictable violent outbursts to Asberger's Syndrome. Some of these students are highly intelligent (a la Steve Jobs, Bill Gates, Tom Cruise, Stanley Kubrick, et. al).

Principal Angela Rose-Bounds has served as Principal at the James W. Lilley Elementary School since September 1, 1996. She became Respondent's supervisor when he transferred to the Lilley School from the Glenn Landing Middle School.

After I accepted appointment as the Arbitrator in this matter, I was informed by counsel for Petitioner on March 22, 2013 that he had not yet fully recovered from a medical procedure and "was not yet 100%." He insisted that the hearing move forward, but with a modest extension of time. On March 23, 2013, I requested until June 1, 2013 to complete this matter and was informed that the June 1 2013 proposed extension was "no[t a]problem." (See April 25-27, 2013 Gregory/Duncan emails)

Hearings were convened on March 22 and on May 7 and 8, 2013 in a conference room within Petitioner's central administrative office building. The hearings were not transcribed. Petitioner called several witnesses. Each was sworn, testified under oath, and was cross-examined. In addition, Petitioner presented over 100 various and extensive exhibits.

Respondent was present with counsel throughout the hearings. At the close of Petitioner's case in chief, Respondent rested and brought an oral Motion to Dismiss. The Motion was heard and replied to by Respondent. I deferred judgment until I would have the opportunity to carefully study the parties' forthcoming papers on the Motion.

At the close of the arbitration's third day on May 8, 2013, the parties set a briefing schedule; I completed receipt of the parties' post hearing briefs on May 21, 2013.

I have carefully read and studied the thousands of pages of documentary submissions that constitute the record, and the parties' post hearing papers and the authorities cited therein. The parties were superbly represented by outstanding counsel.

Findings of Fact, Analysis, and Discussion

I fully subscribe to the statutory Axiom that "The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met."

As an initial important procedural matter, I find that Respondent's Motion to Dismiss, perhaps while somewhat unconventional and conceptually intriguing in such proceedings, does not carry the day. Via voluminous exhibits and extensive testimony by several forthright and largely credible sworn witnesses, Petitioner articulated and plausibly elucidated a theory of the case more than sufficient to stymie Respondent's Motion to Dismiss.

I also find nothing in the relevant law was violated by Respondent's decision not to engage in bilateral discovery in this case. Respondent relied completely on Petitioner as the custodian of the record. Respondent's case was entirely derivative via cross examination, but requiring no documents beyond the purview of Petitioner's archives.

There is an especially unwieldy mélange of gravely serious incidents and nearly insouciant utterly de minimus inconsequentialities oddly interwoven throughout the case, as Respondent aptly observes and summarizes (Respondent's post hearing brief at pages 1-2)

I find that Petitioner failed to meet its burden of proving that Respondent was Insubordinate. Insubordination is the deliberate and willful disobedience by the subordinate of an express, direct, and lawful order issued by the superior. Imperfect, incomplete, or even careless, minimal, and thoroughly mediocre unsatisfactory effectuation does not, ipso facto, sink to the depths of Insubordination.

One of the most serious disturbing incidents involves Respondent facilitating student cheating on a standardized test. The New Jersey Department of Education, Office of Fiscal Accountability and Compliance determined that Respondent violated ASK TEST protocol.

Teacher facilitated cheating in any significant aspect of academic or co-curricular life is the most cynical and reprehensible depravity. It robs the environment of integrity

and corrosively undermines truth and learning. The damage is incalculable to students witnessing such conduct unbecoming a teacher. Thomas Aquinas posited three quarters of a millennium ago that premeditated murder and theft were perhaps the only two crimes that, prima facie, merited capital punishment.

The credible evidence is that Respondent apparently indirectly facilitated student cheating by a protocol breach, and not by flagrant, direct malfeasance. Petitioner, incredibly, subsequently assigned Respondent to monitor ASK test takers in subsequent years. This astonishing act by Petitioner substantially vitiates, and simultaneously exacerbates, the singular fact that, for whatever reasons, Petitioner did not take seriously teacher facilitated student cheating. This incident occurred more than three years ago, with no recurrent similar problematic behavior. Given the nature of the protocol breach and Petitioner's return of Respondent to test monitoring, this episode is more properly characterized as Respondent's incompetence rather than conduct unbecoming.

I found all of Petitioner's witnesses forthright, candid, and credible. Principal Angela Rose-Bounds is Petitioner's primary witness. She has been Principal for the better part of two decades. Her zealous dedication to providing the best possible education to every student in her care is obvious. She wanted to move forward on charges against Respondent years ago, when some superiors did not share her intrepid resolve.

Unfortunately for Petitioner, however, the highly idiosyncratic interpretive gloss that Principal Angela Rose-Bounds places upon the annual performance review is prima facie arbitrary and capricious. To her great credit, she very candidly testified that she regards a single Unsatisfactory in more than one of the 26 categories on the annual performance review as rendering the teacher's entire annual review rating as Unsatisfactory. She testified that Respondent has been the only one of approximately fifty five employees to receive an Unsatisfactory in more than one of 26 categories on his annual performance review, and thus consequently mandating a deserved Unsatisfactory rating for the entire year. Petitioner offered no policy and practice interpretive memoranda to corroborate the Principal's view that, effectively, there are only two outcomes on the annual review: a Satisfactory, de facto perfect score; or, an Unsatisfactory based on more than one Unsatisfactory subcategory and even though the teacher reviewed had received Satisfactory on 24 of 26 subcategories (there being no category higher than a Satisfactory.)

