
**In the Matter of the Tenure Hearing of Michael Coe, School District of the
City of Trenton, Mercer County, Agency Dkt. No. 43-3/17**

DECISION

**Before
Robert C. Gifford, Esq.
Arbitrator**

Appearances:

For the School District:

Adam S. Herman, Esq.
Adams Gutierrez & Lattiboudere

For Michael Coe:

Arnold M. Mellk, Esq.
Edward A. Cridge, Esq. (On the Brief)
Mellk O'Neill

The City of Trenton Board of Education ["Board" or "Petitioner"], pursuant to N.J.S.A. 18A:6-10 *et. seq.*, certified tenure charges with the Commissioner of Education alleging that the Respondent Michael Coe had committed acts of conduct unbecoming and/or other just cause for dismissal based upon 41 counts of willful and intentional conduct of submitting weekly work records and payroll vouchers for extra duty work he did not actually perform but for which he was paid. The Board seeks to remove the Respondent from his tenured position.

On May 27, 2017, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that this matter was referred to me pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26.

On March 28, 2017, I notified the parties that an informal settlement conference was scheduled for April 27, 2017. Settlement/pre-hearing conferences were held on April 27, May 12 and June 8, 2017. Although the conferences were productive, the parties were unable to reach a resolution to this matter.

The evidentiary proceedings were held at the Board's offices in Trenton, New Jersey on June 9, 15, 16, 22, 23 and 28, 2017.¹ A stenographic recording of

¹ The transcripts for the hearing dates shall be referred to in chronological order as T1 through T6.

the proceedings was taken. During the proceedings, the parties were given the opportunity to argue orally, examine and cross-examine witnesses and submit documentary evidence into the record.² Testimony was received from Lissa Johnson – Assistant Superintendent for the Office of Talent Acquisition and Development; Monique Harvey – Supervisor of Special Education, Home Instruction and Homeless Services; Leodito Yanogacio – Assistant Comptroller; Paula Bethea – Principal of Joyce Kilmer School; Jayne Howard – Business Administrator/Board Secretary; SGB – parent of student SB; Respondent Michael Coe; and Shawn Mitchell – Assistant Business Administrator/Comptroller.³ Time extensions to hear and decide this matter were timely requested and granted.

The parties submitted post-hearing briefs on or before August 22, 2017. The Board submitted a reply brief on August 29, 2017.⁴ The record was closed on August 30, 2017. With the consent of parties' Counsel, Director Duncan granted an extension of time until November 10, 2017 to issue this Decision.

² Respondent's request to proceed with a Counterclaim was denied. [T5:6].

³ Lisa Johnson's testimony is located at T1:12-92; Harvey's at T2:4-40; Yanogacio's at T2:40-85; Bethea's at T3:4-51; Howard's at T3 51-93; SGB's at T4.4-50, Respondent Coe's at T5:6-51, T6.4-166; and Mitchell's at T6:168-175.

⁴ Respondent Coe did not file a reply brief.

RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. Dismissal and reduction in compensation of persons under tenure in public school system

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, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

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.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

STIPULATED ISSUE

Whether the City of Trenton Public Schools has proven that Michael Coe, a tenured teaching staff member, is guilty of conduct unbecoming and other just cause sufficient to warrant his dismissal from employment by the District? If not what shall be the appropriate remedy? [T1:5].

BACKGROUND

The parties submitted proposed findings of facts as part of their post-hearing briefs. I have adopted the findings of facts as modified herein.

Respondent Coe has been employed by the Board as a tenured teaching staff member for 17 years. The Respondent has never received a negative performance evaluation, and he has no prior formal discipline in his personnel file. [T5:50]. At all relevant times, the Respondent has been a member of the Trenton Education Association ["TEA"]. During the 2015-2016 and 2016-2017 school years, the Respondent was employed as Special Education Teacher assigned to the Joyce Kilmer Middle School.

For the 2015-2016 and 2016-2017 school years, the Respondent received a salary to perform his teaching duties during regular school hours. He was also approved by the Board to perform extra duty assignments, which include

AM/PM Supervision, Home Instruction and Extended School Year. AM/PM Supervision involves teachers or support staff members supervising pupils prior to the school day during the breakfast program and after school as pupils are waiting for transportation. [T1:15-16]. Home Instruction involves instructional services provided by certified teachers in a child's home where the child is unable to attend school for a certain reason, such as behavioral difficulties, medical issues or other physical limitations. [Id. at 14]. Extended School Year involves instructional services provided to classified students during the summer to prevent regression. [Id. at 15]. In accordance with the collective negotiations agreement between the Board and the TEA, the Respondent was paid an hourly rate of \$42 for these extra duty assignments.

The Respondent also attended meetings as part of the School Leadership Council, School Leadership Team, and Advisory Council.⁵ In accordance with the collective negotiations agreement between the Board and the TEA, the Respondent was paid an hourly rate of \$36 for these meetings.

