

Introduction

This matter arises from tenure charges against Emil Nell, (Respondent) filed August 28, 2013 by the School District of The City of Beverley, Burlington County (the District) and a September 23, 2013 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to N.J.S.A. 18A:6-16 as amended by *P.L. 2112, c. 26*.

The hearing in this matter was conducted on October 9 and 22, 2013 in Beverley, New Jersey. All present were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Emil Nell was present for the entire two days of hearing and testified on his own behalf. A transcript of the hearing was taken. At the close of the hearing on October 22, 2013 the parties elected to submit written post-hearing briefs, upon the receipt of which by the undersigned the dispute was deemed submitted at the close of business November 8, 2013.

This Award is made following my careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses

Issues

Based upon the record as a whole, the issues presented may accurately be described as:

Has the District met its burden of establishing the truth of its tenure charges against Respondent and, if so, is the appropriate remedy for such dismissal?

The Tenure Charges

The tenure charges filed by the District allege fourteen charges of Incompetency/Inefficiency in Classroom Management & Insubordination, Conduct Unbecoming a Teaching Staff Member and Incompetency in Lesson Plan Development.

Facts

Respondent

Respondent began teaching music in the District in or about 2003, and initially taught on a full-time basis for three to four years. Thereafter, due to District budget cuts in art and music, he taught for the District on a part-time, three day a week, basis. As a music teacher Respondent would travel from classroom to classroom to conduct his instruction periods, and transported his materials and equipment on a pushcart.

Respondent has a dual Bachelors degree in music and English, a Law Degree and a Masters degree in School Administration. He has been certified to teach in music, English and elementary education, and has passed exams in principal and school administration. Prior to the 2011-2012 school year, Respondent received positive recommendations from the District's two previous superintendents.

January 2011 through June 2012

The District is a K through 8 district operating in a single building. Superintendent Elizabeth Giacobbe came to the District in January 2011 and was tasked by the School Board to "turn around" the school. Giacobbe testified that she began her efforts by conducting both formal and informal observations of each teacher in the

District. As part of that process, Giacobbe conducted an Observation of Respondent on February 25, 2011. When she observed Respondent, she testified, she was “quite shocked” at his deficiencies considering Respondent had been an educator for some time. Most egregious at the time, Giacobbe testified, was Respondent’s lack of classroom management. Following her initial observation of Respondent, Giacobbe met with Respondent and discussed her observations relating to Respondent needing to work on his lesson plan design, including how such should be written, and offered suggestions on how he could improve his classroom management. According to Giacobbe, following the February 25, 2011 observation Respondent participated in the post-observation meeting in the same manner she eventually learned he usually does; by sitting, listening, offering no comment and signing the paper. In regard to the February 25, 2011 observation, Respondent did not offer a written rebuttal.

Giacobbe conducted another formal observation of Respondent on April 30, 2012, and testified that although it had been well over a year since she had first observed and meet with Respondent and shared her concerns about his performance and her advice on how he could address his issues, Giacobbe observed that Respondent was conducting himself pretty much the same as he had in February 2011. According to Giacobbe, Respondent did not understand how to form a lesson plan based upon the New Jersey standards. Giacobbe found Respondent’s lesson plans and classroom teaching “absolutely not acceptable.” Giacobbe explained that in addition to a continuation of his poor lesson plans and classroom management, she observed that Respondent was not using instruments in his music class notwithstanding that she had repeatedly told Respondent that she wanted him to use instruments and would approve the purchase of new

instruments if Respondent submitted a purchase order. He never submitted such a purchase order, Giacobbe testified.

On June 20, 2012 the District's Board voted to withhold Respondent's salary adjustment increments for the 2012-2013 school-year. The June 27, 2012 Notice of Increment Withholding issued to Respondent listed three "major areas of concern...evidencing your poor performance." In regard to "Classroom Management," the Notice informed that:

... Your classroom management has been of great concern over the past two school years and has been addressed in observations and instructional memos in the past. Rather than following the administrative directive that misbehaving students are not to be "thrown" out of class, you continue to remove students, rather than developing and posting classroom rules that incorporate both negative and positive consequences for certain behavior from year to year. Your 2011/2012 professional development plan included workshops focusing specifically on classroom management, which you attended, but little to no improvement has been seen in your performance in this area.

