STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Ten	ure Dismissal between:					
CAROL ZEPRALKA, Respondent,						
-AND	AWARD AND OPINION					
GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION						
Docket No. 162-7/15						
BEFORE:	Ernest Weiss, Arbitrator					
APPEARANCES:	For the Respondent:	Ned P. Rogovoy, Esq.				
	For the School District:	Louis J. Greco, Esq.				

Issue:

Did the Greater Egg Harbor Regional High School District Board of Education meet its burden of proof to justify the tenure termination of Respondent, and if not, what shall be the remedy?

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of N.J.S.A. 18A:6-16 as amended by P.L. 2012, c.26, on August 19, 2015 I conducted an arbitration hearing at the offices of the Greater Egg Harbor Regional Board of Education, 1824 Dr. Dennis Foreman Drive, Mays Landing, NJ, at which time the parties were offered a full opportunity to present evidence and argument in support of their respective positions. At that time, both the Respondent and the School District submitted exhibits that were admitted, along with joint exhibits. Post hearing briefs were submitted by counsel and considered herein.

STATEMENT OF FACTS

Joint Ex 1, the case history record, was submitted and marked for identification and taken into evidence. Both sides waived making opening statements.

The Greater Egg Harbor Regional High School District ("the District") brought tenure charges based on "conduct unbecoming" against its employee, Carol Zepralka ("Zepralka" or "Respondent"). Prior to the hearing, it was established that the Respondent had been employed with the District during the 1995-96 school year, had worked since 2000 as a computer operator/secretary and continued in that role in the 2014-15 school year. On March 4, 2015, Zepralka consumed alcohol during school hours in the work place, when students were present. The District chose to seek termination rather than the more usual practice when a long serving employee has an unblemished record, citing its zero-tolerance policy and its concern over the potential harm to "young and impressionable children (who

were <u>high school students</u> in this case – emphasis mine) in the public school setting." The employee had daily contact with the students and parents in the course of tracking student attendance, which was part of her duty.

It is undisputed testimony that the Respondent voluntarily entered an inpatient employee assistance program on March 29, 2015, continuing for eighty days and was discharged by the facility's Medical Director (see Ex. R-1) and on June 22, 2015, was cleared to return to work without restriction, and determined fit for duty. The Superintendent did not have first hand knowledge of the March 4, 2015 incident and acknowledged that this was the Respondent's only incident of misconduct in the workplace.

SUMMARY OF TESTIMONY

The District called John J. Keenan ("Keenan"), the District Superintendent, to testify. He testified that he had been employed as the District Superintendent since July 1, 2014 and had been a school district superintendent for the previous five years elsewhere in New Jersey, and had taught for nine years, and had been an educator for twenty-eight years, all those roles having certificates issued by the State of New Jersey.

Keenan testified that he first met Zepralka at the beginning of July 2014 and stated that on March 15, 2015, Dr. Gatto, (the Principal of the Greater Egg Harbor Regional High School) was advised by an assistant principal that there was a strong smell of alcohol coming from the attendance office, and that she was concerned that the Respondent was believed to be under the influence of alcohol during school hours on March 14, 2015. Ultimately it was documented that there was a strong odor of alcohol coming from the attendance office and the Respondent was the only person using that office. Following several procedural steps, the Respondent

was interviewed and the outcome of that investigative interview was reported to Keenan, who testified that he reviewed everything that had occurred to that point, including Zepralka's personnel file, which included her prior performance evaluations.

Keenan testified that after reviewing all the evidence, he came to the decision that he would recommend tenure termination to the Board of Education, which in turn reviewed, authorized and certified that his recommendation be followed. There followed a delay in the proceedings due to a requested and approved leave of absence sought by the Respondent for the purpose of entering a rehab facility. Further, he testified with respect to the tenure termination, that the hearing in question proceeded upon completion of the leave of absence. Keenan explained that he pressed for tenure termination because of his concern and responsibility for the safety and security of the District, together with the students and staff. He stated that "zero tolerance is self explanatory." He went on to explain that alcohol is an ongoing issue and concern and that not enforcing the Policy would amount to enabling such behavior in his part. He noted that the Respondent's office is in the main lobby of the high school and is the first office one sees upon entering the school.