As an employee of the school district, the Respondent was responsible for completing and submitting "Weekly Work Records" and/or "Payroll Vouchers" after performing his extra duty assignments. Weekly Work Records are completed after a teaching staff member performs home instruction duties that

⁵ Throughout the proceedings, the parties used various references to these meetings: "SLT", "SLC", "SLD", "ESEA Council", etc.

usually take place at a child's home. The Weekly Work Record for Home Instruction requires the employee's name, employee's payroll identification number, student's name, student's school, student's grade, subject/course assigned, date and week worked, description of job, location worked, time in and time out, hours worked, total hours, name of home instructor, signature of home instructor, name of parent/guardian, signature of parent/guardian and date. Payroll Vouchers are completed after a teaching staff member performs AM/PM Supervision, Home Instruction and Extended School Year duties. Payroll Vouchers set forth an employee's names, payroll identification numbers, home school, full time or part time designation, phone number, Board approval date, account number, date submitted, dates worked, description of job, location worked, time in and time out, hours worked daily/hourly rate, total hours, rate of pay, total earnings, employee signature, supervisor/principal signature, date and approval.

During the 2015-2016 and 2016-2017 school years, the Respondent completed, signed and submitted multiple Weekly Work Records and Payroll Vouchers. As will be more fully discussed below, the Board contends that the Respondent was paid by the Board with public funds for time that he did not actually work and for services that he did not provide. The Board claims that Respondent falsified time sheets, committed theft of time, services and public funds. The Board contends that Respondent's inappropriate and unprofessional

conduct violates law and Board Policy. The Board contends that Respondent's actions were sufficiently flagrant and egregious to warrant termination. Further, his actions demonstrate that he is not fit to serve as a teacher, and that his willful and intentional misconduct constitutes conduct unbecoming sufficient to warrant dismissal from employment. The Respondent denies these claims.

The Board proceeded to file tenure charges against the Respondent. Board Secretary/School Business Administrator Jayne Howard sent the Respondent a written copy of tenure charges against him as well as the written statement of evidence. The written charges were sworn to under oath by Assistant Superintendent Lissa Johnson on February 7, 2017. [Ex. B-39]. The Respondent did not submit a written response to the Charges.

On February 27, 2017, the Board held a closed session and determined by a unanimous vote of six (6) to zero (0) in favor that there was probable cause to credit the evidence in support of the Charges, and that Charges, if credited, to sufficient to warrant the dismissal of the Respondent. [Ex. B-41]. The Board suspended the Respondent without pay beginning February 28, 2017. The Board served the information upon the Respondent's Counsel. On March 7, 2017, the Board filed with the Commissioner of the Department of Education the written tenure charges and supporting evidence against the Respondent. [Ex. B-39].

On March 15, 2017, the Respondent, through his attorney, submitted an Answer in which he either admitted or denied the allegations contained in the Board's written statement of the charges. [Ex. R-15].

On March 27, 2017, the matter was referred to me pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26*.

Testimony was received from several witnesses during the tenure proceedings. Testifying on behalf of the Board were Lissa Johnson – Assistant Superintendent for the Office of Talent Acquisition and Development; Monique Harvey – Supervisor of Special Education, Home Instruction and Homeless Services; Leodito Yanogacio – Assistant Comptroller; Paula Bethea – Principal of Joyce Kilmer School; Jayne Howard – Business Administrator/Board Secretary; and Shawn Mitchell – Assistant Business Administrator/Comptroller. Testifying on behalf of the Respondent were the Respondent and SGB, the parent of SB, the student who received Home Instruction from the Respondent. Their testimony is summarized below.

Monique Harvey is the Supervisor of Special Education, Home Instruction and Homeless Services. [T2:4]. Part of her responsibilities include assigning home instructors to pupils and monitoring and approving the home instructor time sheets. [*Id.* at 6]. Harvey testified that home instructors provide instruction to

students that are at home due to medical issues or waiting for a special education placement. [Id.]. Harvey indicated that home instructors receive \$42 per hour for direct contact with the students. [Id. at 8]. Harvey testified that home instructors are not compensated for preparation time or travel time. [Id.].

Harvey testified that home instructors submit Payroll Vouchers for her review and approval. [T2:12]. The vouchers must include the date that the Home Instruction was provided, the location of the Home Instruction, the time in and out, the number of hours, the hourly rate, and the home instructor's signature. [Id.]. Harvey indicated that there are Weekly Work Records for Home Instruction that must include similar information, but they also require the signature of the child's parent to confirm that Home Instruction services were performed in accordance with the information that the home instructor provided therein. [Id. at 13]. Harvey testified that she compares the Payroll Vouchers and Weekly Work Records to verify that the dates match, the hours are calculated correctly, and the Home Instruction services were provided on a school day rather than a weekend or a holiday. [Id. at 13-14]. She also confirms that the documents include the appropriate signatures. [Id.]. Harvey testified that she is responsible for reviewing the Home Instruction payroll documents, but she does not review any other Payroll Vouchers that the Respondent may have submitted for his other extra-compensation duties in 2015-2016 and 2016-2017. [Id. at 18-19].

On cross, Harvey was asked "whether any the Director of Special Education within the last five years issued any policies or procedures to be followed in home instruction". [T2:27]. Harvey replied, "I'm not sure". [Id. at 28].

Paula Bethea is the Principal for the Joyce Kilmer Middle School. [T3:4]. Bethea has been the school principal since 2010 and has been employed by the Board since 2001. [Id.]. Bethea is responsible for reviewing and approving extra-duty assignments for her staff. Bethea testified that AM/PM Supervision consists of monitoring students during breakfast and recreational activities that take place prior to the start of the regular student day, or supervising students after school as they wait for their transportation home. [Id. at 8-9]. Bethea indicated that the morning supervision is usually from 7:50 a.m. to 8:20 a.m., and the afternoon supervision usually begins at 2:55 p.m. and ends between 3:30 p.m. and 4:30 p.m. [Id. at 10-11]. As to SLT/SLC meetings, Bethea indicated that the meetings are usually held with the school principal once a month and last about an hour. [Id. at 15-16].

