

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Case No: 1-1/17

In the Matter of the TENURE Hearing between the

The SOUTH HACKENSACK BOARD OF EDUCATION,

PETITIONER

and

CHRISTOPHER MASULLO,

RESPONDENT

BEFORE: Ira Cure, Esq.
Arbitrator

APPEARANCES

For the Petitioner School District:
Vittorio S. LaPira, Esq.
Fogarty & Hara, Esqs.

For the Respondent:
Ty Hyderally, Esq.
Sally A. Sattan, Esq.
Hyderally & Associates, P.C.

OPINION and AWARD

Pursuant to *N.J.S.A., 18A:6-16*, as amended by *P.L. 2012, c. 26* and *P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the South Hackensack Board of Education on behalf of the South Hackensack Public School District ("District") against Christopher Masullo ("Masullo") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on January 3, 2017. An answer was filed by Mr. Masullo with the DOE on January 18, 2017. I was

appointed to hear this dispute on January 30, 2017. I conducted a hearing at Hillside Square, 8 Hillside Avenue, Montclair, New Jersey on March 6, and March 8, 2017.

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties submitted briefs and the record was closed as of March 31, 2017. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Vittorio S. LaPira, of the firm of Fogarty & Hara, Esqs. represented the District. Ty Hyderally, Esq. and Sally A. Sattan, Esq. represented Mr. Masullo.

THE ISSUE:

The issue for arbitral determination is:

Has the District established that Mr. Masullo engaged in misconduct alleged in the charge brought against him? If so what shall be the penalty?

THE CHARGE¹

Christopher J. Masullo, a tenured teaching staff member in the employ of the South Hackensack Board of Education, engaged in conduct unbecoming a teaching staff member when he disconnected a loudspeaker in his Computer Lab classroom without permission, thus jeopardizing the health and safety of students and staff, since he could not hear emergency notifications (such as a school security drill or *actual* bomb threat, active shooter situation, etc.), and such action alone (and certainly when combined with Mr. Masullo's attempt to cover up his actions and his prior incidents of misconduct), *justifies dismissal from his teaching position.*

(Emphasis in the original).

¹ There are numerous specifications to the Charge which will not be set forth herein.

BACKGROUND

A. Mr. Masullo's History in the District

Mr. Masullo, a teacher for twenty years, was hired by the District in 2007. Mr. Masullo is a sixth-grade math teacher and is a computer teacher for students in grades Pre-K through 8. He teaches at the District's Memorial School.

Throughout most of Mr. Masullo's employment in the District, Dr. William DeFabiis ("DeFabiis") served as both District Superintendent of Schools and Principal of Memorial School. Dr. DeFabiis retired in June 2013, and was succeeded by the present District Superintendent and Principal, Dr. Gregorio Maceri.

Dr. DeFabiis testified that Mr. Masullo was an excellent teacher, and an invaluable staff member who took initiative and worked with staff members to solve problems with electronic technology. As Mr. Masullo's supervisor, Dr. DeFabiis prepared observation reports (Respondent Exs. 1, 2, 3 and 6), and performance reports concerning Mr. Masullo. (Respondent Exs. 4 and 5). These observation reports and performance reports were uniformly positive. Each of the observation reports concluded with the phrase "Keep up the good work!" The performance reports had three possible ratings for 38 separate criteria. These ratings were: satisfactory, needs improvement and unsatisfactory. In both 2013 and 2012, Dr. DeFabiis rated Mr. Masullo as satisfactory in each of the 38 criteria. In both years, Dr. DeFabiis recommended that Mr. Masullo receive a salary increment. (Respondent Exs. 4 and 5).

Dr. DeFabiis' testimony was not uniformly positive regarding Mr. Masullo's performance. Dr. DeFabiis testified that on two separate occasions he had a strict talk with Mr. Masullo about the teacher's interactions with other staff members².

On May 10, 2016, Dr. Maceri prepared a Teacher Summary Rating form for Mr. Masullo. That form contains twenty-seven different criteria concerning teacher performance. Dr. Maceri rated Mr. Masullo as proficient in one category, accomplished in sixteen categories, and distinguished in ten categories. There were no comments in the section entitled "Recommended Actions for Improvement." The final comment on the document stated in pertinent part: "Mr. Masullo is encouraged to continue his approach of locating and implementing new and innovative methods of improving student achievement." (Respondents Ex. 9).

B. Mr. Masullo's Classroom and the Loudspeaker

Because Mr. Masullo is a computer teacher for the District's Pre-K to 8th grade students, his primary classroom is the Computer Lab. The Computer Lab is in a glass enclosed room that adjoins the Memorial School Library. There are low ceilings in the Computer Lab, and there is no sound buffering or dampening system in the room.

Each classroom and office in the Memorial School has a loudspeaker embedded in the ceiling of the room. The loudspeaker is used to make school announcements, and to announce security drills including "bomb drills" and "active shooter drills." (There is a separate alarm system for fire drills). Security drills are announced in "plain language" over the loudspeaker. The person making the announcement would state "active shooter" or "bomb threat³." In addition, during the school day, if a visitor incorrectly rings the night

² One such discussion occurred in 2008.

³ Pursuant to Department of Education guidelines, the individuals making the announcement rotate.

bell, the sound of the bell is transmitted through the loudspeaker system into each classroom including the Computer Lab.

Mr. Masullo testified that, because of the configuration of the Computer Lab, sounds emanating from the loudspeaker are extremely loud and disruptive. Mr. Masullo testified that he had chronic ear infections, and that because of a surgical procedure in 2013 to get rid of fluid in his ears, he was very sensitive to sounds. (A medical record detailing Mr. Masullo's auditory problems was introduced as Respondent's Ex. 10).

Mr. Masullo also testified that some of his students were on the autism spectrum, and that they reacted poorly to noises from the loudspeaker. Mr. Masullo testified that it took time to calm his students down after hearing the jarring noises of the loudspeaker.

On March 21, 2013, Mr. Masullo sent an email to Dr. DeFabiis concerning the loudspeaker. The email stated in pertinent part: "Can we do anything about the volume of the ceiling speakers? The sound of the bells and such are deafening in the Library and Computer Lab." (Respondent Ex. 7).

Dr. DeFabiis did not remember receiving the email, but did remember speaking to Mr. Masullo about the noise in the Computer Lab. Dr. DeFabiis testified that he made some inquiries and determined that because there was no volume control on the speaker there was no way to adjust the volume in the Computer Lab. Mr. Masullo also complained to Head Custodian James Parisi ("Parisi") and to Custodian Carmine Barricella ("Barricella") about the excessive noise in the Computer Lab. Mr. Parisi testified that he would not disconnect the loudspeaker unless he was authorized to do so by Dr. DeFabiis.

After Dr. Maceri became District Superintendent and Principal a meeting was held in his office with Mr. Masullo and Jeff Badre ("Badre"), an information technology

consultant, to discuss certain computer contracts. Mr. Masullo testified that at the meeting he observed Mr. Parisi disconnect the loudspeaker in Dr. Maceri's office because it was too loud. Mr. Parisi admitted that he had disconnected the loudspeaker in Dr. Maceri's office, but he did not remember if Mr. Masullo observed him performing that task.

At some point in 2015, after Mr. Masullo learned that Mr. Parisi disconnected the loudspeaker in Dr. Maceri's office, Mr. Masullo unilaterally decided to disconnect the loudspeaker in the Computer Lab. Mr. Masullo claimed that he was still able to hear the monthly security alarms even after the loudspeaker was disconnected. Mr. Masullo also testified that he told Anne Turtoro ("Turtoro") the Library/Media Specialist and Gifted and Talented Teacher whose work area in the library adjoined the Computer Lab, and Mr. Barricella that he disconnected the loudspeaker. Both Ms. Turtoro and Mr. Barricella testified and denied knowing that Mr. Masullo had disconnected the loudspeaker⁴.

Ms. Turtoro testified that on two occasions in the Spring of 2015 and in September 2016 she alerted Mr. Masullo to an ongoing security drill. Ms. Turtoro testified that as she was leaving for these drills, she could see Mr. Masullo through the glass walls and that he did not seem to be preparing to take part in the security drills. Ms. Turtoro alerted Mr. Masullo to the drills, and Mr. Masullo and his classes took part in those drills without incident.

C. The Events of October 19, 2016 and the Aftermath

On October 19, 2016, Dr. Maceri initiated a security drill by announcing over the loudspeaker the phrase "bomb threat" three times. Except for Mr. Masullo's class, the entire building was evacuated and moved to staging areas adjacent to the school. Ms.

⁴ There is no indication that Mr. Masullo ever told Dr. Maceri that he disconnected the loudspeaker.

Turtoro heard the alarm but, because of the configuration of the library, she left with a student she was working with without observing that Mr. Masullo and his class remained in the Computer Lab⁵.

At the time of the drill, Mr. Masullo was working with Teacher Jessica Carroll's ("Carroll") third grade class. When Ms. Carroll noticed that her class had not come down for the drill, she alerted Dr. Maceri. After trying to determine if Mr. Masullo utilized a different staircase and was perhaps delayed, Dr. Maceri went into the building to look for Mr. Masullo. Fifteen minutes after the drill began, Dr. Maceri found Mr. Masullo teaching his class of nineteen students. When confronted by Dr. Maceri, Mr. Masullo said that he had not heard the drill. Dr. Maceri left to conclude the drill and arrange for the students to return to the building. Dr. Maceri then directed Mr. Parisi to check on the loudspeaker in the Computer Lab.

Teacher Assistant Gina Jiries ("Jiries") was working with Mr. Masullo at the time of the security drill. Ms. Jiries testified that she did not learn about the drill until Dr. Maceri came to the Computer Lab. Ms. Jiries testified that Dr. Maceri directed her to stay in the Computer Lab until the other students returned to the school. Ms. Jiries said some of the students were upset about missing the drill, and that she calmed them down. Ms. Jiries stated that Mr. Masullo asked her if she was going to escort the students to their next class. Ms. Jiries stated that, at that point, she told Mr. Masullo that she would be remaining in the Computer Lab as directed by Dr. Maceri. Ms. Jiries testified that she then observed Mr. Masullo leave the Computer Lab and return with a ladder. Mr. Masullo then placed the

⁵ The Library surrounds the Computer Lab in the form of a horseshoe, and if Ms. Turtoro was in a particular spot in the Library, she would not be able to see the Computer Lab or be able to determine if Mr. Masullo was preparing to take part in a drill.

ladder under the loudspeaker and Ms. Jiries observed Mr. Masullo remove a tile from the ceiling. Ms. Jiries testified that she was not sure what Mr. Masullo was doing on the ladder. When Ms. Turtoro returned to the Library, Ms. Jiries determined that the drill had concluded as such Ms. Jiries escorted her students to their next class. Later that day, Ms. Jiries escorted another class to the Computer Lab, and noticed that Mr. Masullo was on the ladder again.

Dr. Maceri informed Mr. Parisi that Mr. Masullo's class never heard the drill announcement. Dr. Maceri directed Mr. Parisi to correct the problem. When Mr. Parisi got to the Computer Lab accompanied by Dr. Maceri, the ladder left by Mr. Masullo was under the loudspeaker. Mr. Parisi climbed the ladder, removed the ceiling tile and discovered that the loudspeaker had been disconnected. Mr. Parisi informed Dr. Maceri that the loudspeaker had been disconnected, and Dr. Maceri directed Mr. Parisi to call the vendor to have it repaired.

Later, on October 19th, Mr. Masullo called Mr. Parisi's cell phone and informed Mr. Parisi that he reconnected the loudspeaker. Mr. Masullo called Mr. Parisi once more and asked if Mr. Parisi knew who disconnected the loudspeaker. On October 20, 2016, Mr. Masullo called Mr. Parisi and inquired about what was going on. Mr. Parisi testified that he told Mr. Masullo that, "some people" had seen Mr. Masullo on the ladder, and Mr. Parisi counseled Mr. Masullo to tell the truth to Dr. Maceri.

Also on October 20, 2016, Dr. Maceri made further inquiries concerning the events of the previous day and Mr. Masullo's failure to respond to the drill. Dr. Maceri spoke to Ms. Jiries and Ms. Turtoro. Dr. Maceri then convened a meeting attended by Mr. Masullo, South Hackensack Education Association ("Association") President Lori Murphy

("Murphy") and Association Vice-President Kelly Marella ("Marella")⁶. Dr. Maceri questioned Mr. Masullo about the disconnection of the loudspeaker. Mr. Masullo initially denied that he disconnected the loudspeaker, and suggested that he received permission from Dr. DeFabiis to disconnect the loudspeaker. Upon hearing this, Dr. Maceri said that he would call Dr. DeFabiis to confirm whether, Dr. DeFabiis gave Mr. Masullo permission to disconnect the loudspeaker. Mr. Masullo testified that he brought up Dr. DeFabiis only to indicate that Dr. DeFabiis was aware of the issue with the loudspeaker. Eventually, Mr. Masullo admitted that he did not have Dr. DeFabiis's permission to disconnect the loudspeaker. Mr. Masullo confessed that he had disconnected the loudspeaker.

At the conclusion of the meeting, Dr. Maceri demanded that Mr. Masullo resign and stated that if Mr. Masullo did not have tenure he would fire Mr. Masullo immediately. Mr. Masullo refused to resign. Dr. Maceri immediately suspended Mr. Masullo. On November 2, 2016, NJEA/Uniserv Field Representative Richard Lockke ("Lockke") met with Mr. Masullo, Ms. Murphy, Ms. Marella, and Dr. Maceri in an effort to convince Dr. Maceri to reinstate Mr. Masullo to his position. This effort was not successful.

Mr. Masullo testified that he understood the seriousness of his actions, and expressed a great deal of remorse. Mr. Masullo said he would never deliberately put his students at risk.

⁶ The meeting was transcribed by Elizabeth Schaefer the School Secretary.

POSITIONS OF THE PARTIES

A. The District's Position

The District vigorously argues that the only acceptable penalty for Mr. Masullo's actions is termination. In reviewing the record evidence, the District notes that "Mr. Masullo disconnected the loudspeaker in the Computer Lab without authorization from, or notification to, the school administration."

The District also contends that, once Mr. Masullo realized he missed the drill on October 19, 2016, he compounded his errors by trying to cover up his actions. The District posits that Mr. Masullo tried to have Ms. Jiries leave the Computer Lab so that he could reconnect the loudspeaker. In addition, the District maintains that when Mr. Parisi first climbed the ladder in the Computer Lab to determine what was wrong, Mr. Masullo could have admitted that he disconnected the loudspeaker, but Mr. Masullo said nothing. In addition, even though Dr. Maceri directed Mr. Parisi to reconnect the loudspeaker, Mr. Masullo took that task upon himself. The District contends that this is further evidence that Mr. Masullo hoped that no one would find out who disconnected the loudspeaker. The District maintains that Mr. Masullo panicked and tried to cover up his actions.

The District goes on to argue that at the October 20, 2016 meeting with Dr. Maceri, Mr. Masullo tried to deflect his guilt by initially asserting that Dr. DeFabiis was aware that he had disconnected the loudspeaker. The District contends that Mr. Masullo only admitted his guilt when Dr. Maceri threatened to call Dr. DeFabiis. The District portrays disconnecting the loudspeaker as being done in secret, without authorization and states that Mr. Masullo's actions endangered the lives of students and staff.

The District characterizes the testimony of Mr. Masullo's treating therapist and

social worker Dr. James Silvestri (“Silvestri”) as damning⁷. Dr. Silvestri testified that Mr. Masullo had a personality that liked to solve problems. The District characterized this personality trait as being consistent with Mr. Masullo’s decision to take matters into his own hands and to disconnect the loudspeaker.

The District also strenuously contends that, in the event of a real bomb threat or shooting incident, the lives of Mr. Masullo’s students would have been in jeopardy.

In applying the facts to the legal standards governing this proceeding, the District argues that termination is the only acceptable penalty. The District states that any teacher that puts students and staff members lives at risk does not deserve a second chance. The District concedes that there are not many cases on point but argues that:

Behavior rising to the level of unbecoming conduct ‘need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.’

(District Brief at 3, *quoting, In re Tenure Hearing of Motley*, No. EDU 7421-97 (Initial Decision May 5, 1999), *aff’d as modified*, No. 252-99 (Comm’r Aug. 4, 1999), *aff’d o.b.*, No. 38-99 (State Bd. Dec. 1, 1999) (slip op. at 15-16).

The District also notes that conduct unbecoming can embrace a wide range of conduct, and that unfitness for tenure may be shown by a single egregious incident. The District argues that a teacher “forfeits his/her protection of tenure when ‘by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected’.” (District Brief at 4, *quoting, In re Tenure Hearing of Bradley*, 1990

⁷ Dr. Silvestri has been treating Mr. Masullo for anxiety issues since 2008.

S.L.D. 790, 816 (Initial Decision), (internal cite omitted) *adopted*, 1990 S.L.D. 818 (Comm'r 1990), *aff'd as modified*, 1991 S.L.D. 2521 (State Bd. 1991).

The District argues that an award upholding Mr. Masullo's termination would be consistent with other cases. The District points to one case where a teacher, like Mr. Masullo, disconnected a loudspeaker. The teacher's termination was upheld by the Commissioner⁸. (District Brief at 38, *quoting, In re Tenure Hearing of Thomas*, No. EDU 05594-02 (Initial Decision August 14, 2002), *aff'd*, No. 361-02 (Comm'r Oct. 9, 2002). The District also notes that the Commissioner has upheld terminations of teachers for conduct unbecoming based on a single instance of egregious behavior; *see, e.g.* (District Brief at 39-40, *citing, In re Tenure Hearing of Chaki*, No. EDU 1529-11 (Initial Decision Oct. 24, 2011), *aff'd as modified*, No. 542-11 (Comm'r Dec. 12, 2011) (making derogatory remarks to a student; (District Brief at 43-42, *quoting, In re Tenure Hearing of Cooper* EDU 6550-00 (Initial Decision Feb. 2, 2001), *aff'd*, No. 104-01 (Comm'r March 22, 2001) (teacher terminated for telling student to kiss the teacher's "butt"). (District Brief at 43-44, *quoting, In re Tenure Hearing of O'Brien*, No. EDU 5600-11 (Initial Decision Oct. 11, 2011), *adopted*, No. 544-11 (Comm'r Oct. 28, 2011), *aff'd*, No. A-2452-11 (App. Div. Jan. 11, 2013) (teacher terminated for calling students criminals on Facebook page). The District also notes that an arbitrator upheld terminations for a single instance of conduct unbecoming; *see, e.g.* (District Brief at 44, *quoting, In re Tenure Hearing of Bringham*, No.236-8/12 (Nov. 30, 2012) (Gifford Arb.) (teacher terminated for streaking)).

The District argues that under well settled labor arbitration principles an employee

⁸ As will be discussed below, the teacher in question also wore earplugs and had a history of excessive absenteeism.

may be terminated for placing others at risk. Accordingly, the District asks that Mr. Masullo's termination be upheld.

B. Mr. Masullo's Position

Mr. Masullo contends that his actions did not have an "injurious effect" upon the school or its administration, and therefore his actions did not constitute "conduct unbecoming." Mr. Masullo notes that, under similar factual circumstances a school principal's license was suspended but not revoked. (Respondent's Brief at 3-4 citing, *In re Suspension of the Certificates of Steven Kramer*, No. A-4573-08T2, 2010 N.J. Super. Unpub. LEXIS 2588 (Super. Ct. App. Div., 2010)). In the *Kramer* case, the principal of a school had a malfunctioning fire alarm system that went off several times per month and disrupted the school. Without board approval, the principal switched the alarm to "test" which had the effect of disabling the alarm system's ability to alert the fire department. A fire occurred and because of changes to the alarm, notification to the fire department was delayed. Tenure charges were filed against the principal. The State Board of Examiners did not revoke the principal's license, but imposed a suspension of two and a half months.

Mr. Masullo contends that the holding in this case is instructive, and maintains that he acted reasonably to rectify a difficult situation. He asserts that the loudspeaker caused "pain, annoyance and disruption," and affected Mr. Masullo's ability to teach and, also had a deleterious impact on his students. Mr. Masullo notes that he had complained to Dr. DeFabiis and Dr. Maceri, and to the custodial staff. Mr. Masullo also justifies his actions because he has suffered auditory damage and the loudspeaker was making his hearing difficulties worse.

Mr. Masullo points to Dr. Silvestri's testimony which generally supports the

contention that Masullo lacked malicious intent, and that Mr. Masullo was trying to protect his students from the disruption caused by the loudspeaker.

Mr. Masullo notes that prior to October 19, 2016, he never previously missed a security drill, and that he believed that because there existed other loudspeakers were outside of the Computer Lab, he would have been alerted to the drill on October 19, 2016. Mr. Masullo states that previously Ms. Jiries had heard the drills and announcements. In addition, Mr. Masullo contends that Ms. Turtoro's testimony in which she stated that she had previously alerted Mr. Masullo to other security drills lacks credibility, and notes in this regard that prior to the October 19, 2016 incident, Ms. Turtoro never spoke about issues concerning the loudspeaker with either Mr. Masullo or school administrators. Mr. Masullo also contends that the announcement for the bomb drill lasted only a few seconds and that the record was unclear concerning who made the announcement.

Mr. Masullo points to the fact that he was generally regarded as a superior teacher who freely gave his time and money to help the Memorial School. Mr. Masullo notes that his record is devoid of any serious discipline. Mr. Masullo characterizes the events of October 19, 2016 as unique unfortunate occurrence and that there has never been any other instance where Mr. Masullo jeopardized the health and safety of students or staff. Mr. Masullo contends that the health and safety of his students was his paramount concern.

Regarding the events of October 19, 2016, Mr. Masullo denies that he was surreptitiously trying to hide the fact that he disconnected the loudspeaker. Mr. Masullo states that he admitted to Mr. Maceri and Mr. Parisi that he disconnected the loudspeaker. Mr. Masullo maintains that he never would have left the ladder out in plain sight if he had

been trying to hide the fact that the loudspeaker was disconnected. Mr. Masullo maintains that he never implied that Dr. DeFabiis gave him permission to disconnect the loudspeaker, and contends that he mentioned Dr. DeFabiis at the October 20, 2016 meeting to indicate that Dr. DeFabiis was aware of Mr. Masullo's complaints regarding the loudspeaker.

Mr. Masullo states that he has shown remorse for his actions. He also points to the testimony of Mr. Lockke, the NJEA/Uniserv representative, concerning the devastating impact that an adverse finding in this proceeding would have on Mr. Masullo's career. Mr. Masullo contends that an examination of his overall record should mitigate any penalty that might be imposed. (Respondent's Brief at 11-12 citing, *In re Tenure Hearing of Leslie Ann Ramos, School District of the City of Elizabeth, Union County*, DOE Docket No. 261-9/14 at 18 (Jan. 5, 2015); *In re Tenure Hearing of John Vingara, Somerset County Vocational Technical School District, Somerset County*, DOE Docket No. 121-4/16 at 56 (Jan. 17, 2017)).

Mr. Masullo notes that if the ultimate penalty is imposed there is a very good chance that his teaching license would be revoked, and that all of his training, including doctoral level courses in Instructional Technology, would be rendered useless.

Mr. Masullo also maintains that the penalty of discharge is too severe because he was not subjected to progressive discipline. Mr. Masullo concedes that on occasion a teacher's behavior may be so egregious that a single incident might justify the ultimate penalty of termination. However, he contends that the events of October 19, 2016 merited progressive discipline and not termination. (Respondent's Brief at 13 citing, *In re Tenure Hearing of Leonard Yarborough, State Operated School District of the City of Newark*,

Essex County, New Jersey, DOE Docket No. 259-9/15-12/14 at 15 (May 24, 2016)).

Finally, Mr. Masullo argues that, if his actions constitute conduct unbecoming, dismissal is not the appropriate remedy and that he should be reinstated and made whole for his loss in pay, seniority, benefits and emoluments. Mr. Masullo, conceded that his conduct may have constituted a lapse in judgment but he contends it should be analyzed as a single incident. Mr. Masullo contends that he has recognized his wrongdoing and expressed his remorse, and that this should have a bearing on any penalty that might be imposed (Respondent's Brief at 18 citing, *In re Tenure Hearing of Maryellen Lechelt, Edison Township Board of Education*, DOE Docket No. 360-12/14 at 84 (June 30, 2015)). Mr. Masullo cites to numerous cases where arbitrators and administrative law judges have reduced the penalties of teachers for conduct that is more egregious than Mr. Masullo's. (Respondent's Brief at 18-20 and the cites therein).

In the alternative, Mr. Masullo asks that his suspension be reduced to 120 days or less.

DISCUSSION

A. The Legal Standard

The Education Tenure Act governing teacher tenure provides in pertinent part:

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

N.J.S.A. 18a:6-10.

Tenure is a “statutory right that may not be forfeited or waived.” *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 77 (1982). Tenure is designed to protect employees from dismissal “for unfounded, flimsy or political reasons”. *Wright v. Bd. of Educ. Of E. Orange*, 99 N.J. 112, 118 quoting *Zimmerman v. Newark Bd. of Educ.*, 38 N.J. 65, 72 (1962). Although an employee’s lack of fitness may be “demonstrated by a series of incidents” it is well established that a single “flagrant” act may be sufficient to remove a tenured teacher from his or her position. *In re Tenure Hearing of Harriman*, No. EDU 3510-12 (Initial Decision Aug. 31, 2102), *adopted*, No. 408-12 (Comm’r Oct. 12, 2012) citing, *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (Sup. Ct. 1943), *aff’d*, 131 N.J.L. 326, 327 (E. and A. 1944).

In order to find that an employee engaged in conduct which merits removal, that

employee is “entitled to an evaluation of the conduct in terms of its relationship to the nature of the office itself, and in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question.” *Sch. Dist. Of Parsippany-Troy Hills v. Hess*, 97 N.J.A.R. 2D (EDU) 34, 45 (citations omitted). Charges of unbecoming conduct are determined on a “case-by-case basis.” *Santiago v. Bd. of Educ. Of Elizabeth*, No. EDU 7135-98 (Initial Decision Aug. 16, 2000) (slip op. at 4), *aff’d sub nom. In re Tenure Hearing of Santiago*, No. 330-00 (Comm’r Oct. 2, 200d), *aff’d o.b.*, No. 54-00 (State Bd. Mar 9, 2001).

In *In re Tenure Hearing of Fulcomer*, 93 N.J. Super. 404 (Super. Ct. App. Div. 1967), the Court established a number factors that should be considered when deciding whether a teacher should be dismissed for unbecoming conduct. Those factors include: 1) the nature and gravity of the offenses under all the circumstances involved; 2) the teacher’s attitude – i.e. whether the acts were premeditated, cruel, or done with intent to punish; 3) any evidence as to provocation, extenuation or aggravation. In *Fulcomer*, the Court recognized that there may be circumstances which should be considered which may mitigate any penalty to be imposed on a respondent teacher. These factors include: 1) the teacher’s ability, record and length of service⁹; 2) the teacher’s disciplinary record; and 3) the “impact of the penalty on the [teacher’s] career, including the difficulty which would confront him as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in the State.”

⁹ *Fulcomer* involved allegations of corporal punishment. The Court noted that the Respondent’s “teaching record was good and his teaching ability unquestioned. [The Respondent] had not been disciplined in any manner by the Board prior to the date of the incidents” in question.

B. The *Fulcomer* Factors Applied to Mr. Masullo

Although there is no case precisely on point, both the District and Mr. Masullo were able to locate cases where pedagogues tampered with alarm systems. The District relies in part on *In re Tenure Hearing of Thomas*, No. EDU 05594-02 (Initial Decision August 14, 2002), *aff'd*, No. 361-02 (Comm'r Oct. 9, 2002). In *Thomas*, the teacher in question not only disconnected the loudspeaker in her classroom endangering students, but on three separate occasions wore earplugs, on one occasion failed to follow proper procedures in a fire drill, was insubordinate, and was frequently absent. The administrative law judge sustained the tenure charges and dismissed the teacher.

On the other hand, Mr. Masullo relies on the case of *In re Suspension of the Certificates of Steven Kramer*, No. A-4573-08T2, 2010 N.J. Super. Unpub. LEXIS 2588 (Super. Ct. App. Div., 2010). As noted above, in *Kramer*, a school principal altered a fire alarm system which had malfunctioned and was disrupting the operation of a school. The alteration of the alarm prevented the fire department from learning that the alarm was triggered. Having analyzed the actions of the principal and having concluded that it constituted conduct unbecoming, the State Board of Examiners weighed those actions against the difficult circumstances that the principal faced, together with his long and distinguished career, and suspended the principal for sixty-nine days. The principal appealed his loss of back pay to the Appellate Division. The Court held that the Board of Examiners' decision was supported by substantial credible evidence and was neither arbitrary nor capricious.

A comparison of *Thomas, supra* and *Kramer, supra* supports the premise that tenure issues must be determined on a case-by-case basis. While a tenured pedagogue

may have engaged in unbecoming conduct, that conduct must be weighed against that pedagogue's career and record. In *Thomas*, the teacher in question was guilty of far more than merely disconnecting an alarm in her classroom. Her overall record revealed behavior which combined with the conduct in disconnecting the alarm, in the aggregate, were considered by the Commissioner and provided the basis for upholding her dismissal. In *Kramer* by contrast, the principal's overall record as an excellent employee limited his discipline to a sixty-nine-day suspension.