On cross-examination, Respondent's attorney began by identifying Exhibit R-1, the letter of clearance of the Respondent by the rehabilitation facility, and offering it into evidence. Keenan acknowledged having seen the letter previously and that he understands that the Respondent has a "medical condition." Keenan expressed concern about future failures in job performance by reason of this condition. He acknowledged that the statute gave him the right to require that the Respondent be examined for a fitness for duty determination by an independent medical examination which must

be complied with under the statutory scheme, but that neither he nor the District made such a request. Thus, the only medical determination of the Respondent's fitness for duty was from the Medical Director of the rehabilitation facility.

He testified that he reviewed the Respondent's personnel file as part of the process is determining the discipline for so serous a charge with its potential consequences. Keenan stated that absent this incident there was nothing in the record that indicated any unfitness for duty. He testified that there may have been individual items requiring improvement, but overall the record was satisfactory, if Average. Average is one of five categories of evaluation, being the middle category and Superior being the top.

Respondent's counsel then requested Keenan to review Exhibit R-2, which was Zepralka's entire record of performance evaluations, and it was marked and entered into evidence. Keenan had reviewed this performance record prior to making his recommendation, including the fact that the evaluators were her different supervisors over the course of her employment.

Since the fact of the Respondent's having imbibed alcohol in school during school hours was the "primary," reason for the recommended tenure termination, Respondent's counsel pressed Kennan for any "secondary" reasons. There was a difficult series of exchanges around that question, the only answer that the Arbitrator received was that Keenan had many years of experience, including experience with substance abuse, which should not be discounted.

Zepralka's counsel then inquired as to Keenan's use of the phrase "... under the influence of alcohol," and Keenan acknowledged that there was no record or indication of behavior that appeared to be "under the influence of alcohol," and that he had not observed the Respondent on March 4, 2015.

He stated that he was aware of and had resources readily available with respect to the State's definition of "under the influence," as well as available testing for it.

On redirect, the District's counsel elicited from Keenan that the medical clearance letter was neither directed to the school nor included any knowledge that the Respondent was a public school employee with close contact with students. The letter in question was addressed to the Human Resources Department at the school and somehow found its way to the payroll supervisor.

On re-cross, it was determined that the "letter" had been in the District's possession prior to its determination to pursue tenure termination.

The District closed its case in chief.

Zepralka's attorney offered for identification an amendment to R-2, an original copy of the Respondent's personnel evaluation which has not been part of the original submission of R-2. It was marked for identification as R2B. With that, the Respondent's counsel closed her case.

The parties agreed to submit letter briefs by close of business of August 31, 2015 in order to meet the parties' separate tight timeframe needs.

DISCUSSION AND OPINION

This case is an appeal of a certification and subsequent disciplinary action of termination sought by the Respondent.

Both parties agree that prior to this arbitration full due process was observed in this case. I am reviewing the case based on the credibility of the witness before me, together with the exhibits and documents presented.

The District's sole witness, Superintendent Keenan, has been the Districts Superintendent for about a year, but brings twenty-eight years of experience as a teacher, principal and superintendent

He had, however, no first hand knowledge of the incident that occurred on March 4, 2015, and relied on the report of his subordinate principal, Dr. Gatto, on whom he had no reason not to rely. He was familiar with the Respondent, who he met from time to time since her office was the first that one encountered upon entering the high school.

He acknowledged that this was the Respondent's only incident of misconduct in the workplace. He testified to having reviewed the Respondent's personnel record as part of his normal practice before reaching any decision of such magnitude. Of the five categories used for performance evaluation over the twenty-plus years of Zepralka's employment, Keenan concluded that her performance was average or slightly above average, with areas in need of improvement. In fact, on cross- examination, he acknowledged that there were years where most or all of her evaluations, performed by her various supervisors, were superior. He further acknowledged that the District had in its possession the medical clearance letter, issued after 80 days of voluntary inpatient rehabilitation, stating that she was fit for duty without restriction. Finally, he testified that the primary reason for his and the Board's decision to pursue tenure termination was his concern for and his responsibility for the safety of his students and staff, and indicated that to not enforce the zero tolerance policy would be enabling unacceptable behavior on his and the Board's part.

In the letter brief submitted by the Respondent's attorney, several cases were cited to show how public employers should deal with an employee who can be considered an alcoholic (a medical condition). In

these cases, where the employees had either been cross-addicted and/or had multiple instances of being under the influence, were given multiple chances to return to work following a successful rehabilitation program.