Betha testified that teaching staff members are responsible for submitting Payroll Vouchers for their extra-duty assignments. [Id. at 17]. Bethea reviews and approves these vouchers by verifying that the staff member was in attendance on the particular date, and ensures that the documents are fully

completed and signed. [*Id.* at 18-20]. Bethea relies upon the staff member's signature to verify that the work was actually performed. [*Id.* at 20-21].

Jayne Howard is the Board's Business Administrator and Secretary. [T3:52]. Howard has served in that capacity since 2009 and has been employed by the Board since October 2001. [*Id.* at 52-53]. Howard testified that the State's Office of Legislative Services ["OLS"] conducted an audit of the school district's Home Instruction programs, before and after school duties, and other activities for the 2007-2008 and 2008-2009 school years.⁶ [*Id.* at 54-60]. Howard indicated it was her understanding that the audit was based upon "received complaints that our home instructors were basically frauding the District with false documentation and time sheets." [*Id.* at 55]. Howard indicated that the audit revealed a number of discrepancies (i.e. duplicate hours, inflated hours) in the time sheets submitted by a number of home instructors. [*Id.* at 58; see Ex. B-32]. It was her understanding that the discrepancies led to personnel actions that included paid restitution, dismissal, resignation, non-renewal, and the Superintendent's loss of license. [T3:60].

Howard testified that based upon her prior experience as an auditor that she anticipated that the Office of Legislative Services would conduct a similar

⁶ The OLS audit report ["Report"] was admitted into evidence. [Ex. B-32]. The Report included a summary of the scope of the audit, objectives, methodology, conclusions, findings and recommendations, and the auditee response. The auditee response was not included as part of the Report that was admitted into evidence.

audit in 2017-2018. [*Id.* at 60-61]. In preparation for this audit, Howard authorized Assistant Comptroller Leodito Yanogacio in November 2016 to conduct an internal audit of the home instructor time sheets for 2015-2016 and those submitted up to that point for 2016-2017. [*Id.* at 65-67]. Howard testified that the initial review revealed discrepancies in the Respondent's time sheets. [*Id.* at 68].

Based upon Yanogacio's initial review of the home instructor time sheets, Howard requested Yanogacio to audit the Respondent's time sheet submissions for his before and after school programs as well as his school leadership team programs. [*Id.* at 70-71]. Based upon the more detailed audit, Howard concluded that there were thirty-nine (39) occasions that the Respondent's time sheets either failed to account for a break between his duties (i.e. the times that the Respondent marked on his time sheet for PM supervision reflected an end time of 4:00 p.m. and his time sheet for Home Instruction at a different location that required travel reflected a start time of 4:00 p.m.) or included an overlap in time (i.e. the times that the Respondent recorded on his time sheets indicated that he was performing and paid for more than one task at the same time, some of which may have required the Respondent to be in more than one location). [Exs. B-1 through B-28]. As part of the audit, the discrepancies were marked on a spreadsheet. [Ex. B-33]. Howard testified that there were other time sheets that the Respondent submitted that included a break between his

duties at the Joyce Kilmer Middle School and his Home Instruction assignments. [T3:78-79, 88].

Howard instructed Yanogacio to drive from the Joyce Kilmer Middle School to locations that the Respondent performed home instruction in 2015-2016 and 2016-2017. Yanogacio testified that each trip took at least 10 minutes. [T2:64-68]. Howard testified that home instructors are not compensated for travel time. [T3:80].

Lissa Johnson is the Assistant Superintendent for the Office of Talent Acquisition and Development. [T1:13]. Johnson oversees the District's human resources processes. [Id.]. Johnson testified that Howard notified her of the Respondent's time sheet issues. [Id. at 16]. Johnson sat down with Howard to review the Respondent's extra-duty time sheets. [Id. at 17]. Johnson also reviewed the audit performed on the Respondent's time sheets that included the Respondent's AM/PM Supervision vouchers, Home Instruction vouchers, Home Instruction weekly summaries ("Weekly Work Records"), and Payroll Vouchers for meetings. [Id. at 20]. Johnson testified that the audit showed there were occasions where the start and end times for separate extra-duty assignments were the same, the second extra-duty assignment started before the end of the first assignment, or the assignments occurred at the same time.

[See generally Johnson's testimony]. In addition, there was an overlap of three (3) extra-duty assignments. [Id.].

Johnson testified that she and Howard met with the Respondent on January 10, 2017, to discuss the audit findings incident by incident. [Id. at 18-19]. Johnson testified that the Respondent was afforded with the opportunity to have a representative present during the meeting and to respond to each issue raised in the time sheets. [Id. at 19]. Johnson indicated that the Respondent did not have a representative present and based upon the advice of his counsel he would not provide responses. [Id.]. Johnson testified that she provided the Respondent with a conference summary memorandum at the conclusion of the meeting that indicated that the Respondent was immediately excluded from performing extra-curricular duties and that she was referring the matter "to Board Counsel to determine all other applicable policy and legal violations and to begin preparing tenure charges". [Id. at 18; see Ex. B-34].

Johnson testified that Howard conducts an annual training session on the Board's finance procedures, but she did not provide specific detail as to what is discussed during the annual training. [T1:89-90].