In regard to Instructional Planning, the Notice stated:

This is the second area of major concern, which if improved upon, would likely assist in your classroom management issues. A well-planned lesson, with a variety of engaging activities, ensures that a majority of students will remain on task and active participants in the class. During formal observations and several instructional counselings, you were instructed on how to write a basic lesson plan including a "do now" activity, an anticipatory set and direct instruction using modeling, guided practice, independent practice, some form of assessment and closure. After having been provided much guidance in the area of lesson development, a basic skill for a teacher, you managed to incorporate the required parts of a lesson into your written plans a majority of the time. However, what was written was often not what was implemented in a live classroom setting; an issue addressed in your observations. Despite some improvement in your written plans, many written plans did not translate into effective instructional practices

(discussed below as the third major area of concern).
Examples of poor planning include “playing jazz musical chairs,” “watching and singing along with Disney songs,” and “reviewing students’ portfolios,” demonstrating your inadequate lessons and poor use of instructional time.

As for the third major area of concern identified - Effective Instructional Practices – the Notice provided:

Without quality classroom management and effective lesson plans, this area will always be deficient. You have been notified on numerous occasions that music lessons should include music and not simply videos. Despite these notifications, you continue to fail to incorporate modeling with instruments, notes, stanzas or even musical pieces highlighting the concept that the students are learning into the direct instruction component of a lesson.

Respondent did not file a grievance challenging the District’s withholding of his 2012-2013 increments.

The 2012-2013 School Year

During the 2012-2013 school year Respondent was scheduled to teach Mondays, Tuesdays and Wednesdays. At the start of the school year the District placed Respondent on an “action plan” to be implemented during the first sixty days of instruction for the year. According to Superintendent Giacobbe, the purpose of the plan was to involve Respondent with other members of management and other teachers to help Respondent improve his performance. The initial September 5, 2012 action plan listed three target areas for improvement largely along the same lines as the “three major areas of concern” identified in his June 27, 2012 Notice of Increment Withholding; Development of Lesson Plans, Instructional Delivery and Student Engagement / Classroom Management. The action plan also identified two “Support Personnel” who would assist Respondent in the

plan; Superintendent Giacobbe and the District's Curriculum Supervisor, Kerri Lawler. Under this initial action plan, Respondent was required to submit his lesson plans for the following week to Supervisor Lawler by Thursday.

Respondent's action plan was modified on September 24, 2012, according to Giacobbe, because Respondent had shown no improvement. Under the new plan, supervisor Lawler was required to review Respondent's lesson plans and provide Respondent her feedback by 5:00 pm Friday. Respondent was required to then incorporate the Supervisor's feedback and submit his revised lesson plans by 8:00 AM Monday morning. In this version of the action plan Respondent was given further detail than presented in the plan of a few weeks earlier in certain target areas, including directives such as "[l]esson should include a variety of focusing and closing activities," and "[m]aintain a professional decorum at all times with all students. No more nicknames, etc." Respondent was also given assistance with his computer to aid in his connecting to the District's lesson plan program "OnCourse" and informed of other teachers he could observe.

In addition to Respondent receiving weekly feedback from District evaluators, for each version of the plan District personnel (Giacobbe and Lawler) met with Respondent and his Union representative to review the plan and address questions from Respondent. The third modification of Respondent's action plan is dated October 15, 2012, and as was the case for each version before, and would be the case for later versions throughout the school year, the items of focus listed for Respondent increased. For example, in the October 15, 2012 plan, Respondent is instructed that approximate times should be listed for each element of a lesson, that differentiated instruction should be included for every

music lesson and that his lesson instruction needed to include “different modalities as some students are visual learners, tactile learners, kinesthetic learners, and auditory learners.”

Giacobbe conducted an observation of Respondent October 15, 2012. She testified that when conducting the observation she used and completed the “Danielson Model” form to memorialize her observations. In this regard, Giacobbe explained that although she used the evaluation forms incorporated into the model, the District did not use the full Danielson Model of evaluation during the 2012-2013 school year.¹ Giacobbe also testified that the Danielson Model is the evaluation model approved by the District pursuant to the NJ Department of Education mandate and that all teachers, including Respondent, received a training book and attended a training session on the model in September 2012.

The evaluation form used by Giacobbe to record her observation of Respondent includes four “Domains,” within each of which are listed various elements that are assessed by the observer as “U” (Unsatisfactory/Ineffective); “B” (Basic/Partially Effective); “P” (Proficient/Effective) and “D” (Distinguished/Highly Effective). The October 15, 2012 Observation form reflects that Giacobbe gave Respondent 10 ratings of “U” and 12 ratings of “B” and no ratings of “P” or “D.” Respondent submitted a “rebuttal” to the October 15, 2012 observation, beginning his narrative with:

¹ In this regard, the parties stipulated to the following:

“The parties stipulate that for purposes of this case the District’s evaluation of Respondent involved herein were performed independently by two District administrators using the rubrics and domains of the Danielson Methodology. The District did not apply the independent double scoring/observation allowing for calculation of measures of inter-observer agreement or any other recognized objective scale since the program at the District was instituted in the 2012-2013 school year as a pilot program.”