The lesson drawn from these cases is that the record must be analyzed to determine if there are enough mitigating factors to reduce the ultimate penalty of dismissal. In this proceeding, Mr. Masullo's conduct in disconnecting the loudspeaker in the Computer Lab constituted a grave offense which may have endangered students and staff. Under well settled principles, this act was flagrant enough that a serious penalty is merited. It is of no moment that this might have been the only time that Mr. Masullo failed to participate in a security drill pursuant to an announcement by school administration. I credit Ms. Turtoro's testimony that on at least two previous occasions she believed that she successfully alerted Mr. Masullo to the fact that a security drill was taking place and Mr. Masullo followed protocol and participated in the drill. Once the loudspeaker in the Computer Lab was disconnected by Mr. Masullo, there existed a continuing danger to Mr. Masullo's students. It is of no significance that Mr. Masullo believed that he could hear the loudspeakers outside of the Computer Lab. Clearly, on October 19, 2016, Mr. Masullo did not hear the loudspeaker. If there had been an actual shooter or bomb scare on October 19, 2016, Mr. Masullo's students would have been in grave danger.

Nevertheless, termination is not an appropriate penalty in Mr. Masullo's case. In

reviewing the *Fulcomer* factors as applied to this case, I conclude that the penalty of termination should be reduced. While I conclude that Mr. Masullo acted recklessly when he disconnected the loudspeaker, I do not believe that he intentionally sought to endanger either his students, other staff members or himself. His testimony demonstrated a tremendous amount of remorse, and I believe that if he is reinstated he will not engage in such reckless behavior again.

I credit Mr. Masullo's testimony that he felt justified in disconnecting the loudspeaker because he became sensitive to the sounds emanating from the loudspeaker. I also credit Mr. Masullo's testimony that the loudspeaker sounds disrupted Mr. Masullo's classroom and that the sounds disturbed students on the autism spectrum.¹⁰ Mr. Masullo's sensitivity to the sounds does not excuse his actions and he could certainly have been more forceful in pressing for an accommodation to this problem.

Mr. Masullo's conduct in this matter must be weighed against his entire record as a teacher. Although there is some evidence of poor interactions with other staff members, Mr. Masullo's disciplinary record is generally a good one, and he has shown himself to be an active participant in school activities. The testimony of both Dr. DeFabiis and Dr. Maceri establish that Mr. Masullo took leading roles in extracurricular activities, and spent his own time and money in support of the school. In addition, the record evidence established that, overall, Mr. Masullo is an excellent teacher. The District's observation and evaluation reports entered into the record support this conclusion.

¹⁰ As set forth below in this decision, I have concluded that Mr. Masullo shall be reinstated to his position. If he is reassigned to the Computer Lab, I make no finding regarding any accommodation, if any which should be made regarding the volume of the loudspeaker. See, e.g. *The New Jersey Law Against Discrimination*, N.J.S.A. 10:5-12.

Finally, I am mindful that, if Mr. Masullo was to be terminated, there is a very strong likelihood that his license to teach within the state of New Jersey would be revoked. While this is obviously true of all teachers faced with a loss of tenure, given Mr. Masullo's overall record, I conclude that he is deserving of one more chance. I do not believe that the actions proven in this case render Mr. Masullo unfit to teach.

It is my view that if Mr. Masullo is returned to the classroom, he will continue to be an effective teacher. Mr. Masullo is cautioned that he may not engage in any activity that could be perceived as endangering the safety and wellbeing of his students and fellow staff members. In lieu of termination, I direct that Mr. Masullo be suspended for the remainder of the 2016-2017 school year, that his increment for the 2016-2017 school year (if any) be withheld upon his return in the 2017-2018 school year, and that he receive no payments for time lost from the date of his suspension to the date of his reinstatement.

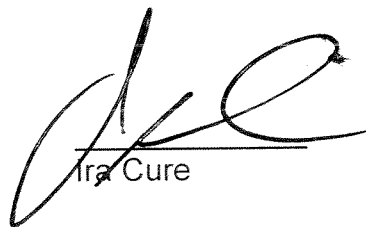
Based on the above, I render the following:

AWARD

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A:6-16*, as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ") hereby issues and AWARDS as follows:

1. The Allegation of the Charge has been proven, with such conduct constituting conduct unbecoming and providing just cause for discipline;
2. Christopher Masullo shall remain suspended for the remainder of the 2016-2017 school year;
3. Christopher Masullo shall be reinstated to his position as a tenured teacher in the South Hackensack Public School District and resume his duties in the District at the appropriate time for teachers to return to work for the 2017-2018 school year;
4. There shall be no back pay for the period of Christopher Masullo's suspension, and his increment for the 2016-2017 school year (if any) shall be withheld upon his return to employment;
5. The undersigned shall retain jurisdiction for the limited purpose of resolving any disputes concerning the remedy herein.

Dated: April 18, 2017


Ira Cure