Respondent's counsel very effectively pressed this point on cross examination, and the Principal concurred in so far as she recognized that Satisfactory is the highest possible ranking one can achieve on the annual review. There is no grade of Satisfactory Plus, let alone a grade of Perfect. The Principal, however, unequivocally testified that more than one subcategory ranked as Unsatisfactory would result in an Unsatisfactory annual review.

It is a foundational Axiom of contract law and of arbitration law that each word in a document is to be given its plain meaning. There is nothing on the face of the annual

review that supports the Principal's radically transmogrifying interpretation that more than one Unsatisfactory reduces the annual review to Unsatisfactory per se (rather than to a 92% overall Satisfactory grade.) If Satisfactory can be achieved only by perfection, the entire dynamic of the annual review is rendered both a counterfactual and counterintuitive nullity.

As the late United States Senator Daniel Patrick Moynihan was fond of reminding everyone: While each person is entitled to their own opinion, we are not entitled to our own facts. The plain meaning on the face of the annual reviews administered to Respondent by Plaintiff is that all of his annual reviews of record are supermajority Satisfactory by a considerable margin. That is how I shall regard them in this matter. The Principal's radical, counterfactual transmogrification that Satisfactory does not really mean Satisfactory is wholly contrary to established law and completely absent from the plain face of the annual review document.

Completely separate and apart from the meaning of the annual performance review, I find that Petitioner has met its burden of proving the charge of Incompetence. There is compelling , comprehensive, and credible documentary evidence that Respondent is chronically late, careless, and incomplete in preparing his lesson plan. A professional and timely lesson plan does not guarantee success in teaching. Without a good lesson plan, however, ultimate success is compromised from the inception and rendered virtually impossible to achieve and maintain. Likewise, the credible evidence is that Respondent consistently failed to timely read the IEPs of his students. His misspellings of the words Maryland and Virginia are, in the larger relevant context of discussing colonial history with his students, symptomatic of embedded carelessness metastasizing into incompetence. These are not trivial and infrequent spelling errors, but, instead, I find, painfully indicative of a larger framework of insufficient care and diligence in his work.

Having found sufficient evidence to sustain the charge of Incompetence, I also find, however, several significant mitigating factors militating against termination from employment. To their credit, Petitioner's counsel cite significant authority recognizing the Arbitrator's authority and responsibility to consider mitigating factors making the ultimate penalty proportionate to basic norms of fundamental fairness and due process. (Petitioner's Post Hearing Brief at pages 7-10.)

Respondent is widely recognized as an excellent disciplinarian. His case presents the exquisitely ironic paradox of the "undisciplined" disciplinarian.

Even Principal Rose-Bounds acknowledged in her testimony that Respondent had significantly improved from a "flat F to a cumulative B," although, she noted, there had been recent deterioration once again by Respondent.

Although Respondent was criticized by observers for purportedly incorrectly defining the meaning of "faithful," while in conversation with an obviously precocious, highly intelligent 11 year old 4th grade student, Petitioner's agents perhaps fail to fully

appreciate Respondent's pedagogical gifts so palpable in his conversation with the student. While the "definition" of faithfulness offered to the student by Respondent may not have been technically correct according to Webster's dictionary, the incorporation of "love" into the conversation reflects a sophisticated intuitive awareness of two of the three theological, penultimate virtues---a profound teachable moment for both teacher and student.

In the voluminous evidence of record, there are several documented examples of Respondent's virtual obliviousness to his chronically late and incomplete lesson plans. On other occasions, he responsibly acknowledges the problem, but, for whatever reasons, fails to rectify the recurring problem.

Respondent's Principal recognizes that Respondent has the capacity to improve dramatically---from, recently, an F to an overall B. If they can work together, Respondent must creatively reprioritize meticulous, thorough, and timely lesson plans as the bedrock precondition to teaching success. The Principal and her colleagues can certainly contribute positively to this process, but the ultimate responsibility is the Respondent's. He would not take chronically late, sloppy, and incomplete work from his students. He must now apply the same discipline to himself.

Decision, Award, and Order

The Respondent's Motion to Dismiss is denied. I find that Petitioner put forward a more than sufficient quantum of credible evidence compelling denial of Respondent's Motion to Dismiss.

I find that Petitioner failed to meet its burden of proving the Charges of Insubordination and of Conduct Unbecoming. Those Charges are dismissed.

I find that Petitioner met its burden of proving the Charge of Incompetence.

Respondent is hereby formally reprimanded for, and further suspended without pay from the date of this Decision through the last day of this 2012--2013 school year for, proven Incompetence.

Respondent shall be returned to work effective with the first day of the 2013—2014 academic year.

So Ordered,

David L. Gregory
Arbitrator

I, David L. Gregory, affirm that I have executed this document as my Decision, Award, and Order in this matter on this day and date of Friday, May 24, 2013.

David L. Gregory

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