I respectfully submit this Rebuttal in response to your recent Observation, and that of the first day of instruction. Please make this attached to the three forms I have been provided with. Please sign the Rebuttal, as I am required to do. There are three copies.

1. Initially, let me note that I totally understand the Charlotte Danielson Model which I was taught in Graduate School at Rowan University, School of Educational Leadership.
2. I also know that the rubric is VERY SUBJECTIVE and subject to interpretation. I also know the changes in the Tenure Law signed by Gov. Christie. I also know what the procedures are, as negotiated by the NJEA and the NEA. I am also aware of the positive and negative ways it can be used against personnel, if they have an agenda.
3. It is very apparent to me that, since I filed a Request for Accommodation under the ADA,^[2] I have been on the “radar,” as others are, for other reasons. At every opportunity, administration has made things difficult for me. It began with the withholding of my increment, last year, which has never happened before the current administration arrived. Also, I have been falsely accused of items, defamatory, to which I have responded, personally and legally. I was helped by the Union and Counsel, and those allegations were withdrawn as unfounded.

As for the various comments written by Giacobbe in the observation form, Respondent disputed most. For example, to Giacobbe’s observation that; “an area of concern in this area is [Respondent’s] lack of knowledge of the students, which makes his designing coherent instruction an issue.” Respondent wrote: “I know the individual students better than the person who observed me. My asserted ‘lack of knowledge of the students’ is ludicrous. I have taught this class since Kindergarten.” When Giacobbe wrote that Respondent’s “classroom management is an area of grave concern... The constant interruption, lack of follow through, and individual student correction contributed to an environment that did not promote learning, respect, or establishing rapport,” Respondent rebutted with; “I have great rapport and respect from my students. I

² Requiring the need for frequent visits to the lavatory.

make music fun. My creating a culture of learning was outstanding...” Where Giacobbe wrote in regard to the Domain of “instruction” that Respondent’s “instruction is also an area of concern and is a focus of his corrective action plan” Respondent countered “[m]y instruction was perfect since 100% mastery of the materials was accomplished.”

The District continued Respondent on an evolving action plan throughout the school year; a plan modified on November 20, 2012, January 28, February 27, April 8, May 6 and June 4, 2013. Respondent was also subject to a formal observation by Curriculum Supervisor Lawler on November 28, 2012, wherein he was rated “U” in 14 areas and “B” in 8 areas, and a second observation by Superintendent Giacobbe on January 23, 2013, in which Respondent was given 19 “U” ratings and 3 “B” ratings.

According to Supervisor Lawler, Respondent generally submitted his initial weekly lesson plans to her in a timely manner, incorporated the recommendations contained in the “instructional memos” she routinely provided Respondent and submitted his revised lesson plans by the Monday morning deadline. However, Lawler testified, the problem was that, perhaps with the exception of incorporating time elements in his plans, she was required to make the same or similar corrections and modifications to Respondent’s lesson plans over and over again throughout the school year; Respondent would correct his plans after she provided him her feedback, but seemed unwilling or unable to incorporate her suggestions on his own initiative no matter the number of times she advised Respondent. In this regard, Lawler identified recurring issues with Respondent’s lesson plans in the areas of focusing events, using age appropriate focusing events, differentiated instructions, using musical instruments in his lessons, using different modalities for the different types of learners in the classroom, use positive and

negative consequences for student behavior and achievement and posting rules and consequences in the classroom. Moreover, even when Respondent incorporated changes into his lesson plans, observations of his teaching showed that Respondent would not follow the plan when teaching, Lawler testified.

Unbecoming Conduct and insubordination

In addition to evidence and testimony regarding its charges relating to incompetence and inefficiency, the District offered evidence relating to charges of unbecoming conduct and insubordination. In regard to the unbecoming conduct, the District asserted that on May 13, 2011 while conducting a music class for a second grade class Respondent stated that he had poison ivy in his butt; that on September 10, 2012 while teaching a forth grade class Respondent stated to the class that it was “kind of hard to miss T.T.” referencing an overweight student and discussed what his cat killed with the students; that on September 18, 2012 while teaching and singing the alphabet song with pre school students taught that “P” is for “pom;” On June 11, 2013 stated to a District secretary who was pregnant at the time, “wow, your getting really big, you should join the summer weight loss contest, you would definitely win;” and in that same month made comments about the weight of another pregnant secretary in the office. The District provided documentary evidence relating to these allegations of unbecoming conduct, including investigation results and written warnings, but did not offer testimony by direct witnesses to the incidents.