As a condition for continued employment, the employer can monitor the employee's performance closely and may require random testing to insure compliance.

The conclusion of Respondent's counsel is that in appropriate circumstances, as in this case, the courts would favor multiple chances for an employee to rehabilitate his/herself and return to work subject to employer monitoring.

Given her twenty years of otherwise unblemished behavior, I was not persuaded by Superintendent Keenan's testimony regarding the possibility of repeated future behavior. There was no showing that her rehabilitated status would not hold under a last chance agreement.

I have thoroughly considered Superintendent Keenan's testimony and the arguments of the parties herein and also I considered the evidence in the Record. Having thoroughly considered all the evidence, including the arguments and allegations of both parties, I have determined for the above stated reasons that the District has not met its burden of proof to justify the tenure termination of the Respondent after twenty years of otherwise unblemished service.

I have included here a copy of a "last chance agreement," provided by Respondent's Counsel, with minimal modification, and directed herein as binding upon the parties and mutually executed the "last chance agreement" upon receipt of the instant Arbitration award.

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

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In the Matter of the Tenure Dismissal between:

CAROL ZEPRALKA, Respondent,

-AND

AWARD

GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Docket No. 162-7/15

The undersigned arbitrator, having been designated in accordance with N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26, entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

The Tenure Termination is not sustained. The parties shall enter into the "Last Chance Agreement" as annexed hereto. The Arbitrator shall retain jurisdiction for the sole purpose in the event that there are any issues arising out of this decision.

ERNEST WEISS, ARBITRATOR

STATE OF NEW JERSEY)

) ss:

COUNTY OF SOMERSET)

On this 4TH day of September, 2015, before me personally came and appeared Ernest Weiss, known to me to be the Hold will of New 11317 and who executed the foregoing have comminstrument and be acknowledged that he executed the same.

LAST CHANCE AGREEMENT

THIS AGREEMENT made and entered into the date last written below, by and between GREATER HARBOR REGIONAL HIGH SCHOOL DISTREICT BOARD OF EDUCATION (the "Employer"), a body politic of the State of New Jersey, having its principal office at 1824 Dr. Dennis Foreman Drive, Mays Landing, New Jersey 08330 and CAROL ZEPRALKA (the "Employee"), having an address of 8 Franklin Drive, Somers Point, New Jersey 08244.

WITNESSETH:

WHERAS, the Board is the governing body of the GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTREICT BOARD OF EDUCATION; and

WHEREAS, the Employee is a computer operator/secretary and has been employed by the Board in different positions since on or about the 1995-1996 school year or for approximately twenty years; and

WHEREAS, on or about March 4, 2015, the Employee, a tenured secretarial staff employee, consumed some alcohol during school hours and while on school premises; and

WHEREAS, as a result of her behavioral health medical condition she became enrolled in a full time treatment program at the Recovery Institute of South Florida, with her admission being on March 29, 2015 and her fit for duty discharge with no restrictions occurring on June 22, 2015; and

WHEREAS, the District by and through their Board of Education certified Tenure Charges based on unbecoming conduct pursuant to N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6A:3-51 et seq.; and

WHEREAS an Arbitration took place on August 19, 2015 at the Greater Egg Harbor Regional District Offices.

NOW, THEREFORE, the parties agree to the terms of this Last Chance Agreement as follows:

1. Employee agrees that she shall never again imbibe in the consumption of alcohol during school hours or on school property, and at any and all times any testing, as set forth in subparagraph 2 below cannot yield over a .02% blood alcohol content (BAC) or there will be immediate unilateral termination under this agreement, with the only due process

right of the Employee if a test should come back over a .02% BAC is the propriety of the test.

- 2. Employer shall be entitled under minimum probable cause to ask the Employee to submit an alcohol test either by blood or urine sample at its cost. Again, if the Employer requests the Employee to take a blood alcohol level test and it yields more than .02% BAC, or if the Employee refuses the request, there shall be immediate termination without bringing tenure charges and subject only to the Employee's right to see that the test was properly performed.
- 3. In this case the Arbitrator has decided the tenure charges and orders the District and the Respondent to enter into this last chance agreement, both sides shall sign this Last Chance Agreement and be bound by the language herein.
- 4. So long as the Employee complies with the terms herein, she shall return to her regular status and regular job with all benefits and emoluments.

CAROL ZEPRALKA, Employee Dated:
GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION
By: John Keenan, Superintendent Dated: