418-15

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Michelle Rhodes:

THE JERSEY CITY BOARD OF EDUCATION, HUDSON COUNTY

Agency Dkt. No. 54-3/15

"Petitioner,"

- and -

MICHELLE RHODES

"Respondent."

OPINION AND AWARD

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
John G. Geppert, Jr., Esq.
John A. Boppert, Esq., on the Brief
Richard E. Golden, Esq., on the Brief
Schwartz Simon Edelstein & Celso, LLC

For the Respondent:
Randi Doner April, Esq.
Oxfeld Cohen, P.C.

This proceeding arises from tenure charges filed by the Jersey City Board of Education [the "Petitioner" or "District"] against Michelle Rhodes [the "Respondent" or "Rhodes"], a tenured elementary school teacher. The tenure charges were filed with the Board on January 21, 2015 pursuant to N.J.S.A. 18A:6-11. On March 17, 2015, the Board determined that the charges were sufficient to warrant dismissal of the Respondent and pursuant to N.J.A.C. 6A:3-5.1(b)(4), filed the charges with the Commissioner of Education. The Respondent filed an Answer to the tenure charges on March 30, 2015 denying that all of the tenure charges constitute just cause for her termination and that all of the charges be dismissed. Pursuant to P.L. 2012, c. 26, I was appointed by the Department of Education to hear and decide the tenure charges on April 10, 2015.

Formal arbitration hearings were held on May 21, June 2, June 3 and June 16, 2015. At the hearings, each party argued orally, presented and cross-examined witnesses and submitted extensive documentary evidence into the record. The Board's witnesses included Principal Sandra Jones, Principal Shante Jones, Assistant Principal Martha Osei-Yaw, Assistant Principal Paulette Bailey, Teacher April Nelson, Principal Clerk Cindy Makwinski, Security Guard Angela Hudson, Assistant Principal Francine Luce, and RAC Coordinator Catherine Coyle. The Respondent's witnesses included Lisa Fantacone, JCEA

Member and Senior Building Director in P.S. #34 and Michelle Rhodes, Respondent. Each party filed post-hearing briefs on or about July 10, 2015.

BACKGROUND

Respondent Michelle Rhodes was initially employed by the Jersey City Board of Education in December 2000. She became a full-time teacher in September of 2001 and was then employed as an elementary school teacher at P.S. #38 for eight years. Her last position was a sixth grade teacher at P.S. #34.

The tenure charges are extensive in nature and segregated into eleven (11) separate charges. They include: unbecoming conduct, insubordination, and/or other just cause for dismissal related to failure to follow, and/or acting in defiance of, administrative directives and policies (21 counts); to unprofessional conduct and disrespect towards parents and students (10 counts); to altercations with co-workers and other staff (4 counts); to refusing to cooperate with and/or obstructing administrators in the performance of their duties (3 counts), to failure to follow proper protocol (6 counts); to failure to deliver instruction (4 counts); to misuse of time (3 counts); to misrepresentation to administrators (3 counts); for chronic/excessive absenteeism (11 counts); for chronic tardiness (8 counts) and for engaging in a pattern of unbecoming conduct over an extended period of time. In Respondent's testimony, she has agreed with a limited number of the Counts, had no recollection of others and denied engaging in the conduct complained of regarding those Charges and Counts that appear to form the main

basis for the tenure charges. She also denies being noticed or presented at any time with certain evidence that the Petitioner has offered in support of some of the charges presented during these tenure proceedings.

The charges encompass a wide spectrum of time beginning with events and incidents that occurred in 2004. The Respondent's increment had been withheld at the end of the 2005-2006 and 2006-2007 school years for school years 2006-2007 and 2007-2008 respectively for Conduct Unbecoming and Performance/Conduct Unbecoming. The Respondent objects to any weight given to evidence offered by the Board in this proceeding that relate to events that occurred prior to the 2007-2008 school year. She asserts that the Board, in this proceeding, is attempting to impose double punishment for the same events that it considered during the time that the aforementioned increments were withheld. Based upon this, Respondent seeks that Charge I Counts 1-10, Charge II Counts 1-10, Charge III Counts 1-2, Charge IV Count 1, Charge V Counts 1-3, Charge VI Counts 1-4, Charge VII Counts 1-3, Charge VIII Counts 1-3 and Charge XI all be dismissed. In response, Petitioner rejects the Respondent's claim that conduct prior to the increment withholdings constitutes "double jeopardy" based upon evidence that it contends reflects that the Respondent has engaged in misconduct of a worsening nature since the increment withholdings.

Initially, I address the parties' arguments concerning scope of the analysis of the time periods that are relevant for consideration of the events set forth in the tenure charges. Petitioner and Respondent offer citations to prior cases that pertain to the admissibility or weight to be given to evidence of prior disciplinary action in connection with whether such prior evidence can be considered to support a new disciplinary action.[1] Respondent contends that evidence of prior conduct in connection with the withholding of her increment for the 2006-2007 school year for "Conduct Unbecoming" and for the 2007-2008 school year for "Performance/Conduct Unbecoming" is either inadmissible or must be given no weight towards the Board's attempt to remove Respondent's tenure rights. After review of all of the arguments of the parties concerning this evidentiary dispute, I reach the following conclusions.

I agree with Respondent that she cannot be disciplined anew solely for performance or misconduct that occurred prior to July 1, 2007. Disciplinary action in connection with those events formed the basis for two consecutive increment withholdings. Respondent has been already disciplined for these events. Moreover, disciplinary action for any other events that were not considered at the time that the prior increment withholdings occurred cannot now be raised solely for the purpose of imposing new disciplinary charges for those

[1] Town of West New York v. Bock, 38 N.J. 500 (1962), I/M/O Stallworth, 208 N.J. 182, 199 (2011), Randolph Township Board of Education and Jill S. Buglovsky, Docket No. 265-9/12, Tenure Hearing of Desly Getty, 2009 N.J. AGEN LEXIS 319 (ALJ 2009), aff'd, Cmm'r (July 20, 2009), Tenure Hearing of R. Scott McIntyre, 96 N.J.A.R. 2d (EDUCATION) 718 (1995), aff'd, Cmm'r (June 7, 1995), Tenure Hearing of Lakhisha Wheeler, Docket No. 18-1/14 (June 23, 2014) (Lowitt), Tenure Hearing of Richard Graffanino, Docket No. 2232-9/13 (January 31, 2014) (DeTreux), Tenure Hearing of Frank Flood, Docket No. 97-5/13 (July 29, 2013) (Brown).

events. However, the prior increment withholdings are relevant in considering the level of discipline to be imposed in the event that the Petitioner establishes that further disciplinary action is warranted for conduct that occurred after the increments were withheld. Put another way, the increment withholdings, especially as they relate to performance and/or misconduct, may be considered as having served notice on Respondent that conduct of a similar nature thereafter may serve as a basis for determining whether cause exists for a level of discipline beyond that which had been previously imposed.

In Charge III, the Petitioner alleges that Respondent engaged in unbecoming conduct, insubordination and/or other just cause for dismissal related to altercations with co-workers and other staff. In Count 4, the Petitioner alleges that on or about October 17, 2014, during an emergency evacuation drill, and while in the presence of students, Respondent engaged in an altercation with Angela Hudson, a Security Guard at PS #20, telling her, "The next time I see you on Jackson Avenue I'm going to fuck your ass up bitch." Ms. Hudson filed an Incident Report on that day and also reported the incident to her principal and Respondent's principal. A few days later, Ms. Hudson filed a complaint in Jersey City Municipal Court against Respondent alleging harassment. Thereafter, Respondent filed a similar complaint against Ms. Hudson. This resulted in a court supervised Mediation Agreement stating "No contact. Effective at once, no physical, no phone, no text, no email, no social network. No physical or communication whatsoever." These terms applied to both individuals.

Petitioner's case on this allegation rests mainly on the testimony of Angela Hudson, a Security Guard at PS #20.[2] Ms. Hudson has been a Security Guard for 18 years. According to Ms. Hudson, an emergency evacuation drill was being conducted on October 17, 2014 at PS #34. Its students, including those of Respondent, were transported on foot towards PS #20. According to Ms. Hudson, this type of drill is routinely conducted during the first two months of school and included all staff and students. She testified that while she was outside she observed Respondent with her students and Respondent said to her "The next time I see you on Jackson Avenue I'm going to fuck your ass up bitch." Ms. Hudson said she felt threatened by the remark. Ms. Hudson then promptly reported the incident to her Assistant Principal at PS #20 and to Ms. Shante Jones, the Principal of PS #34. Ms. Hudson wrote a Security Department Incident Report on October 17, 2014 stating:

> At the above date and time P.S. #34 came to P.S. 20 for an evacuation walk, as the school filed out the court yard, the teacher by the name Ms. Michelle Rhodes walk pass me and said "The next time I see you on Jackson Ave. I'm going to fuck your ass up, bitch." I told her Principal Ms. Jones and my Asst. Principal Mrs. Dortrait.

Ms. Hudson testified that she filed the Incident Report in order to authenticate what she believed had occurred.

[2] Petitioner also cites testimony and documents from others in connection with events occurring after Ms. Hudson reported the incident to Principal Shante Jones.

In further support of Charge III, Count 4, Ms. Hudson also testified to prior incidents involving Respondent that she deemed inappropriate or threatening. According to Ms. Hudson, an incident occurred during the third week of August 2014 in a neighborhood store located on Jackson Avenue. While in the store, Ms. Hudson said she spoke to an unknown individual. At the time, she did not know that the person was a friend of Respondent nor that Respondent was in the store. According to Ms. Hudson, after she spoke to the person, Respondent turned around and said to her friend "every time she is in uniform, she thinks she is hot shit." Ms. Hudson said she responded, "are you speaking to me because I wasn't talking to you." Ms. Hudson also referred to another incident that occurred at PS #34 during the 2012-2013 school year. She testified that she went to PS #34 to pick up her son and her grandson who was a pupil there. According to Ms. Hudson, she came upon the Respondent and heard her tell her friend behind her back that Ms. Hudson was a "bitch".

In response to all of Ms. Hudson's testimony, Respondent denied that she ever said anything inappropriate or threatening to her. She acknowledged that PS #34 was conducting an evaluation drill on October 17, 2014 and that she was in the courtyard walking with her class. Respondent denied making the comment alleged by Ms. Hudson. She said that she was with her class and saw Ms. Hudson but that she was never next to her and that she had no conversation with her whatsoever. She testified that she felt harassed when she received Ms. Hudson's complaint filed in Municipal Court and that she then filed a counter

claim. Although Respondent acknowledged that she had previously seen Ms. Hudson in or around the store located on Jackson Avenue, she rebutted Ms. Hudson's testimony by denying that she said anything improper to Ms. Hudson in or around the neighborhood store on Jackson Avenue. Respondent testified that she was tutoring a student next to the store and while walking a parent to the car, she observed Ms. Hudson looking her up and down and rolling her eyes at her.

I conclude that the Petitioner has proven, by a preponderance of the evidence that Count 4 of Charge III occurred as alleged and that this altercation constituted unbecoming conduct. Ms. Hudson's testimony as to the incident was straightforward, consistent and credible. She was composed during direct and cross-examination and had a clear and vivid recollection of the events. She wrote an incident report immediately after the alleged incident occurred and reported it to the Principal of her school (PS #20) and the Principal of Respondent's school (PS #34). These reports prompted administrative investigations. She also promptly filed a complaint in Municipal Court. Her actions after the incident are consistent with the concern she had over Respondent's remark. I find no significance in a minor inconsistency between Principal Jones' written statement that Ms. Hudson told her that the remark was whispered to her compared to Ms. Hudson's testimony that the remark was louder than a whisper.

Respondent's denials have been carefully reviewed and evaluated including her testimony that she never spoke to Ms. Hudson that morning. A credibility determination is required over whether anything was said, and if so, what was said. Respondent's version of denial can only be credited if a determination can be made that Ms. Hudson made up the incident in its entirety due to her testimony that she never saw or spoke to Ms. Hudson. The record, however, does not support a finding that Ms. Hudson either invented the incident or lied about the events that occurred or did not occur. Ms. Hudson's testimony as to a prior separate incident on Jackson Avenue placed the October 17, 2014 incident in a context that confirmed that there had been a prior event between the two on Jackson Avenue a month or so prior and that it was Respondent that had shown hostility toward her. It also reflects that Respondent had negative feelings about Ms. Hudson relating to her position as a uniformed security officer and the manner in which Ms. Hudson conducted herself in that capacity. While the prior incident on Jackson Avenue in and of itself was not significant, its context in relation to the alleged threat made during the evacuation drill is significant as serving as support for Ms. Hudson's testimony that Respondent made a threat about what she would do if she saw Ms. Hudson in the future on Jackson Avenue. The 2012-2013 incident at PS #34 is also entitled to supporting weight for similar reasons. Moreover, the record contains no evidence reflecting that Ms. Hudson had any hostility whatsoever towards Respondent or did anything to provoke Respondent into making a threat.

The incident involved two co-workers on school property. While there is no evidence that students heard anything relating to this event, the lack of such evidence is not relevant to whether the remark was made. Any reasonable person would regard a remark such as the one made by the Respondent to a co-worker as evidence of intent, at minimum, to frighten and cause distress and one that reasonably could be construed as constituting a threat to cause physical harm in the future. Based on all of the above, I conclude that Petitioner has sustained Charge III, Count 4. I defer an analysis of disciplinary action until review of additional charges.

The events set forth in Charge III, Count 4 are related to and lay a context to review Charge IV, Counts 2 and 3, Charge I, Count 15 and Charge 1, Count 16 based on the Petitioner's view of events that ensued after Principal Jones began to investigate Ms. Hudson's complaint. In Charge IV, Count 2, the Petitioner alleges that:

> Respondent refused to cooperate and defiantly obstructed Principal Shante Jones in the performance of her duties when, in response to Principal Jones' investigation of Angela Hudson's complaint of even date that Respondent had threatened Ms. Hudson, Respondent "pulled her cell phone from out of the inside of her blouse and yelled out, 'I am now recording you because this is a litigation!'" Respondent then held her cell phone toward the Principal's face, shining a light at her.

In Charge III, Count 3, the Petitioner alleges that:

> On or about October 17, 2014, Respondent refused to cooperate and defiantly obstructed Principal Shante Jones in the performance

> of her duties when, in response to Principal Jones' instruction that Respondent wait in the main office while she investigated Angela Hudson's complaint that Respondent had threatened Ms. Hudson, Respondent declared the Principal was "taking too long," and left the office.

In Charge I, Count 15, the Petitioner alleges that:

> On October 17, 2014, Respondent declared the Principal was "taking too long" and left the main office, in defiance of the Principal's directive that Respondent wait there while the Principal investigated the complaint of another employee, Angela Hudson, that Respondent had threatened Ms. Hudson by stating, "The next time I see you on Jackson Avenue I'm going to fuck your ass up bitch."

In Charge I, Count 16, the Petitioner alleges that:

> On October 17, 2014, Respondent failed to follow the Principal's directives to report to the main office, and to sign out of the main office before leaving the building.

The separate charges above flow from the aftermath of Ms. Hudson's reporting to Principal Jones what Respondent said to her during the evacuation drill. After Ms. Hudson reported the incident to Principal Jones, Principal Jones wrote a lengthy same day incident report of her own describing what Ms. Hudson told her about the incident and the steps she took thereafter to investigate. Her description of the incident, in her report and in her testimony, parallels Ms. Hudson's report and testimony with the exception of stating in her report that Respondent's remark to Ms. Hudson came in a whisper as opposed to Ms. Hudson's testimony that it was louder than a whisper. In addition to describing the incident, Principal Jones testified that she spoke to Respondent on October

17, 2014 and after telling her that both administrators at each school would create their own incident report, Respondent pulled a cell phone out from inside her blouse and yelled that "I am now recording you because this is a litigation." Respondent said she did so because she was unable to bring an Association Representative with her to the meeting. Principal Jones testified that she told Respondent to put her cell phone away but Respondent continued to record. Principal Jones also stated in her report that Respondent held her cell phone up to her face with the light shining towards her. This incident regarding the cell phone was included separately in Petitioner's tenure charges at Charge IV, Count 2.

The testimony of Principal Jones was corroborated by Principal Clerk Ms. Makwinski. Ms. Makwinski testified to observing the statement and actions of Respondent as testified to by Principal Jones. Ms. Jones said that she told Respondent to put the cell phone away and asked her to wait in the main office while she checked with Dr. Michael Wings, Director of Division A, to see if it was appropriate to question Respondent's students pursuant to Respondent's request that she do so. After attempting to reach Dr. Wings, Principal Jones said that Respondent informed Ms. Makwinski that Principal Jones was taking too long and then went back to her classroom before Principal Jones could respond to Respondent's request. Principal Jones said that she attempted to reach Respondent to come back to the office but Respondent instead went to a different floor to confer with an Association Representative. After checking

Respondent's schedule, Principal Jones learned that it was Respondent's preparation period at the time.

In respect to the meeting with Principal Jones, Respondent acknowledged that she did use her cell phone as alleged because she wanted to have a video and audio recording of the meeting out of a fear that she would be improperly disciplined. She said she continued to use the cell phone to record for this reason. She also acknowledged saying that she did so "for litigation." She denied shining a light in Principal Jones' eyes and said she raised her hand holding the phone only for the purpose of recording the events. She said that her phone does not light up when recording and she demonstrated this at the arbitration hearing. She acknowledged that she may have been speaking in a louder tone than normal but that is her manner of speaking when she is on a video recording. She said she also felt frustrated because she felt she was being accused of saying something that she did not say.

There is no dispute that Respondent produced a cell phone for the purpose of having a video/audio recording of the interview with Principal Jones. Charge IV, Count 2 alleges that Respondent pulled the phone out of her blouse and yelled that "I am recording this because this is a litigation." This Count, even if true, does not establish an independent basis for discipline. There is little significance to where Respondent housed her cell phone. I also cannot find, on this record, that Respondent held the cell phone towards Principal Jones' face

while shining a light at her face. It should be noted that the Count implies that the light was for the purpose of intimidation. However, this suggestion does not contemplate that the cell phone could appear lit due to the normal video recording process. Even if there was a light, the distance between Principal Jones and Respondent, as testified to by Principal Jones and Ms. Makwinski, was such that the light could not have been for the purpose of intimidation or obstruction of the interview. The testimony does show that Respondent was in an agitated state as a reaction to Ms. Hudson's allegations against her and was somewhat defensive and confrontational. I attribute her raised voice to her hostility for the purpose of the interview rather than a raised tone that she said she would normally use when being recorded. Beyond this, Respondent's conduct during the interview has not been proven to have been obstructive or insubordinate. The Petitioner has not produced a policy or rule prohibiting the open recording of an interview nor was there testimony from Principal Jones that Respondent was directed to cease recording and that she refused to obey such direction. Further, Petitioner's allegation that Respondent's remark concerning her use of the cell phone was for the purpose of litigation has not been shown to be based upon a refusal to cooperate or to defiantly obstruct the investigation. Principal Jones testified that Respondent said "because this is a litigation" while Respondent acknowledged that she said it was "for litigation." I give the Respondent the benefit of doubt as to what was said and to her intent. Regardless of the version accepted, the remark was linked to Respondent's obvious intention to have a recording of the interview which, under the

circumstances in this case, has not been proven to violate any rule or policy, nor is there any evidence that Respondent was directed to refrain from recording the interview with disciplinary consequences for any such refusal. Accordingly, Charge IV, Count 2 is dismissed.

Charge I, Count 15 and Charge III, Count 3 both allege that Respondent was defiant, uncooperative and obstructive when she left the main office while Principal Jones was investigating Ms. Hudson's complaint. Respondent was alleged to have ignored a directive from Principal Jones to remain in the office and to have said to Ms. Matwinski that Principal Jones was "taking too long" to investigate the conduct prior to leaving the office.

This incident arose in the context of Principal Jones' checking with Dr. Wing as to whether she had the authority to question students as to whether they may have heard Respondent make a threatening statement towards Ms. Hudson. The testimony of Principal Jones reflects that she "asked" Respondent to remain in the office until she could contact Dr. Wing. The record does not reflect that Respondent received a directive to remain in the office within the common meaning of the term. Had this been the case, Respondent's departure from the room would clearly have been insubordinate. When Principal Jones returned to provide the results of her conversation with Dr. Wing, she was easily able to locate Respondent. Respondent left the office during a time that she had a preparation period. There is no indication her departure from the office was for

the purpose of terminating Principal Jones' investigation of Ms. Hudson's complaint or that Respondent thereafter refused to engage in any conversation that Principal Jones wished to have with her over the incident. Respondent's actions did give rise to suspicions of non-cooperation and reasonably could have been viewed as being uncooperative but there is no evidence that Respondent was insubordinate or obstructive. When this Count is reviewed as a whole, I do not find that it has been sustained and it therefore will be dismissed.

Charge I, Count 16 alleges that "on or about October 17, 2014, after the incident, Respondent failed to follow the Principal's directives to report to the main office and to sign out of the main office before leaving the building." At the time of this event, Principal Jones had been informed by the Board's General Counsel that Respondent should be sent home without any time being deducted from her attendance. Principal Jones contacted Respondent to tell her that she could sign out for the remainder of the day. The record reflects that Respondent left the building but did not sign out. Principal Jones testified that she had told Respondent that she needed to speak with her in the main office before leaving but Respondent did not appear. Petitioner contends that Respondent's actions support its charge that she failed to follow and acted in defiance of administrative directives and policies. The record developed on this point is insufficient to establish a refusal to follow a directive. There is no testimony as to what the purpose of the meeting would have been on the sign out issue. It is simply not clear that Respondent was directed to report to the office prior to leaving the

school. Ms. Makwinski testified concerning the existence of a Staff Daily Signed-Out/In Book. This provides that a staff member sign out and in and provide a reason for leaving the building on a PS #34 form. Respondent's name did not appear on the PS #34 form for October 17, 2014. Ms. Makwinski acknowledged that the book is not always signed despite teachers being required to. She was not aware that anyone had ever been disciplined for failure to sign out. Under the circumstances present on October 17, 2014, I do not find that the Petitioner has established that Respondent's failure to sign out was either an act of defiance or a deliberate failure to follow Board policy. The Petitioner was aware that Respondent would be leaving the school, had directed her to do so and was aware that she would no longer be present. Given all of the above, I conclude that the Petitioner has not sustained this Count and it will be dismissed.

In Charge III, Count 3, the District alleges that:

> On or about May 13, 2014, Respondent engaged in a threatening and confrontational altercation with April Nelson, a teacher, when, as Ms. Nelson entered the building in the morning, Respondent "paused in front of Ms. Nelson and whispered something in her face," whereupon Ms. Nelson replied, "What did you say?" to which Respondent stated, in a threatening manner, "Come upstairs and I will tell you."

Testimony concerning this incident was offered by Ms. April Nelson, a Mission Read teacher at PS #34. Ms. Nelson testified that after entering the building at 7:30 a.m., she observed Respondent at an exit door on her left. Respondent then changed direction and passed in front of her towards another

exit door while mumbling something to her. Ms. Nelson asked Respondent what she said and Respondent said "come upstairs and I'll tell you." Ms. Nelson regarded this as a threat. She responded "get out of my face" to the Respondent, walked away and went to Principal Shante Jones who wrote a report of the incident. Ms. Nelson testified that Security Guard Annie Dickson observed and heard the incident and told her that she heard Respondent tell Ms. Nelson to "come upstairs" in a low tone of voice and then Dickson rolled her eyes. Ms. Nelson filed a harassment complaint against Respondent with the Board. Respondent then filed a complaint against Ms. Nelson in Municipal Court. Ms. Nelson testified that a mediation session resolved the issues and each agreed to be civil to each other and there have been no problems ever since.

Respondent denied making a threatening remark to Ms. Nelson. She said that she felt harassed by Ms. Nelson causing her to file the complaint against Ms. Nelson in Municipal Court. According to Respondent, she admitted turning around and walking in front of Ms. Nelson but said the reason she did so was that she was texting her husband and said "excuse me" to Ms. Nelson prior to Ms. Nelson offering a nasty response. According to Respondent, her comment to Ms. Nelson was misinterpreted. She testified that she said that they could go up to her classroom if Ms. Nelson wanted to continue the discussion. Principal Shante Jones testified that Ms. Dickson wrote a report of the incident but that she could not find the report. Ms. Dickson did not testify. Principal Jones' report indicates that a Teacher's Aide, Frances McClean was asked to write a report

and wrote" no comment" but verbalized that "I was not listening to their conversation and everyone needs to grow up around here and act like adults."

There is no dispute that Respondent uttered the words "come upstairs" to Ms. Nelson, although Respondent asserts that it had a different connotation and purpose than what Ms. Nelson believed. Credibility determinations are required over what occurred and was said. I find Respondent's explanation that she inadvertently crossed over into Ms. Nelson's path to be implausible. It suggests that her path away from one exit door in front of Ms. Nelson would have occurred even if Ms. Nelson was not present. If the incident occurred as testified to by Respondent, it is unlikely that when Ms. Nelson asked Respondent what she had said to her that Respondent's answer would have been to "come upstairs." There is simply no logic nor any rationale at that point in time for Respondent, consistent with her testimony, to invite Ms. Nelson to come upstairs to meet her in her classroom in order to continue a dialogue when there was no evidence that an issue existed that would have formed a basis for a continued dialogue. I have considered Respondent's argument that no disciplinary action occurred at the time of the incident. I do not find this contention persuasive or a waiver of Petitioner's right to raise this incident in the tenure charges in light of credible record evidence that other events occurred that establish that Respondent has engaged in other conduct that is confrontational in nature. Accordingly, I conclude that the record evidence on this charge supports the sustaining of Charge III, Count 3.

In addition to the above performance and conduct related charges, the District has alleged that the Respondent has engaged in chronic/excessive absenteeism (Charge IX) and chronic tardiness (Charge X). It submits evidence of such absenteeism and tardiness for the last five years (July 1, 2010 through December 8, 2014) and for years prior. During July 1, 2009 through June 30, 2010, Respondent was absent 11 days, including 9 absences due to personal illness. During the same time period, Respondent was tardy 12 times. During July 1, 2010 through June 30, 2011, Respondent was absent 17.25 days, including 13.25 absences due to personal illness. During that same time period, Respondent was tardy 6 times. During July 1, 2011 through June 30, 2012, Respondent was absent 15.75 days, including 12.75 absences due to personal illness. During July 1, 2012 through June 30, 2014, Respondent was absent 10 days due to personal illness. During July 1, 2013 through June 30, 2014, Respondent was absent on 55 days, including 50.5 absences due to personal illness. During that same time period, Respondent was tardy 7 times. During July 1, 2014 through December 8, 2014, Respondent was absent on 13 days, including 9 absences due to personal illness. During the same time period, Respondent was tardy 2 times.

In respect to the issues of absenteeism and tardiness, the Board submits the following arguments in support of Charge IX and Charge X.

Chronic or excessive absenteeism may warrant removal even when the absences have been excused or caused by legitimate medical reasons such as long-term poor health, or work related injuries. See State-Operated School District of Jersey City v. Pellechio, 92 N.J.A.R.2d (EDUCATION) 267 (1992). This may be the case even when legitimate reasons, such as long-term health issues, caused the absences. Id. Also see, State-Operated School District of Newark v. Gillespie, 2011 N.J. AGEN LEXIS 226 (OAL 2011), modified Cmm'r (August 3, 2011), aff'd App. Div. (May 17, 2011) (stating "[c]learly, the mere fact that the absences were excused does not obviate the possibility that the teacher may be dismissed for excessive absenteeism"); In the Matter of the Tenure Hearing of Randi True, Willingboro Board of Education, 2011 N.J. AGEN LEXIS 839 (ALJ 2011), aff'd Comm'r (August 15, 2011).

Randi True, like the Respondent herein, was granted multiple leaves of absence for extended periods of time. Yet, both an Administrative Law Judge and the Commissioner sustained tenure charges for chronic absenteeism, among other infractions. The ALJ in True specifically cited In Re Reilly, 1977 S.L.D. 403, 414 to support a determination that chronic absenteeism must not be tolerated even when leaves of absence are granted:

> The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. . . . The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

Legal precedent clearly establishes that "[E]ven if a teacher's performance in the classroom is sufficient . . . the absences may nevertheless be considered as material to the issue and can justify removal of the teacher." Tenure Hearing of Jeanne Cook, Old Bridge Board of Education, 2005 N.J. AGEN LEXIS 48, *14 (ALJ 2005), rev'd on other grounds, Comm'r, 2005 N.J. AGEN LEXIS 812 (June 9, 2005); citing Trautwein v. Bd. of Educ. of Bound Brook, 1980 S.L.D. 1539, cert. denied, 84 N.J. 469 (1980).

In the instant case, Respondent was absent from her post on over two hundred (200) occasions, primarily due to personal illness. (**FF 55-65, P-50-60**.) As established in Pellechio, supra, the fact that Respondent may have had legitimate medical excuse is completely immaterial to this analysis. Respondent's poor attendance has had a deleterious effect on the continuity of instruction, as the Board is then compelled to hire substitutes. (As indicated in the testimony of Principal Shante Jones, who declared that absenteeism interrupts the continuity of instruction for students.) For example, in the 2005-2006 school year, Respondent was absent for 34% of the school operating days. Yet again in the 2013-2014 school year, Respondent was absent for 31% of the school operating days. In five other school years (2009-2010; 2010-2011; 2011-2012; 2012-2013 and 2014-2015), Respondent either met or exceeded the annual contractual allotment of thirteen 13 sick days.

Excessive tardiness "may constitute both 'unbecoming conduct' and 'incapacity' such as to amount to 'just cause' warranting the suspension or termination of the teacher." In the Matter of the Tenure Hearing of Randi True, 2011 N.J. AGEN LEXIS 354, *56-*57 (June 29, 2011), adopted, Comm'r, 2011 N.J. AGEN LEXIS 839 (August 15, 2011); citing In re Kacprowicz, 93 N.J.A.R.2d 147, 151 (January 21, 1993). In True, the administrative law judge (AU) wrote that whether "absenteeism and tardiness are judged to be excessive fall within the reasonable judgment and discretion of the local school district."

When prosecuting tenure charges for both absenteeism and tardiness, a board of education must establish:

(1) that it considered both the number of days and the particular circumstances of the absences [and/or tardiness]; and
(2) the impact that the absences [and/or tardiness] had on the continuity of instruction during the period of time the absences occurred; and
(3) that the teacher received some warning that his or her supervisors were dissatisfied with the teacher's absences [and/or tardiness].

See Tenure Hearing of Sonia Velez, 2006 N.J. AGEN LEXIS 242, * 17 (ALJ 2006), adopted, Comm'r, 2006 N.J. AGEN LEXIS 654 (April 27, 2006). In the instant matter, the Board has easily met all three prongs of this test:

The Board considered the circumstances of Respondent's absenteeism and tardiness, by issuing to Respondent Summative

Evaluations on May 21, 2010; June 7, 2011; and June 4, 2012 in which she was cited as "needing improvement in the areas of attendance and punctuality." (**P47--P-49**). Had the Board simply acted on the raw number of absences and tardies, Respondent may have been subject to discipline at the time. However, the Board considered the totality of circumstances in its decision to continue employment with increment. Also, the Board granted extensive medical leaves on multiple occasions, to allow Respondent to resolve medical issues. (**P-51, P-59**). But as noted in Pellechio, supra, the legitimate medical concerns do not mitigate against chronic absenteeism from the classroom. Despite ameliorative measures by the Board (continued reemployment with increment, granting of extended leaves) Respondent's poor attendance and tardiness has continued all the way through to the most recent school year, 20 142015. (**P-58-60.**)

The Board considered the impact of the Respondent's absenteeism and tardiness, which force the Board to incur a significant daily cost for substitute teachers, in addition to the Respondent's salary and benefits. Moreover, Respondent's frequent absences prevent the satisfactory performance of the duties of her position. Board Policy 4151 - Attendance Patterns (P-65) clearly states that the "[R]egular presence of assigned personnel is vital to the success of the district's educational program. Consistent absenteeism or tardiness is unacceptable and subject to disciplinary action."

<u>In Tenure Hearing of Randi True</u>, <u>supra</u>, the ALJ noted that the petitioning board need not point to specific instances or examples supporting its contention; rather, it need only demonstrate the likely result of the absences." See also, <u>In the Matter of the Tenure Hearing of Alicia Dugan</u>, 2012 N.J. AGEN LEXIS 249 (May 7, 2012), <u>adopted in part</u>, <u>modified in part</u>, Comm'r, 2012 N.J. AGEN LEXIS 664 (June 14, 2012), where the mere fact of a teacher's absence for 197 days over a six year period was sufficient to infer a negative impact on students.

As noted above, Respondent has been warned about her persistent and unacceptable pattern of absenteeism and tardiness, in three Summative Evaluations, (P-47—F-49), yet the problem has continued unabated. Moreover, all teaching staff members are subject to Board Policy 4151 – *Attendance Patterns*, <u>supra</u>. The evidence proffered by the Board shows that sufficient warnings were given to the Respondent.

During the hearing on this matter, the Board presented uncontroverted testimony from Principal Shante Jones that when

> teachers are excessively absent, children do not receive instruction. Moreover, Jones noted during testimony that Respondent's chronic absenteeism made her unavailable for proper and thorough observation/evaluation.
>
> Accordingly, the Board has proven by a preponderance of the evidence that Rhodes engaged in numerous acts of insubordination and conduct unbecoming relating to failure to provide instruction. Therefore, dismissal from her position is warranted.

Respondent offers extensive argument contending that the Petitioner's charge of excessive absenteeism and tardiness must fail given its view that the Petitioner has not sustained its burden to prove that the absentee record was either excessive or had negative impact on the educational process. Respondent further notes that there was medical evidence to support approved leaves of absence. She submits that:

> In order for a Board of Education to terminate a tenured teacher for excessive absenteeism, it must demonstrate that it considered the number of days and the particular circumstances of the absences, the impact the absences had on the continuity of instruction and that the teacher received some warning. In re the Tenure Hearing of White, 92 N.J.A.R. 2d (EDU) 157. The nature of the warnings and the corrective actions taken are relevant in determining proper discipline. Passaic Bd. of Ed. v. Viani, 92 N.J.A.R. 2d (EDU) 76. Further, with regard to the claims of tardiness for years 2004-2005 through 2007-2008, the Board withheld Rhodes' increment twice for reasons that included absenteeism/tardiness and, as stated supra., cannot and should not be disciplined twice for the same offense.
>
> The Board inclusion of excessive absenteeism is absurd. First, every witness to this count acknowledged that there were only two school years in which Rhodes was absent in excess of the thirteen contractual days. The first one was during the 2005-2006 when she was on medical leave for her pregnancy and subsequent maternity leave. **Eight years later** she took two medical leaves of absence during the same school year, 2013-2014. These two years hardly exemplify / excessive absenteeism.

In the Matter of the Tenure Hearing of Gregory Short, District of the City of Elizabeth, Union County, Agency Docket No. 263-9/14, Arbitrator DeTreux found that while the Board established chronic absenteeism it was not sufficient to warrant termination. He noted that as per White, the Board had given warnings. Because the Board provided testimony regarding the issues that occurred when Short was absent, the arbitrator found that it proved adverse impact. The arbitrator then looked at the circumstances of the absences: work related injury illness of new born. Ultimately, the arbitrator found that as Short was an "average to above average teacher" with positive evaluations, he found that an increment withholding was appropriate. (See also In the Matter of the Tenure Hearing of Leslie Ann Ramos, District of the City of Elizabeth, Union County, Agency Docket No. 261-9/14 (despite almost 500 days absent over seven years, arbitrator returns teacher to the classroom with a suspension and an increment withholding due to her change in medical condition as well as testimony that she was a good teacher.)

As important as the failure to prove that the sheer number of days were excessive, the Board completely ignored the requirement that it prove the adverse impact that her absences had on the education process. Not a single Board witness testified as to the impact, either good or bad, that Rhodes' absences had on the educational process. On this point alone the charges related to excessive absenteeism must be dismissed. Surely, if the Board had any evidence that Ms. Rhodes' absence led to any educational issues (in fact Shonte Jones testified that she had no documentation of parental complaints) it would have so offered it. By failing to do so, this Arbitrator must accept that there is no such evidence, and Charge IX must be dismissed.

Similarly, Charge X must be dismissed as well. Tardiness issues are handled similarly as chronic absenteeism. In the Matter of Tenure Charges Against Vice Principal Lawrence F. Hawkins by the State Operated School District of the City of Newark, Agency Docket No, 24310/13, Arbitrator Laskin found that the Board was unable to prove excessive tardiness. She noted that In re Tenure Hearing of True, EDU 812-10, was determinative. In order to demonstrate tardies are excessive, the Board must prove:

> "(1) that it considered both the number of days and the particular circumstances of the absences; (2) the impact the absences had on the continuity of instruction during the period of time the absences occurred; and (3) that the teacher received some

> warning that his or her supervisors were dissatisfied
> with the [employee's] absences [or tardies]."

Because the Board could not prove that Hawkins' tardiness affected the continuity of instruction, the claim failed.

The Respondent's record of absenteeism and tardiness commencing with the 2009-2010 school year was clearly a concern to the Board. Consistent levels of absenteeism, even if within contractual limits, can yield recommendations for improvement. However, prior to the 2013-2014 school year, I do not find the record on absenteeism and tardiness to form the basis for discipline or to support tenure charges. However, the record shows that the Respondent clearly had an excessive amount of absenteeism during the 2013-2014 school year. The sheer number of absences, 50.5 days, even if supported by medical documentation, does not render Respondent immune from disciplinary action. She was not in her classroom for almost one-third of the school year. The Petitioner need not establish the level of negative impact asserted by Respondent to be the required standard for disciplinary action. Even so, Petitioner has established through the testimony of Principal Shante Jones, that Respondent's absences caused interference with the proper evaluation of her performance, the ability of the Board to have Respondent's students graded in timely fashion as well as having to bear the substantial cost of teacher replacement. Although the number of absences and tardiness do not, standing alone, provide a basis for termination under the circumstances present, they are sufficient in number to support some level of disciplinary action for failure to achieve a minimum performance level over the entire 2013-2014 school year, including the withholding of an increment.

In further support of the tenure charges, the Petitioner cites to nine (9) instances of reprimand issued to Respondent between January 6, 2011 and December 10, 2014.[3] One involves bulletin boards and is dated January 6, 2011 (Charge I, Count 11). This was issued by Francine Luce, Principal of PS# 34. Another involves a late call in to report an absence and is dated September 16, 2011. (Charge V, Count 4). This was also issued by Francine Luce. Another involves late lesson plans and is dated February 11, 2012. (Charge I, Count 12). This was also issued by Francine Luce. Another involves a late reporting time and failure to sign in dated October 23, 2012. (Charge V, Count 5). This was also issued by Francine Luce. Another involves failure to timely complete several documents for administrative review dated November 13, 2014. (Charge I, Count 17). This was issued by Shante Jones and Assistant Principal Paulette Bailey. Another involves failure to timely complete several documents for administrative review dated December 1, 2014. (Charge I, Count 18). This was issued by Shante Jones. Another involves failure to comply with a PLC Committee Directive also dated December 1, 2014. (Charge I, Count 19). This was issued by Shante Jones and Assistant Principal Paulette Bailey. Another involves failure to submit documents and disrespectful conduct dated December 10, 2014. (Charge I, Counts 20 and 21). This was issued by Principal Shante Jones. Testimony in support of these charges was offered by Principal Luce,

[3] There are also several instances of reprimand dating back to 2004 and 2005 issued by Respondent's then Principal Sandra Jones. Because of their remoteness to the filing of the tenure charges and the fact that they predate the two increment withholdings, they will not be considered for reasons previously stated.

Principal Jones and Assistant Principal Bailey. Respondent rebutted their testimony and offered a document (R #8) disputing the events set forth in Petition exhibits dated December 1 and December 10, 2014.

Prior reprimands would normally be considered as final actions that do not warrant de novo review on their merits. Absent timely appeal, they are prior actions issued to Respondent and part of prior discipline. I find this to be the case with those that were issued between January 6, 2011 and February 11, 2012. However, because of the proximity of actions in November and December 2014 to the January 21, 2015 filing of the tenure charges, I will consider those reprimands on their merits as if they had been grieved by Respondent.

On November 13, 2014, Principal Shante Jones wrote a memo to Respondent stating the following:

> The following documents **have not been completed** for administrative review during the past requested due dates. Please review the information listed below and adhere to the revised due dates.
>
> 1. **Emergency Contact Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.
>
> 2. **School Committee Selections Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.
>
> 3. **Staff Needs Survey** (see attached) - Complete and hand it in on Friday, **November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.

4. **SGOs** - Submit **two tiered SGOs** both **electronically** (one copy to myself and Mrs. Bailey) and as a **hard copy** of each along with the students' scores on **Monday, November 17, 2014 by 9am to Cindy Makwinski** (Principal Clerk) in the main office.

5. **Bulletin Board** - Select one sixth grade classroom and post work up for every student in the homeroom. Follow the bulletin board guidelines **(CCSS, Graded Work, Constructive Feedback, Objectives, & Rubrics)** that were discussed at the staff meeting on October 9, 2014 and listed on the agenda. All new bulletin boards are due on **Tuesday, November 18, 2014 by 1:15 pm** in preparation for the upcoming Open House.

6. **Lesson Plans** - On a daily basis your lesson plans should be readily available for continuity in instruction and administrative review. You did not have them available for review on October 1st when asked by Mrs. Paulette Bailey, AP during her visit to your classroom or on October 15th during the district walk-throughs when asked by Mrs. Catherine Coyle, Director of The Regional Achievement Centers.

Thereafter, on December 1, 2014, another memo was sent by Principal Jones to Respondent alleging that Respondent had failed to comply with the November 13, 2014 memo:

> On November 13th, you received a memo in writing to follow through with completing the following tasks by a specific date and time:
>
> 1. **Emergency Contact Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.
>
> 2. **School Committee Selections Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.

3. **Staff Needs Survey** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski** (Principal Clerk) in the main office.

4. **SCOs** - Submit **two tiered SGOs** both **electronically** (one copy to myself and Mrs. Bailey) and as a **hard copy** of each along with the students' scores on **Monday, November 17, 2014 by 9 am to Cindy Makwinski (Principal Clerk)** in the main office.

5. **Bulletin Board** - Select one sixth grade classroom and post work up for every student in the homeroom. Follow the bulletin board guidelines **(CCSS, Graded Work, Constructive Feedback, Objectives, & Rubrics)** that were discussed at the staff meeting on October 9, 2014 and listed on the agenda. All new bulletin boards are due on **Tuesday, November 18, 2014 by 1:15 pm** in preparation for the upcoming Open House.

On Friday (November 14th) and Monday (November 20th) you called out for Personal Illness Days. However, today is Monday, December 1st and you have yet to hand in any of the requested documents above in the main office for my review. Also, your hallway bulletin board that is supposed to display student work for one of the classes you teach remains incomplete since both the October 14th and November 18th due dates.

On November 13th when I discussed the contents of the letter with you, you shared that you were not going to complete the Emergency Contact Form because you felt "unsafe" in this school building and are receiving text messages. In order to accommodate your concern, I explained that the only information that I did require that you complete on the Emergency Contact form was your list of current certifications in order to update your Highly Qualified Teacher status for the 2014-2015 school year. You responded by saying, "I don't have any certifications." I also need the description of your car and license plate number so you can be contacted in the event of an emergency since you park in our school lot.

When inquiring a out the reason for not handing in your state mandated SGOs, you stated that you did not understand the ".77 number." I told you that I did not know what number you were referring to and needed to see you SGO drafts in order to help you. I also asked why you didn't share with me that you needed assistance in the past few weeks so that I could have guided you

> along the way. In addition to this, I informed you that I would have also invited the district supervisors (who presented the revised SGOs to our staff) to come back to help as needed. Your colleagues who received special SGO development training also turn keyed examples to the staff in all grade levels during morning PLC meetings; however; you stated that you thought your colleagues did not understand it either. Notwithstanding, you are still expected to submit two SGOs as directed.
>
> This memo serves as a letter to document your insubordination and by Wednesday, December 3, 2014, all of the above requested documents are due by 9 am to the main office for my review so that I can assist you with your SGOs, materials/technology needs, and assign you to one of your three choices for the PLC Committees (depending on the number of participants who have already been assigned to each committee). Also, on Wednesday, December 3rd by 2 pm, your hallway bulletin board is also expected to be completed (see above guidelines for #5). Continued failure to adhere to my administrative directives may result in disciplinary action.

The issue concerning PLC committees was the subject of an additional December 1, 2014 memo. Principal Jones testified that the memo was written to confirm her direction to Respondent that she could not join the Health and Wellness Committee and that Respondent failed to comply with her directive. The memo stated:

> On Thursday, November 20th, you and a few other teachers who were not on the original list of the morning PLC Committees were called down to the main office in order to review your three selections on the form that was due on the revised date of Friday, November 14th, by 2 pm in the main office. Upon your arrival to the main office with Ms. Lisa Fantacone (Teacher) as your JCEA Representative, I verbally asked you what three committees you chose since you still did not hand in the School Committee Selections Form. You then asked if we could meet in a more private area. I stepped outside of the main office with the two of you and asked the same question. You stated that you selected the Health and Wellness Committee. As I looked at my count of staff members on each committee, I informed you that the

committee you selected as your first choice was no longer an option due to its high number of participants who already handed in their forms on the original due date, therefore, I asked what your second and third choices were as well. At this point you referred to what happened last Thursday morning while I was out of the building. You said that Mrs. Bailey (the Assistant Principal) told you that you could select to sit in any committee you wanted to, therefore, by "default" you will remain on the Health and Wellness Committee. As I began to reiterate that the final list will be based on the number of participants on each committee and that Mrs. Bailey did not have that information last week, you repeated that the Health and Wellness Committee was the group that you were going to be a part of despite my explanation. When I stated that that committee was no longer an option, you said, "I feel like I'm being discriminated against." I then dismissed you by stating that I was not going to go back and forth with you over this situation because I needed to visit each committee meeting. Contrary to my directive, you proceeded to sit in the Health and Wellness Committee meeting in Room 102.

I followed up with Mrs. Bailey to inquire about what she said to you last Thursday in reference to your three selections. Mrs. Bailey stated that she in fact did not speak directly to you at all and instead made a general announcement to all staff members as a reminder that it was Committee Day. She also said that she announced that if there were any staff members who were not assigned to a committee yet, they could sit in on a meeting that morning until a final committee was assigned. This final assignment will be completed by me as your Principal solely based on balancing the number of participants in each group; this is why we asked every staff member to make three choices. You have been given the directive in another memo to complete the School Committee Selections Form by Wednesday, December 3rd at 9 am for my review so that I can place you in one of your other two selected committees (the Health and Wellness Committee is no longer an option as I told you on Thursday, November 20th). If you continue to fail to adhere to my directives, a disciplinary action may result.

On December 10, 2014, Principal Jones issued another memo to Respondent concerning her prior requests:

On Monday, December 1, 2014 you received two Failure To Comply letters directing you to once again hand in the five requested documents (Emergency Contact Form, School Committee Selections Form, Staff Needs Survey, and two state mandated SGOs) as well as complete your hallway bulletin board by December 3rd. None of the five documents have been handed in and the bulletin board remains incomplete.

On Wednesday, December 3rd, Mr. Charles Murphy (Technician from the Board of Education) informed me that he was going to install two new computers inside your classroom. As I attempted to reach out to you by calling your homeroom on the intercom, there was no answer. Therefore, I tried the computer lab and asked you to pick up the intercom phone. My first question to you was if you signed up to utilize the computer lab with Ms. Crystal Warren (Library Media Specialist) because I did not know where your class was located. You told me that you did not sign up to use the lab with Ms. Warren and wanted to stay there all day so your students could type and print. As I proceeded to remind you of the importance of signing up so that you have administrative approval and also so that your location would be told to the main office/security desk, you said, "O.K." and hung up the phone before I finished my sentence. I then called you back on the computer lab intercom phone to inform you about the installation of the two new computers and we continuously were disconnected. Once I was able to reach you a few minutes later, you picked up the computer lab's intercom phone and stated, "I will not talk to you unless I have union representation." You then hung up the phone once again. I called you back on the intercom phone and announced that Charles would be visiting your classroom to install two new computers.

Also, on Thursdays at 8 am - 8:30 am, all staff members signed up for three committee and were assigned to participate in one of them. On December 4th, you still did not hand in the requested committee selections form. As per my and Mrs. Bailey's observation while visiting all committee meetings that morning and reviewing all agenda sheets with the participant signatures, you did not report to any of the morning meetings.

As a result of your insubordination, it is recommended that you bring union representation upon your request) to meet with me on Thursday, December 11th at 2:30 pm (coverage will be provided) in the first floor conference room to discuss your refusal to hand in any of the requested paperwork, complete your hallway bulletin board, and disrespectful communication with me as the Principal. As your immediate supervisor, you will speak to me to discuss

> anything related to instruction like installing classroom computers without union representation being present because it is not warranted. Your disrespect to me as the Principal is unprofessional and will not be tolerated.
>
> If you continue to fail to follow my administrative directives, a disciplinary action may follow.

The testimony from Principal Shante Jones and Assistant Principal Paulette Bailey concluded that Respondent either did not adhere to, or comply with, the directives set forth in the memos sent by Principal Jones to Respondent. Respondent either denied failing to perform the directives or offered explanations as to why she did not or need not comply.

At hearing, Respondent offered an exhibit (R #8). This exhibit consists of two memos she said had been sent to Principal Jones on December 2, 2014 in response to the December 1, 2014 memos. Petitioner objected to the document pointing to the testimony of Principal Jones that she had never seen the memo. Petitioner also contends that the document was not properly produced pursuant to N.J.S.A. 18A:6-17. The first memo is entitled "Complied with PLC Committee Directive" and states:

> Thursday 11/20/14, during my Professional Learning Committee 8:00-8:30 morning meeting, I was called to the main office by Ms. Jones several times over the intercom. Upon arriving at the office with my JCEA representative Ms. Jones told me to choose another PLC committee. This took place in the presence of secretaries, staff and whoever else was present. Unfortunately public disclosing staff members' matters in the main office is common practice for Ms. Jones that is why I brought the Senior JCEA Representative Lisa Fantacone to accompany me to the office.

I asked Ms. Jones if we could we speak in private and she agreed. However, as I (*Mrs. Rhodes*) and Ms. Fantacone left the main office, Ms. Jones followed behind us stridently questioning me about a PLC committee. After entering the hallway Ms. Fantacone and I stopped walking and waited for Ms. Jones to escort us to a private area such as the conference room to conduct the meeting, instead Ms. Jones stationed us in the hall and continued to discuss my personal issue without regard for my right to privacy.

I'll have you know, I submitted the original PLC committee document and don't understand why my name wasn't added to the original roster of the Health and Wellness Committee I chose.

In addition it is important that you know I and Lisa Fantacone are the JCEA building directors for PS 34. This may be why my name was not added to the roster. Lisa Fantacone and I as JCEA union representatives are harassed together. We are often called to the office for hostile confrontations one after the other and receive written reprimands on the same day. Ms. Jones regularly exhibits anti-union behavior.

The morning of 11/20/14, I informed Ms. Jones that while she was not present the morning of 11/13/14 Ms. Bailey made an announcement over the intercom stating teachers whose names were not on the roster of a committee were to choose a committee to report to and their names would be added to the roster of that committee. In response to this information Ms. Jones retorted, "I'm the principal not Mrs. Bailey!" At that juncture I expressed to Ms. Jones I feel discriminated against.

Then I and my JCEA Representative returned to the Health and Wellness Committee. Ms. Jones vociferously commented as we were a distance from the main office but still in the corridor, "You can go today but you won't be on committee!" I didn't respond to the statement.

In conclusion I am being harassed for being a union representative and for speaking at the board meetings and standing up for fellow members, students and myself. At this time I will be pursuing legal action against Ms. Shante Jones.

A second memo from Respondent also dated December 2, 2014 is entitled "Complied" and states the following:

November 13th I received a memo in writing to follow through with completing the following tasks by a specific time and date

1. Emergency contact form: I don't park in the lot.
2. School Committee Selections Form: I submitted a hard copy.
3. Staff needs survey: I submitted a hard copy
4. SGO's: I gave Ms. Jones a hard copy when she came to my classroom
5. Bulletin Board – My bulletin board has a 3 part objective. Rubric, CCCs, graded work and constructive student feedback. However, every student's work is not on the bulletin board; because I have been absent due to Ms. Jones perpetual anti-union harassment and professional development workshops.

Absent

- September 25, 2014
- September 30, 2014
- October 29, 2014
- November 3. 2014
- November 5, 2014
- November 10, 2014
- November 14, 2014
- November 17, 2014

Workshop

- October 22, 2014
- October 27, 2014
- October 30, 2014
- November 21, 2014

Not counting the 2 half days, 7 days the district was closed, quarterly assessments, Moreover, November 20, 2014 was a Thursday

In conjunction with the absences; students academically perform at different levels and therefore work at different paces. Paramount to Ms. Jones' actions which stem from her anti-union partialities, I am bound by the federal government via No Child Left Behind (NCLB), Jersey City Public School district and curriculum to differentiate instruction.

In addition, prior to this written notice Ms. Jones and I spoke privately November 18, 2014 in reference to the bulletin board. I

explained to Ms. Jones I have one working computer in my class (*Which was out of commission for several weeks*) and my goal is to have students hand written drafts and typed published essays displayed on the bulletin board, as the, work currently presented on the bulletin board. Ms. Jones acknowledged my dilemma and granted me extra time to put my class' essays up.

However, she reneged on the agreement and accused me of insubordination. It is evident at this point Ms. Jones is either seeking tenure charges or means to withhold my increment.

This isn't Ms. Jones first time falsely accusing me of not handing in work such as alleging on two different occasions that Assistant Principal Mrs. Paulette Bailey and Regional Achievement Center administrator (RAC) Cathy Coyle told her I didn't have lesson plans. In both cases this is a blatant lie.

In conclusion I am being harassed for being a union representative and for speaking at the board meetings and standing up for fellow members, students and myself. At this time I will be pursuing legal action against Ms. Shante Jones.

I credit the testimony of Principal Jones and Assistant Principal Bailey that as of December 10, 2014, none of the documents or tasks that they requested had been fulfilled. The record clearly reflects that the bulletin board was not completed, that mandated personnel forms were not submitted and that Respondent resisted Principal Jones' direction not to join a committee that she did not want Respondent to join. Respondent contends that there were reasonable explanations for not doing what she was requested to do. Even if this were the case, Respondent was under an obligation to do what she was directed and then, if she deemed it appropriate, to challenge the directives in the grievance procedure. Accordingly, Petitioner has established a proper basis to sustain Charge I, Counts 18, 19, 20 and 21.

The Petitioner in Charge I, Count 13 alleges that:

> On or about September 22, 2014, Respondent notified the District that she would not comply with an administrative directive, given on September 9, 2014, to complete final grades and averages for the 2013-2014 report cards for Respondent's former sixth grade Language Arts classes, which Respondent had failed to complete in the prior year due to a leave of absence; Respondent further added, defiantly, that the Principal's directive was "harassing and of no value to anyone."

In support of this charge, the Petitioner offered exhibits and the testimony of Principal Shante Jones. She referred to the following September 9, 2014 document:

> As per our conversation on Thursday, September 4, 2014, Mr. Thomas Purwin (Director of Educational Technology) has informed me at the end of the day yesterday that you now have access for last school year's (2013-2014) report cards for your former sixth grade Language Arts classes (Room #s 201, 210, & 211) beginning today, Tuesday, September 9, 2014. This access will allow you to complete the Language Arts grades for all three homerooms that were unable to be completed due to your Leave of Absence from June 10, 2014 to June 26, 2014. All Language Arts final grades and averages for the sixth grade students of 2013-2014 should be completed and ready to be reviewed/printed by Wednesday, September 17, 2014 by 9am. Please confirm via email by Wednesday, September 10, 2014 that your access for the report cards is working for all three homerooms and let me know if you have any questions. Thank you for your cooperation!

Respondent went on a leave of absence from her sixth grade class on June 1, 2014. The leave ended on June 26, 2014, after the instructional school year had ended. Respondent gave no quarterly or final grades to her students. The grades were needed for the fourth marking period and for final grades for the year. When asked about the grades, Respondent maintained that she was on

leave and had left the grade book on her desk. According to Principal Shante Jones, Respondent's grades were needed in order to forward records to other schools. After not receiving a response from Respondent, the above written communication was made concerning the issue to Respondent on September 9, 2014. Respondent testified that she was on a medical leave at the end of the school year and told Principal Shante Jones that she left the grade book and lesson plans on her desk. She said she heard nothing more until September. When she received the September 9 letter from Principal Shante Jones, she deferred the letter to her attorney who, on September 22, 2014 offered the following response:

> I am attaching a copy of correspondence received on September 9, 2014 from Ms. Shante Jones, the Principal of Public School No. 34. As you know, I represent the JCEA and I respond to you as Ms. Rhodes' attorney.
>
> As the enclosed indicates, my client was on a leave of absence from June 1 through June 26, 2014. Obviously, she did not give final grades and all the material in which she can formulate these grades, is no longer available to her. Ms. Rhodes left her grade books, lesson plans and the like in her room, along with personal belongings and she has not recovered these items, to date.
>
> Accordingly, it is impossible for her to meet the request of Ms. Jones. Additionally, it would appear to me that since all the students have been promoted, the request is harassing and of no value to anyone.

Respondent testified that she was never disciplined over the incident, that the District formulated grades for the students and that none of the students were adversely affected by not receiving a timely grade.

I find that the Petitioner has proven that this incident warrants disciplinary action. The incident reflects that Respondent exercised extremely poor professional judgment on a matter of substantial educational impact, a lack of accountability and an unresponsive attitude towards school management and her students. While Respondent clearly had a right to seek Association advice, she gave no notice of same to Principal Jones who had a right to a more timely response to her inquiry. Moreover, the record does not reflect that Respondent was precluded in any way from completing and submitting student grades or, at minimum, engaging in professional communication directly with her principal to provide input concerning grading for instructional time while she actively worked prior to going on leave.

Charge 1, Count 14 alleges that:

> On or about October 15, 2014, Respondent refused to comply with the District Policy regarding maintaining a lesson plan book when, during a walkthrough of Respondent's sixth grade language arts classroom by Catherine V. Coyle, Regional Achievement Center ("RAC") Coordinator, Respondent stated to Ms. Coyle that "she does not write plans."

Testimony in support of this was offered by Principal Shante Jones, Paulette Bailey, Assistant Principal, PS #34 and Catherine Coyle, Director of Elementary Education and Regional Achievement Center ("RAC") for the New Jersey Department of Education. This issue arose on October 15, 2014. On this date, a walkthrough of Respondent's language arts classroom was conducted by Ms. Coyle. Ms. Coyle testified that she conducts such walkthroughs in all of the

18 schools in Jersey City. When she arrived in the classroom, she observed Respondent at a student desk. After not seeing a plan book, Ms. Coyle testified that she asked Respondent where it was and Respondent said "I don't do plans." Ms. Coyle testified that she was taken aback at the response. She further testified that there was "nothing going on with the students" and that Respondent looked at her and rudely asked "who are you?" Assistant Principal Bailey testified that she heard Respondent say to Ms. Coyle "I don't do lesson plans." She modified her response on cross-examination to recalling that the Respondent said "I don't have lesson plans."

On January 13, 2015, Ms. Coyle sent an email to Chief Academic Officer Jason Bing stating her recollections of her walkthrough.

> I am sending this email in reference to my experience in a classroom visited at #34 School on October 15, 2014 during a Walkthrough. Michelle Rhodes was the teacher in the sixth grade language arts classroom I am referencing.
>
> The teacher, Michelle Rhodes was seated at a student's desk and was whiting out some printing/writing/typed information on papers she had on the desk where she was seated. I approached to ask where I might locate her plan book and she asked, "Who am I speaking with"? I identified myself. Michelle Rhodes shared with me that she does not write plans. She remained seated and continued to white out printing/writing/typed information on the papers she had. Student work was not displayed around the room and student work folders and/or portfolios lacked student work. Students did not understand the assignment.
>
> I am extremely concerned with what I observed. I have shared this concern with the Division Director and the principal. It is apparent that Michelle Rhodes refuses to comply with the District Policy regarding maintaining a plan book.

Respondent denied that she failed to produce lesson plans when asked. She acknowledged asking Ms. Coyle who she was but denied doing so in a rude manner. Respondent points out that Ms. Coyle's memo occurred three months after the incident, that she was not disciplined and that an interim evaluation after the incident did not even refer to it.

I credit the testimony of Ms. Coyle that Respondent did not produce a lesson plan when asked. It is of little significance as to whether the response was "I don't do lesson plans" or "I do not have any lesson plans." The simple fact is that Board policy requires lesson plans and the Respondent did not produce a plan book when requested to do so. It is entirely logical that Ms. Coyle would, in her district-wide capacity, ask to see lesson plans during a walkthrough. I find no basis to conclude that she did not ask for the plans or that Respondent provided offered any other explanation that justified that the plans could not be produced. I also credit Assistant Principal Bailey's testimony that she heard Respondent's answer to Ms. Coyle's question. Respondent offers argument that had Petitioner believed this incident was of significance, reference to the incident could have been made closer to the time of the incident or in the evaluation of Respondent's performance after the incident. The arguments have been considered but do not serve to defend Respondent's failure to adhere to Board policy requiring lesson plans nor can they serve as a waiver of petitioner's right to refer to this incident in support of tenure charges relating to Respondent's overall conduct. Accordingly, I sustain Charge I, Count 14.

The Petitioner has proven, by a preponderance of the evidence, that Respondent engaged in conduct supporting Charge 1, Counts 11, 12, 13, 14, 17, 18, 19, 20 and 21; Charge V, Counts 4 and 5, Charge IX, Count 10 and Charge III, Counts 3 and 4. As such, Petitioner has established that Respondent engaged in unbecoming conduct and/or other just cause for dismissal. The record developed at hearings includes additional Charges and Counts alleging that there was additional conduct by Respondent that supports her removal from the District. After full review of these charges, I find that there is insufficient evidence to support these charges notwithstanding the presence of conduct that could support administrative action in the form of counseling of a non-disciplinary nature. All charges not sustained are dismissed.

Having found that Petitioner has, by a preponderance of the evidence, established a proper basis for disciplinary action, I next turn to the issue of evidence, penalty and whether the Petitioner has proven cause for removal.

In respect to penalty, I first observe that the Respondent previously received increment withholdings in two consecutive years for Conduct Unbecoming and Performance/Conduct Unbecoming. Short of filing tenure charges, these increment withholdings are the most severe penalty that a Board can impose. The increment withholdings served notice on the Respondent that future conduct of similar nature could yield additional disciplinary action at the

same or higher level. Petitioner has made a reasonable case that the incident involving Ms. Hudson could, standing alone, support the penalty of termination for conduct unbecoming. Petitioner has established that Respondent engaged in a threat of physical violence towards a security guard but the additional charges that Petitioner has sustained in addition to the one concerning Ms. Hudson renders such determination unnecessary.

The Petitioner has established that Respondent has engaged in a totality of conduct that represents a pattern inconsistent with the conduct, judgments and temperament required of a teacher within the educational organization and its supervisory structure. The individual acts of alleged misconduct have been reviewed and already analyzed in detail, including those that have been dismissed. Collectively, the charges that have been sustained amount to conduct unbecoming a teacher and represent a just cause basis for Respondent's dismissal pursuant to N.J.S.A. 18A:6-10.

Respondent has forcefully argued, among other things, that the incidents either did not occur, did not rise to the level of removal or that Respondent was either improperly noticed of conduct that warranted disciplinary action. On this latter point Respondent asserts or that Petitioner has, in essence, waived its right to file tenure charges due to a failure to discipline Respondent in timely fashion. I do not find these arguments persuasive. The prior disciplinary actions that led to the increment withholdings, not relitigated here, establish the existence of prior

conduct that amounted to conduct unbecoming or poor performance. Two separate and consecutive increment withholdings provided ample notice and warning to Respondent of potential job jeopardy. The Petitioner has also introduced a volume of counselings and reprimands subsequent to the increment withholdings that establish that Respondent has not responded with conduct that corrected her prior behavior that formed the basis for the previous disciplinary actions. I have also considered Respondent's contention that she may have been the recipient of harsh or disparate treatment due to the attitude of Principal Shante Jones towards her as an individual or as a teacher. I cannot draw any such inference based upon the record evidence and also due to evidence that several administrators and peers have interacted with Respondent and whose testimony reflects similar concerns to those expressed by Principal Shante Jones. It is also significant that Respondent worked under a different Principal and different administrators during the times that her increments were withheld in the past.

Accordingly, and based upon all of the above, I conclude that Petitioner has sustained its burden to prove that it had just cause for the dismissal of Michelle Rhodes.

AWARD

The Jersey City Board of Education had just cause to dismiss Michelle Rhodes from her tenured teaching position for conduct unbecoming pursuant to N.J.S.A. 18A:6-10.

Dated: December 28, 2015
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 28th day of December, 2015, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.