In regard to charges of insubordination, in addition to documentary evidence, District witnesses Giacobbe and Lawler both offered testimony. Concerning its charges of insubordination, the District offered evidence that:

(1) notwithstanding prior directives and warnings not to do so, on June 1, 2011, October 17, 2011 and May 29, 2012 Respondent left classrooms of students unattended;

(2) in a written rebuttal to an October 15, 2012 observation directive to the superintendent Respondent wrote; “Please sign the Rebuttal, as I am required to do”;

(3) On January 28, 2013 Respondent wrote an email concerning a post observation conference - copying Giacobbe and Lawler – and stating:

Ladies, (with respect, so that I will not get in trouble),

In the Post-Observation Conference, someone stated she could teach the same lesson better than me in Italian. I have not written my rebuttal yet, but, I accept that offer for my lesson plans and “focusing event” for next week. That extends my due date on my recent Observation. Let us do the same lesson so we see who knows music. I already know that I am a target; so provide your instruction against mine. I am sure that you will have no lesson plan provided. Please use the same thing that someone uses to evaluate me, so we have an equal playing field. I cannot wait to respond in my rebuttal. Please write a lesson plan for 5th grade for next week, on www.OnCourseSysyms.com, and perform the same thing I am asked to do.

If not, we can start with “Tempo” terms, then there is something coming. In my rebuttal, I loved the fact that you were taking away my increment...again. Thanks for telling me that. The Union and others will love that comment. So will Larry.

(4) On April 10, 2013, after a student had been removed from his class by the superintendent, Respondent reported that “without that distraction today” the class ran smoothly.

Written Reprimands

The District also offered prior written reprimands issued to Respondent related to conduct identified in various of the District's charges, including written reprimands issued as follows:

1) May 31, 2011 for conduct on May 31, 2011 of telling second grade students about his poison ivy and stating he had "poison ivy in my butt." In his rebuttal Respondent asserted that; (a) the alleged witness to the incident was never present while he taught, (b) that he did have poison oak, (c) that he denied making any such statement and (d) that this "was not the first time false and defamatory allegations have been made against me."

2) June 1, 2011 for leaving students unattended in the library, to which Respondent did not offer a written rebuttal.

3) September 18, 2012 for inadequate lesson plans and failing to comply with directives in his corrective action plan, to which Respondent did not offer a written rebuttal.

4) June 4, 2013 for leaving a class unattended on May 29, 2013, to which Respondent did not offer a written rebuttal.

5) June 12, 2013 for making inappropriate and hurtful comments about pregnancy and weight to two female secretaries, to which Respondent did not offer a written rebuttal, and

6) March 4, 2013 for having students grade one another's assessments and share publically how many questions they answered incorrectly, in part stating;

...Students should NOT be singled out in an embarrassing or derogatory manner. Specifically, students should NOT be made to

report their grades out loud in front of others. This is demeaning, embarrassing, may affect their self-esteem and vehemently goes against this district's mission...

In his rebuttal, Respondent asserted that the reprimand was prepared before he had a chance to give his side of the story, denied that he had singled out any student and disagreed with the reprimand. He further wrote:

...What about your comment in the Written Reprimand in reference to "grades out loud in front of others." Posting them in a classroom, in my opinion, is worse than what I was accused of...

Respondent Testimony

Respondent disputed the District's allegations, and testified that he consistently submitted his lesson plans and revised lesson plans on a timely basis and listened to input from Supervisor Lawler and attempted to incorporate such input at every opportunity. He asserted that he was an effective teacher. He testified that contrary to the District's claim he included musical instruments in his lessons, some of which he brought from home, and asserted that the musical instruments owned by the District were largely in disrepair. As for the District's claim that they informed Respondent that he could purchase new instruments upon submission of an appropriate request, Respondent testified that he had the understanding that he could spend only up to \$100.00 for the year on instruments and other needed supplies. He denied that he had made the various inappropriate statements to students alleged by the District, for example claiming he never taught students that "P was for porn," claiming he used the word "corn" and may have spoken to students about his cats and what they caught but never told them the cat killed things.

Respondent asserted that he is a good teacher, he knows how to teach and such is reflected in the performance of his students. According to Respondent, he has had a target

on his back because of a prior legal action he instituted against the District, and the ongoing corrective action plan was a concerted effort by the District to get rid of him.

Positions of the Parties

District

The testimony of District witnesses should be credited, the District argued, based upon well-established principles of credibility resolution. Respondent's testimony should not be credited because he has incentive to avoid responsibility for his conduct. In contrast, the District's witnesses testified in a forthright manner, with no credible reason to lie. As for the tenure charges themselves, the District recognizes that it has the burden of demonstrating the truth of the charges by a preponderance of evidence, and asserts that it has met such a burden. In regard to its charges of incompetency and inefficiency, the District argued that it has shown that Respondent does not have the ability to perform the basic tasks required of every teacher. The evidence established, the District maintained, that Respondent was unable and unwilling to accept constructive criticism from the District's Administration to improve his classroom management and teaching.

This is a classic case of incompetency, the District asserted, Respondent lacks the ability to provide coherent lesson plans to keep students engaged and on track, and although he was offered significant assistance from the District to help him learn how to draft proper lesson plans and appropriately implement the plans in the classroom, such efforts proved useless. Respondent ignored the guidance and advice provided by the District's administrators because, the District argued, Respondent does not believe

anything is lacking in his teaching abilities, yet “he does not even demonstrate the most basic understanding of the pedagogy of teaching.”

According to the District, the evidence also supports a finding of conduct unbecoming against Respondent. In this regard, the District asserted, Respondent was shown to have made inappropriate statements in the classroom such as telling students about having poison ivy in his butt, teaching that “P” is for porn and telling students about what his cat killed. Moreover, his comment to a class that an overweight student was “hard to miss” was callous. Additionally, Respondent’s insubordinate conduct of repeatedly leaving students unattended, even after receiving written warnings on the issue, was insubordinate and amounted to conduct unbecoming, as were his written remarks to District administrators and reference to a student as a “distraction.”

Additionally, the District argued, Respondent’s conduct when viewed collectively supports “conduct unbecoming and other just cause” warranting termination under controlling law. Unfitness for a teaching position is best evidenced by a series of incidents, and here the District has shown ongoing poor performance by Respondent, as well as his unwillingness or inability to improve after extensive efforts by the District to help him over a long period of time. The tenure charges against Respondent should be sustained, the District concluded.

Respondent

Respondent is protected by the tenure law and as a consequence there has to be “cause” to terminate him, and any such cause must be established by proof. Here, the Respondent asserted, there is not such proof. What the record establishes is that superintendent Giacobbe and supervisor Lawler do not like Respondent. But such is not

enough to support the dismissal of Respondent. Such is particularly so where, as here, Respondent has years of good prior service, has received good recommendations from the two prior superintendents of the District and did each and every thing supervisor Lawler asked of him over an extended period. It is not the “quantity” of the proof but the “quality” of the proof that must be examined to determine whether or not the District has met its burden and, Respondent asserted, when the record is fairly examined, it must be found that the District has failed to meet its burden.

The testimony of District witnesses evidenced their animus toward Respondent. Thus, Respondent explained, Superintendent Giacobbe described a historical presentation by Respondent as a “diatribe” – an angry and long speech or writing that strongly criticizes someone or something – and a “spiel” – a long speech intended to persuade but regarded with skepticism or contempt. Such choice of language by the superintended should be viewed as reflecting extreme bitterness toward Respondent. Similarly, Giacobbe showed her animus toward Respondent by asserted Respondent’s written rebuttal – a rebuttal Respondent has a right to present – was insubordinate merely because he asked the superintendent to sign the rebuttal. Similarly, the superintendent showed her animus toward Respondent when, after one of Respondent’s students took a table leg and attempted to hit Respondent and the superintendent made the decision to remove the student from Respondent’s class, and Respondent answered the superintendent’s question of how the class thereafter went by reporting; “without the distraction today, the class went well,” the superintendent wrote that Respondent’s response showed “negligence and delinquency” and that “we will not stand for this behavior from our professional staff.” Such a reaction by the superintendent to a

comment by Respondent within the context of a one-on-one adult communication was overly critical, Respondent asserted, and demonstrated the superintendent's extreme dislike for Respondent.

Supervisor Lawler also showed her animus toward Respondent by criticizing his preparation of students for a holiday show because he had no visuals to aide his teaching and because he used a recording of a "Barney" version of "Let it Snow" to teach the song to classes k through 4. Yet on the witness stand, Lawler could not come up with any appropriate visuals, suggesting something to do with sleds when no mention of sleds is made in the song, and simply assumed that another version of the song would be more acceptable to students in the older grades. But, Respondent continued, as confirmation that her criticisms of Respondent were more based upon animus than legitimate concerns for the effectiveness of his teaching, when asked about the performance of students at the resulting holiday show, Lawler testified that she wouldn't say there was anything bad about the show.

Within the context of such animus, the validity of the District's evaluations of Respondent as well as their testimony are questionable; they should not be credited, Respondent argued.

As for the District's allegations that Respondent is "incompetent," Respondent argued, such an allegation is distinguishable from "inefficiency." Thus, incompetency requires a showing that regardless of assistance offered by certified supervisors, Respondent does not have the ability or capacity to be an effective teacher. Contrary to any such claim against Respondent here, there has been no proof offered by the District that Respondent lacks the capacity to learn. In fact, the Respondent argued, the record

shows just the opposite. In this regard, Respondent has a Juris Doctor degree, has passed the bar exam in four states, graduated from LaSalle with honors and has a masters degree in education. Plainly, Respondent can learn. Moreover, here the record establishes that Respondent learned and followed the autumn 2012 directive of supervisor Lawler by including approximate times for activities in his lesson plans for the remainder of the school year, and appropriately revised his lesson plans and submitted such revisions in a timely manner following critiques by Lawler throughout the school year.

Respondent argued that the record does not show any instance of insubordination. In this regard, to find insubordination the arbitrator must find that Respondent disobeyed a proper authority or refused to follow orders, and no such conduct was established by the record, Respondent asserted. Respondent never refused to correct his lesson plans when asked to do so by Lawler and included time frames in his lesson plans as she instructed. Additionally, the comments by Respondent identified by the District and characterized by the District as disrespectful did not amount to insubordination within the legal definition as it relates to education.

Nor does the record establish unbecoming conduct on his part, Respondent maintained. To amount to such, conduct must have a tendency to destroy public respect for government employees and public confidence in the operation of public services. Here, the District has claimed Respondent made various statements about poison ivy, or an overweight student, or his cat, or that P is for porn without any written corroboration by any witness. The allegations are just that, mere allegations all of which were denied by Respondent. As for District claims relating to Respondent leaving his class unattended, the fact is that Respondent has a 504 plan that allows him to use the lavatory due to a

medical condition and his compliance with such a plan cannot be the basis for a finding of unbecoming conduct or insubordination.

Finally, Respondent argued, the District failed to show that Respondent was inefficient. In this regard, the District has the burden of showing that Respondent did not function, that students did not learn or did not respond to Respondent's teaching. The District did not meet such a burden, nothing in the record speaks to such a conclusion and there simply is not proof in the record that Respondent's students did not learn.

Simply not wanting a teacher in the District is not sufficient reason to remove the teacher; nor is a belief by the District that another teacher may do a better job than Respondent. Such is the very reason why tenure should protect Respondent. The District failed to show that he did anything that would arguably amount to "cause" to support his dismissal, Respondent concluded.

The Merits

The Standard of Review

The task assigned the arbitrator in this matter by statute is to determine whether or not the District has shown, by a preponderance of the evidence, that the tenure charges filed against Respondent are true and sufficient to support the dismissal of Respondent. Based upon a complete and careful evaluation of the evidence offered in this matter, and consideration of the arguments presented by the parties, I find that the District has met its burden of establishing the truth of the tenure charges sufficient to support the dismissal of Respondent.

Credibility

I base my finding that the District has sufficiently established the truth of its tenure charges primarily upon the credible testimony of the District's witnesses. Although I agree with Respondent to a limited extent that the District two witnesses may have exhibited a lack of approval of Respondent, I find that neither witness held animosity toward Respondent, and further find insufficient evidence to support a conclusion that the witnesses' lack of approval of Respondent was based upon any arguably inappropriate or unlawful basis as opposed to a natural, and permissible, disappointment in Respondent's failure to accept direction and change his behavior. I find that neither District witness held a degree of enmity toward Respondent sufficient to compromise her testimony. Consequently, notwithstanding the argument of Respondent, I found the District's two witnesses overall to be forthcoming and cooperative in their testimony, they exhibited no pleasure in testifying against Respondent and appeared genuinely interested in helping Respondent develop the tools and skills necessary for his success. Both District witnesses Giacobbe and Lawler had sufficient education and experience to fairly and accurately evaluate Respondent's performance and I credit their testimony.

Insubordination

Respondent is correct that the generally accepted definition of insubordination in the work place is a knowing, willful and deliberate refusal by an employee to perform work assigned by a superior. Such is the impetus for the often-quoted rule in labor-relations of "work now, grieve later." However, contrary to the argument of Respondent, the refusal to perform work is not the only way an employee may be insubordinate. Thus, it is well recognized that an employee may also be found

insubordinate for using abusive language toward a superior or for exhibiting an attitude of defiance or disrespect.³

In this matter the District has asserted that Respondent has been insubordinate both by refusing to obey its directives – do not throw students out of your class and do not leave your class unattended – and by disrespectful comments written to and about superintendent Giacobbe and supervisor Lawler. Because of the indirect nature of the evidence offered on the subjects and Respondent’s proffered accommodation-related defense, I am not convinced that the District has met its burden relating to its charges of insubordination by refusal to obey directives. Conversely, I am persuaded that Respondent exhibited ongoing defiance and disrespect toward Giacobbe and Lawler to such a degree as to constitute insubordination. His instruction that the superintendent should sign three copies of his rebuttal amounted to an inappropriate directive to the manager and was akin to Respondent saying he was of equal or greater authority to the superintendent. Such a refusal to acknowledging the superintendent’s relative authority amounted to an expression of defiance that I find constituted insubordination.⁴

Similarly, Respondent’s January 28, 2013 post-observation-conference email challenging Giacobbe and/or Lawler to teach a music lesson in Italian, drips of the Respondent’s contempt for the abilities of, and guidance offered by, the superintendent

³ See generally, *Discipline and Discharge in Arbitration*, BNA Books, 1998, Chapter 5, Refusals to Perform Work or Cooperate, II. B Specific Conduct Constituting Insubordination, at pages 157-158.

⁴ In this regard, I do not find that because Respondent’s comment was contained in a written rebuttal to an observation, that fact somehow precludes a finding that the comment was outside of whatever additional protection may arguably be afforded an employee under such circumstances. The fact is, although I might agree that an employee should be given leeway in the manner he or she strenuously disputes reports of unacceptable or inadequate conduct contained in an observation, Respondent’s directive to the superintendent here did not relate to any such report in his observation, but rather, related to the status of the superintendent and amounted to an attempt to diminish that status.

and curriculum supervisor. I find that Respondent's email not only shows his underlying disregard for the continuing efforts of District managers to assist him, but was plainly disrespectful and constituted insubordination.

Based upon the record as a whole and consistent with the above discussion, I find that the District has met its burden of establishing that Respondent was insubordinate.

Conduct Unbecoming

Based upon the record, and primarily relying upon the indirect nature of the evidence offered on the issues, I am not persuaded that the District has met its burden of showing Respondent engaged in conduct unbecoming. As for alleged allegations of unbecoming conduct of which there is direct evidence, I am also not persuaded that the District has met its burden. In this regard and specifically relating to Respondent's email statement about the "distraction" not being present, I am not convinced that within the overall context of the written communication that Respondent's reference was intended to be disparaging of the student involved.

Inefficiency and Incompetency

Respondent's Performance did not Improve Significantly

When the testimony of the District's credited witnesses is combined with the extensive documentary evidence offered by the District, such describes an effort extending over more than two school-years by the District to address the wanting performance of Respondent. Respondent did not challenge the description of his performance during the 2011-2012 school year contained in the District's Notice of

Increment Withholding at the time the Notice was issued. Consequently, for purposes of this matter, I find the criticism of Respondent's performance made in the Notice to be accurate and true. As for the 2012-2013 school year, I find the evidence showed a weekly, good-faith efforts by the District over the school-year to assist Respondent in developing the knowledge and skills needed to improve his methods of teaching, including the importance of independently preparing and developing effective lesson plans, execution of those plans in the classroom and managing student behavior. After such focused effort, after a full school year of an evolving improvement action plan and related assistance by the District, as well as written reprimands, observations and evaluations, the evidence establishes that Respondent did not change his conduct, he did not improve. Even after almost an entire school year of weekly reviews of his lesson plans by the District's Curriculum Supervisor and instruction on what a lesson plan should entail, Respondent continued to have difficulty when it came to independently preparing lesson plans that included all of the elements required. For example, even as late as April 13 2013, the District Curriculum Supervisor Lawler was instructing Respondent in her "second instructional memo regarding [Respondent's] lesson plans for the week of April 15, 2013" that:

First, all of your focusing events seem to center around the same Jazz musician, Glenn Miller, and the influence it had on dance music during WWII. While this certainly sounds interesting, it may not be age appropriate if you are doing the same thing in every grade level. In addition, while I can appreciate that it is Jazz Appreciation Month, how this links to the Core Lesson in each class is difficult for me to understand. Please revise with something that transitions into your activity in a more logical way. As I have said on numerous other occasions, I am asking you to do this so that we ensure your instruction meets the needs of the learners in the classroom by matching the language, vocabulary, and content to the maturity levels and to work within the students' Zone of Proximate Development. I

have asked you this on April 8, February 15, and January 28, 2013 during conferences that you need to aim your discussion and your materials to the learners in your classroom. We also gave you specific instructions in instructional memos dated September 28, 2012, October 19, 2012, January 28, 2013, January 28, 2013 and March 15th, that your focusing events should be age appropriate and engage the learner.

In addition, your activities in Pre-K through 2nd grade are not clear enough. What do you intend to do with your students for twenty minutes that will engage them to find the differences between Hip-Hop music and the music of other genres and cultures? What is the physical activity the students will be doing to meet your objective?

Finally, using Genesis gradebook is part of your professional responsibilities. As Ms. Giacobbe noted in her response to your e-mail from Wednesday night, I sent an instructional memo nearly six weeks ago, on January 25, 2013, stating the individuals who were trained in Genesis, and those who would be able to turnkey this information. I also shared that I was able to assist at any time, and the names of other staff members ...On Wednesday,...it became evidence that you had not even established the basic guidebook options within Genesis. This was also confirmed by the email you sent on Wednesday night with your own admission stating, "I have not been trained in Genesis."...Although my email on January 25, 2013 outlined how you could receive this training, you failed to pursue the necessary steps....

I find that notwithstanding the District's extended efforts to assist Respondent, by the end of the 2012-2013 school year Respondent continued to fail to write adequate lesson plans to meet the differing needs of different groups of students; he continued to fail to adequately implement effective instructional practices; and he continued to fail to effectively manage student behavior.

Respondent did not Accept Constructive Criticism

Although there is always room for some respectful disagreement in any performance evaluation process, I find that Respondent exhibited a repeated tendency to disregard criticism offered by District administrators in an extended good faith effort to

assist Respondent and improve his performance. Instead of accepting such productive criticism for what it was, Respondent habitually argued that he was not wrong and that his way was the right way. Respondent is certainly permitted to disagree with the judgments and directives of his superiors. But mere disagreement does not privilege Respondent to disregard such directives. His written rebuttals did not function to end the narrative. The story continued, and notwithstanding that he disagreed with the Superintendent and/or Curriculum Supervisor and expressed such disagreement, Respondent was not thereby licensed to ignore the direction provided by the District and to act in a manner consistent with his own opinions on the correct way to proceed. Rather, Respondent was required to act in a manner consistent with the directives of his superiors. Although there may have been some arguable merit to an occasional of the points offered by Respondent in his rebuttals, the fact remains that he did not change or improve his performance as his supervisors instructed.

Such an unwillingness to change on Respondent's part is plainly evidenced by his response to the District's efforts relating to lesson planning. Respondent is correct that his final lesson plans were acceptable. But, the goal of the improvement plan as it related to Respondent's lesson plans was not to have Respondent progress only to a point where he consistently and successfully revised his plans *after* review and feedback from the District's curriculum supervisor. Rather, the goal – and an element of an efficient teacher – was to move Respondent to a point where his own originally drafted plans would be consistently satisfactory and acceptable without need of revision. After the exhaustive efforts of the District to assist Respondent in reaching such a point, Respondent simply never got there.

Upon overall review of the record, and acknowledging that I have no reason to question the professional judgments and evaluations of the supervisory educators involved herein, when comparing Respondent's performance in February 2011 to his performance late in the 2012-2013 school year, I find that such a comparison establishes that Respondent failed to show improvement of any significance from the time of his first observation by Superintendent Giacobbe through the end of the 2012-2013 school year.

Based upon my finding that Respondent performed ineffectively and that notwithstanding the significant efforts by the District to assist Respondent, he was unsuccessful in improving his ineffective performance to any significant degree, I find that the District has met its burden of showing the inefficiency of Respondent.⁵

Conclusion

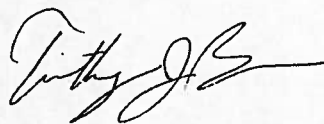
I have sustained certain of the charges of insubordination and inefficiency against Respondent. Although I have not found merit to each and every charge filed against Respondent by the District, I am persuaded that the District has met its burden of showing cause for the dismissal of Respondent on two separate grounds; insubordination and inefficiency. The record establishes that the District took extraordinary efforts to assist Respondent to remedy the deficiencies identified by the District in the June 27, 2012 Notice of Increment Withholding; efforts that began well over a year prior to the date of that notice. Yet notwithstanding such, Respondent's performance was not adequate. Considering such, as well as the disregard held by Respondent for the District's administration as reflected by his acts of insubordination, I am persuaded that there is

⁵ Based upon the record as a whole, I am not persuaded that the District has shown Respondent should be dismissed due to "incompetency."

nothing further the District could or should be required to do to attempt to improve Respondent's performance to a minimally successful level.

Based upon the full record and the above considerations, I find that the District has met its burden of establishing that its charges against Respondent are sufficiently true to support the dismissal of Respondent.

Respondent's discharge is sustained.



Dated: November 22, 2013

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 200-8/13 sustaining tenure charges on Friday, November 22, 2013.



Timothy J Brown