The Board's decision to dismiss the Respondent from his tenured teaching position was based predominantly upon the Respondent's timesheet records

and the conclusions that were drawn therefrom during the Administration's internal audit.

Respondent Coe testified that he has been employed by the Board for 17 years, that he provided Home Instruction for the past 10-11 years, AM/PM Supervision for approximately the past 7 years, and SLC/SLT/SLD services in 2016. [T5:7-8]. The Respondent indicated that in providing such services he was responsible for filling out Payroll Vouchers, Weekly Work Records, invoices, etc. [Id. at 8]. The Respondent during his testimony was asked to review a Weekly Work Record for Home Instruction form. [Ex. B-3, Coe 104]. The Respondent indicated that the form expressly indicated to "round hour to the nearest quarter hour". [T5:9]. The Respondent testified that he understood this language to mean that he was supposed to round his time up to the next quarter hour. [Id. at 9, 13; T6:117, 122]. He also understood this to be true based upon his conversations with his co-workers, and instructions from Vice-Principal/Principal Michael Pettola to round his time up. [T6:161-163]. The Respondent testified that the Administration never addressed this language with him during his time as a home instructor. [T5:9]. The Respondent also indicated that he was under the impression that travel time was included between the school and the location where he was performing Home Instruction, notwithstanding the fact that he did not charge for travel time. [Id.]. The Respondent testified that neither Howard, Harvey, nor anyone else from the

Administration discussed travel time with him or provided written notice that travel time was not to be included. [*Id.* at 9-10, 11-12]. The Respondent testified that he filled out the vouchers, payroll sheets and other related forms in a substantially similar manner during the period of time that the Administration performed its internal audit. [*Id.* at 14-15].

With respect to the audit conducted by the Office of Legislative Services that was performed in 2010, the Respondent testified that he was not aware of the audit until this tenure proceeding. [*Id.* at 10]. Further, neither Howard, Harvey, nor anyone else from the Administration discussed the audit with him or provided him with a summary of the audit findings or recommendations despite the fact that he performed Home Instruction services during at least a portion of the audited time period. [*Id.* at 10-11].

The Respondent indicated that he has been performing the afternoon AM/PM Supervision for five (5) days a week during the school year for at least 7 years. [*Id.* at 16-17]. In his experience, the buses normally run late in the beginning of the school year. [*Id.* at 17]. There are also occasions when there are transportation issues for some of the students. [*Id.* at 18]. The Respondent testified that he has complied with requests from principals and vice-principals to give these children rides home after school. [*Id.* at 19-20].

The Respondent addressed the specific charges in the Board's Statement of Charges. With respect to Charge Number 2, the Board alleged that on August 3, 2015, the Respondent submitted a Payroll Voucher indicating that he provided Extended School Year Services from 8 a.m. to 3 p.m., for a total of seven (7) hours. [Ex. B-39, p. 4]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 2:30 p.m. to 5:30 p.m., for a total of three (3) hours. [*Id.*]. The Respondent admitted that the Payroll Voucher was "not accurate because what was happening I was doing payroll for the ESY staff and that was a typographical error. It should have been from 8 to 2." [T5:23; see T6:25-26]. When asked on cross why did not bring this error to the Board's attention the Respondent replied, "...I did not recognize that mistake until it was brought to my attention. It was not done intentionally." [T6:27]. The Respondent indicated that it would take him about 4 minutes to travel from school to the residence of SB, the child for whom he provided Home Instruction. [*Id.* at 28]. The Respondent testified that he did not charge for travel time, and he did not round up for his time out for Home Instruction. [*Id.* at 28, 31].

With respect to Charge Number 3, the Board alleged that on September 10, 2015, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:50 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 6]. The Board also alleged that for the same

day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:30 p.m. to 6:30 p.m., for a total of two (2) hours. [Id.]. The Respondent testified to the basis for the lack of a break between the services:

...That's the beginning of school. There was a special needs student whose name was not on the list and again I asked if I could drop him off after we tried to reach his parents, couldn't reach the parents, so we were able to drop the student - - student off enroute to going to home instruction. [T5:24].

On cross, the Respondent testified that on this occasion he did not round up his time for Home Instruction. [T6:37].

With respect to Charge Number 6, the Board alleged that on November 2, 2015, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:00 p.m. to 5:00 p.m., for a total of one (1) hour. [Ex. B-39, p. 12]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 5:00 p.m. to 7:30 p.m., for a total of two and one-half (2.5) hours. [Id.]. The Respondent testified that SLC/SLT/SLD meetings are normally scheduled to last one (1) hour, but usually do not last that long. [T6:72]. The Respondent testified that he could not recall if he attended an SLC meeting that day, but he indicated that he was instructed by Pettola that "if the

meetings did not last a complete hour we were told to sign out for an hour because it was contractual for the \$36." [T5:27-29].

With respect to Charge Number 9, the Board alleged that on January 19, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting for a principal interview panel from 4:30 p.m. to 8:00 p.m., for a total of three and one-half (3.5) hours. [Ex. B-39, p. 17]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 3:45 p.m. to 6:15 p.m., for a total of two and one-half (2.5) hours. [*Id.*]. The Respondent testified that he attended the SLC meeting on January 19th, but as to the Home Instruction, he actually performed those services on January 18th:

We did home instruction for [SB] on the 18th because it was Martin Luther King's birthday and I got the permission from the parent that we would come on the 18th because I knew we had to be in a meeting on the 19th for an interview for those that will be coming to princi - - interviewing for a principal position at Kilmer because I sat on the SLC. It was our - - I was required to be there. [T5:30-31; see also T6:64-65].

On cross, the Respondent indicated that it was possible that the SLC meeting could have ended a few minutes before 8:00 p.m. [T6:67].

With respect to Charge Number 10, the Board alleged that on February 1, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [Ex. B-39, p. 19]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 5:00 p.m. to 7:00 p.m., for a total of two (2) hours. [Id. at 20]. As to Charge Number 11, the Board alleged that on March 7, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [Id. at 21]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 5:15 p.m. to 7:15 p.m., for a total of two (2) hours. [Id. at 22]. The Respondent reiterated that the SLC meetings normally do not last a full hour. [T5:32].

With respect to Charge Number 12, the Board alleged that on March 14, 2016, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:50 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 23]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 6:45 p.m., for a total of two and one-half (2.5) hours. [Id. at 24]. The Respondent testified that

on that particular day he performed the Home Instruction at school rather than at the pupil's house. [T5:33-34]. On cross, however, the Respondent indicated that the time out for AM/PM Supervision was a typographical error. [T6:75]. The Respondent testified that it was possible that he completed those duties at 4:00 p.m. [*Id.*]. When asked for his arrival time to SB's house, the Respondent indicated that he got there at 4:15 p.m. [*Id.* at 75-76].

With respect to Charge Number 14, the Board alleged that on April 25, 2016, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:55 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 27]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 3:00 p.m. to 5:30 p.m., for a total of two and one-half (2.5) hours. [*Id.* at 28]. The Respondent testified that he recalled switching his afternoon duties with Marva Downer-Baird, a co-worker who was scheduled for the morning duty, because of the fact that he had to leave a few minutes early in the afternoon. [T5:35; T6:82-83]. On rebuttal, the Board provided Baird's payroll voucher for April 25, 2016, which indicated that she performed AM/PM Supervision from 7:55 a.m. to 8:25 a.m. [Ex. B-44]. Baird's payroll vouchers for April 20, 21 and 22 indicated that she worked the afternoon duties. [*Id.*]. Baird's start and end times appear to be rounded to the nearest five (5) minutes (i.e. 3:05 to 4:05).

With respect to Charge Number 16, the Board alleged that on May 31, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an ESEA Advisory Council meeting from 5:15 p.m. to 7:00 p.m., for a total of one and three-quarter (1.75) hours. [Ex. B-39, p. 32]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [Id. at 31]. The Respondent confirmed that he attended the ESEA meeting. [T5:37].

With respect to Charge Number 17, the Board alleged that on June 6, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [Ex. B-39, p. 33]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour.⁷ [Id. at 34]. The Respondent testified that he performed the Home Instruction services for one (1) hour, but he wrote down the wrong time which should have been 5:15 p.m. to 6:15 p.m. [T5:38-39; T6:94-95].

⁷ The Weekly Work Record actually indicated that the Respondent provided Home Instruction services from 4:15 p.m. to 7:15 p.m. [Ex. B-16, Coe 154]. The Respondent's payroll voucher for Home Instruction indicated 4:15 p.m. to 5:15 p.m. [Ex. B-16, Coe 153]. The Respondent testified that both were in error and should have indicated 5:15 p.m. to 6:15 p.m. [T6:95-98].

With respect to Charge Number 18, the Board alleged that on June 7, 2016, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:55 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 36]. The Board also alleged that for the same day the Respondent submitted a Payroll Voucher indicating that he attended an ESEA Advisory Council meeting from 5:00 p.m. to 5:30 p.m., for a total of one-half (.5) hour. [Id.]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [Id.]. The Respondent confirmed that he attended the ESEA meeting, provided Home Instruction, and performed AM/PM Supervision. [T5:39-40]. The Respondent, however, testified that he wrote the wrong time for the Home Instruction which should have been from 5:15 p.m. to 6:15 p.m. On cross, the Respondent indicated that he provided Home Instruction after the ESEA Advisory Council meeting that ended at 5:30 p.m. [T6:101-103]. As to the AM/PM Supervision, the Respondent testified that the end time should have been 4:00 p.m. because of the ESEA meeting. [Id. at 40-41]. On cross, the Respondent indicated that the AM/PM Supervision end time of 4:30 p.m. was correct. [T6:100].

With respect to Charge Number 24, the Board alleged that on October 5, 2016, the Respondent submitted a Payroll Voucher indicating that he provided

AM/PM Supervision from 2:55 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 47]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:00 p.m. to 6:30 p.m., for a total of two and one-half (2.5) hours. [Id. at 28]. The Respondent testified that the end time for the AM/PM Supervision was incorrect. [T5:42]. The Respondent testified that the supervision ended "roughly around 3, 3-something. Hour it up to make it four o'clock". [Id. at 44]. On cross, the Respondent indicated that "[t]his particular day may have been one of those days when a student was late or either the parent dropped [SB] at the school because when that would happen I would - - I would put down the time the parent picked the student up and also the time that [SGB] may have dropped [SB] off to my school." [T6:133]. The Respondent testified that he did not know for certain if this was the case, but that is what he normally did in those situations. [T6:133]. The Respondent testified that on this occasion he could have been performing both of the extra-curricular activities at the same time because he was still responsible for the student whose pickup from school was late. [T6:134-136].

Charge Numbers 4, 5, 7, 8, 13, 15, 19-23, and 25-40 correspond with the Respondent's timesheets from September 21, October 13, November 3, December 2, 2015. April 12, September 15, 21, 22, 26, 27, October 13, 18, 19, 20, 21, 24, 25, 27, 28, 31, November 1, 2, 3, 4, 7 and 9, 2016. [Ex. B-39]. These are

timesheets that do not reflect a break between extra-compensation activities. [Ex. B-33]. With respect to these charges and timesheets, the Respondent testified that in each instance he rounded up his time out for the first activity. [T6:110-116, 122-130, 138-149]. He testified that it was most likely that he did not round up where his timesheets reflected a break between those activities, but there were occasions that he did. [Id. at 112, 116, 126-132]. The Respondent indicated that he did not include travel time. [Id. at 113-114].

With respect to the Home Instruction services that the Respondent provided to SB, the Respondent testified that with the exception of the inaccuracies that he pointed out during his testimony that he provided all of the Home Instruction services for which he submitted vouchers/weekly work records for payment:

[Respondent, On Direct]

Q. [By Respondent Counsel Melik] All right. During the entire time that you were providing home instruction to [SB] did you provide him the hours of service except as you've excepted during your testimony to [SB]?

A. Yes, I did. And I think I went over the call of duty. Many nights I stayed there later. That time was not noted on my - - my work - - on my weekly work record nor was it reflected on my time sheet because I was given the amount of time that I would be paid for. * * * [T5:47].

During cross-examination, the Respondent testified that the "time out" that he recorded on the Payroll Vouchers for ending the services he provided depended on whether he rounded up. [T6:7-8]. However, he always recorded his "time in" with the time that he actually commenced performing the services. [Id. at 8]. The Respondent rounded up on his time out because of the express language contained on the Weekly Work Record form. [Id. at 9]. The Respondent acknowledged that the same language is not included on the Payroll Voucher forms. [Id. at 9, 13]. The Respondent testified that he sometimes rounded up for the time out on Home Instruction, SLT/SLC meetings, and AM/PM Supervision. [Id. at 9-10]. The Respondent also denied that he rounded up for his attendance at AM/PM Supervision, ESEA Council meetings, or principal interviews. [Id. at 10]. The Respondent testified that on the days where his Payroll Vouchers and Weekly Work Records include an overlap in time or the lack of a break in between activities it is his belief that he rounded up. [Id. at 54]. The Respondent testified that if there was a break between activities that he did not round up. [Id. at 55-60]. When asked on cross why he did not round up every day, the Respondent replied that there "was no need to round up every day". [Id. at 63].

On cross, the Respondent was asked why he did not inform Howard when she interviewed him as part of the Board's investigation of this matter of the basis for rounding up. The Respondent replied, "Because I didn't have any

representation. I didn't want what I was going to say to be misconstrued and so therefore I was given instruction by my attorney to listen and say nothing and that's what I did." [T6:80].

SGB is the parent of SB, a student for whom the Respondent provided Home Instruction services since from the end of 2011 through November of 2016. [See T4:4]. SGB testified that the Respondent regularly provided Home Instruction services for her son five (5) days a week. [Id. at 6]. SGB indicated that the Respondent regularly arrived on time, and he immediately began his instruction with SB who waited for him each day. [Id. at 27-29, 32-35]. SGB indicated that she personally observed the Respondent provide Home Instruction. [Id. at 40]. SGB testified that the Respondent usually stayed at their house for 2.5 to 3 hours each day, sometimes longer. [Id. at 7]. SGB testified that there were occasions that the Respondent provided the Home Instruction at school, rather than at home. [Id. at 19, 36-37]. SGB indicated that she signed the Weekly Work Records for Home Instruction every other week. [Id. at 7, 25]. SGB testified that the Respondent filled out the all of the information on the forms before she signed them. [Id. at 26]. When asked if the Respondent ever "shortchanged [SB] on the actual number of hours that he worked at home instruction", SGB replied, "No". [Id. at 50]. SGB testified to the Respondent's impact on her son:

My son had a great deal of love for Mr. Coe. So did we. [SB] counted on Mr. Coe to come every Monday through Friday to teach him. If he didn't come - - which he never - - [SB] was ready. They got there. They even named each other nicknames. When Mr. Coe didn't come, [SB] got into depression because he couldn't get next to him. He couldn't call him. He couldn't see him. So he questioned us but we couldn't tell him. Trying to protect his feelings.

Before my son died he wanted Mr. Coe - - he got his allowance and he wanted Mr. Coe to come - - or us to call him so he could come and take him to lunch. We told Mr. Coe couldn't come. He got mad, he went in his room and a week later he died.

He got plenty of messages on my phone calling Mr. Coe on the telephone just to ask him how he's doing. "I hope you feel good, buddy." "I hope you all right, buddy." Only teacher he ever opened up to. He ever cared about. He - - I won't say care. I say love because you really had to get next to Stef for him to care about you, for him to wonder what you doing. [*Id.* at 17-18].

The parties presented the following arguments in support of their respective positions.

It is well-settled public policy that all public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. Any conduct that serves to diminish the public trust in the integrity of its employees is intolerable and such conduct is unbecoming a public employee. See *In the Matter of Matthew Greer* (MSB, decided June 7, 2006). The appellant's actions directly contradict the positive image public employees are expected to exhibit. Few actions betray trust more than those affiliated with deceit, and the appellant, by his own admission, intended to deceive the appointing authority.

Id.

A single incident may be sufficiently egregious in nature to warrant termination. In this case, Mr. Coe committed thirty (39) separate offenses which include theft of time, theft of services, and theft of public funds, which amounts to unbecoming conduct. Mr. Coe, as a public employee paid with public funds, breached the public trust. Mr. Coe's actions were sufficiently flagrant and outrageous. Whether he stole \$1.00 or \$1,000 or \$10,000 or \$100,000, he has demonstrated that he is not fit to serve as a teaching staff member for the District.

CONCLUSION.

As outlined above, the statutes and case law are clear. Mr. Coe, as a public employee and teacher, was to serve as a model of appropriate behavior. Instead, Mr. Coe engaged in a pattern of inappropriate and fraudulent conduct. Mr. Coe is guilty of deliberately falsifying time sheets, theft of time, theft of public funds, which amounts to conduct unbecoming a teacher. One of the incidents set forth in the charges alone would be cause for his removal from employment. However, the combination of the thirty nine (39) events spanning the course of two (2) school years, demonstrated through the unrefuted evidence offered by the District, leaves no doubt that Mr. Coe is not fit to serve as a teacher. In the end, as a result of Mr. Coe's intentional and deceitful conduct, he was

paid with public funds for services he did not provide to students. Therefore, each of the tenure charges must be sustained and Mr. Coe must be removed from his tenured teaching position. [Board Brief, pp. 60-92].

The Board's reply brief addresses the Respondent's argument that he was entitled to travel time for his extra-duty assignments:

Mr. Coe cites to 29 C.F.R. § 785.38 for the proposition that he could bill for his travel time from Kilmer to S.B.'s residence. However, said regulation does not apply to extra-duty assignments, as PM supervision and home instruction was not Mr. Coe's "principal activity." Mr. Coe's workday ended when the dismissal bell rang at Kilmer. Indeed, he was not travelling in connection with his main position as a resource room teacher. Any driving from Kilmer to S.B.'s house as part of the extra-duty assignment would be deemed noncompensable commuting time. Normal commuting from home to work and back is ordinary travel and not a "principal activity" absent a contract stating otherwise. 29 C.F.R. §§ 785.34 and 785.35.

Moreover, the undisputed record demonstrated that based upon the contract between the District and the teacher's union, home instructors receive \$42.00 per hour for direct contact with students. (T 6/15/17, 8:1-14; See also Exhibit J-1). Home instructors do not receive compensation for preparation time or for travel time. (T 6/15/17, 8:15-20). Ms. Harvey made clear that home instructors only receive compensation for actual instruction with students. (T 6/15/17, 8:21-24).

Mr. Coe's argument is also inconsistent with his testimony on cross-examination, whereby he stated that he did not bill for any travel time relating to his home instruction duties.

As such, Mr. Coe was not entitled as a matter of law to bill for any travel time. [Board's Reply, pp. 19-20].

The Respondent's Position

The Respondent provides the following legal argument in his post-hearing brief:

LEGAL ARGUMENT THE TENURE CHARGES SHOULD BE DISMISSED

POINT ONE THE APPLICABLE STANDARDS AND LAW

A tenured teacher may only be removed for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10. "The statutory status of a tenured employee may not be lightly removed." *IMO Tenure Hearing of Claudia Ashe-Gilkes, Sch. Dist. of City of East Orange, Essex County*, OAL Dkt. No. 07135-08. Tenure laws are meant to protect teaching staff members from dismissal for unfounded, flimsy, or political reasons. See *Veimeister v. Prospect Park Board of Education*, 5 N.J. Super. 215, 218 (App. Div. 1949); *Spiewak v. Rutherford Board of Education*, 90 N.J. 63 (1982). The Board bears the burden of demonstrating unbecoming conduct by a preponderance of the competent, credible evidence. *Atkinson v. Parsekian*, 37 N.J. 143, 149 (1962). Unbecoming conduct is a broad term which may include any conduct which adversely affects the morale or efficiency of the public entity, or has a tendency to destroy public respect for government employees and confidence in the operation of government services. See *Karins v. City of Atl. City*, 152 N.J. 532, 554 (1998).

A finding of unbecoming conduct does not mandate removal. Rather, the penalty to be imposed for unbecoming conduct (i.e., dismissal or some lesser penalty) requires consideration of a number of relevant factors, including: [1] the nature and gravity of the offense; [2] the impact on the teacher's career; [3] any extenuating or aggravating circumstances; and [4] the harm or injurious effect the conduct may have had on the proper administration of the

school system. *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967). In determining whether removal, or some lesser penalty, is appropriate, the fundamental question is whether the teacher may be returned to his position without harm or injurious effect on the proper administration of the school district. The touchstone of the determination lies in the teacher's fitness to discharge the duties and functions of his position. See *In re Grossman*, 127 N.J. Super. 13, 29 (App. Div. 1974); *In re Young*, 202 N.J. 50, 66 (2010).

When deciding tenure charges, no consideration or deference is given to a Board's decision to pursue the penalty of termination. Rather, as a matter of law, the arbitrator is required to independently determine the appropriate penalty, if any, to be imposed based upon his findings in the case. In other words, tenure charges are decided *de novo*, and not under an "abuse of discretion" standard. *Fulcomer*, *supra*, 93 N.J. Super. at 409-410.

While a single, sufficiently flagrant incident may be grounds for removal (See *Redcay v. State Board of Education*, 130 N.J.L. 369 (Sup. Ct. 1943), *aff'd. o.b.* 1341 N.J. L. 326 (E&A 1944)), a scheme of progressive discipline is generally applied to findings of unbecoming conduct. This reflects the idea that the nature, number and proximity of earlier disciplinary infractions, both minor and major, should occasion progressively severe sanctions, unless just cause to the contrary is shown. *West New York v. Bock*, 38 N.J. 500 (1962); *IMO Tenure Hearing of Owen Newson, State Operated School District, City of Newark*, DOE Dkt. No. 276-9/12; *In the Matter of Arnold Borrero, City of Newark*, 2009 WL 3816616 (N.J. Admin).

It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." *Elkouri and Ekouri, How Arbitration Works*, 7th Ed., 15-40. In less serious cases, arbitrators are very likely to change or modify an employer's discipline if it is excessive, disproportionate to the offense, inconsistent with principles of progressive discipline, punitive rather than corrective, or inconsiderate of mitigating circumstances. *Id.* at 15-43. Even in the case of theft, mitigating circumstances, such as the absence of a policy expressly providing for termination, and a long,

discipline-free record may render termination too harsh a penalty. *Id.* at 15-42 to 15-43.

Moreover, arbitrators are likely to set aside or reduce penalties where the employee had not previously been reprimanded and warned that his or her conduct would trigger the discipline. Even when the misconduct is of a serious nature, the employee must not be lulled into believing that his conduct will not subject him to sanction. *Id.* Once discipline for a given offense is imposed and accepted, it cannot therefore be increased, nor may another punishment be imposed, lest the employee be unfairly subjected to double jeopardy. The double jeopardy doctrine also prohibits employers from attempting to impose multiple punishments for what is essentially a single act. The arbitral concept of double jeopardy arises from fundamental fairness and just cause. See *Elkouri, supra*, 15-60-61.

Removal of a tenured teacher is a serious penalty, not always warranted even in the face of significant misconduct. For example, where not cruel, premeditated, or vicious, a teacher's rash, inappropriate action—even involving inappropriate physical contact with a student—may not mandate removal from tenure. *Matter of Tenure Hearing of Boyd*, 93 N.J.A.R. 2d (EDU) 445 (teacher who struck a student not removed from tenure). Similarly, numerous, relatively minor instances of treating students inappropriately may not warrant removal from tenure. *In the Matter of the Tenure Hearing of Barbara Emri*, Comm. of Ed. Dec. No. 371-02 (teacher who engaged in unbecoming conduct on more than 20 occasions in her dealings with students— including the use of racial slurs – not removed from tenure).

A survey of Commissioner of Education decisions demonstrates that conduct far more serious, or even dangerous to children, than anything alleged by the Board in this case may not warrant removal from tenure. See, e.g., *IMO the Tenure Hearing of Poston*, Comm. of Ed. Dec. No. 362-06 (eighth grade teacher who referred to student's mother as a "dyke" in front of entire class suspended for 120 days without pay); *IMO Tenure Hearing of Adam Mierzwa*, Comm. of Ed. Dec. No. 283-08 (teacher who lost his temper and displayed poor judgment on three separate occasions, including an incident where he forcefully pushed a student

into a seat, suspended for 240 days without pay); See also *IMO Tenure Arbitration of Richard Vicenti*, DOE Dkt. No. 255-14 (teacher who engaged in "abusive, angry, and demeaning behavior on a number of occasions not removed from tenure); *IMO the Tenure Hearing of Henry Allegretti*, School District of the City of Trenton, Comm. of Ed. Dec. No. 96-00 (teacher who engaged in sexually inappropriate discussions with students not terminated from position); *IMO the Tenure Hearing of George Mamunes*, Pascack Valley Regional School District, Comm. of Ed. Dec. No. 208-00 ("extreme penalty" of termination not warranted for teacher who made racist and sexist comments to his students on several occasions); *In re Tenure Hearing of Joseph Prinzo*, Passaic County Technical Institute, Comm. of Ed. Dec. No. 259-01 (teacher's failure to supervise students resulted in students viewing sexually explicit videotape in classroom suspended for 30 days without pay); *IMO Tenure Hearing of Alan S. Tenney*, 1983 SLD 836 (teacher who ordered student to sit outside of classroom unsupervised for disciplinary reasons and left class unattended on another occasion for 23 minutes penalized with loss of three months salary); *IMO Tenure Hearing of Victoria Jakubiak*, Commissioner of Ed. Dec. No. 33-99 (librarian who left five year old child unsupervised for five minutes suspended for one month without pay); *IMO Tenure Hearing of Carmen Quinones*, 1996 N.J.A.R. 2d (EDU) 649 (teacher left a student in the park and left class unattended received penalty of 120 days loss of pay); *IMO Tenure Hearing of Kimberly Geurds*, Comm. of Ed. Dec. No. 267-10+ (teacher who discussed "douche-bags" and who used the words "penis," "vagina", and "balls" in class with fifth grade students not removed from tenure).

Even a teacher's criminal conviction for conduct unrelated to his employment does not, *per se*, warrant removal from tenure. See *IMO Tenure Hearing of Martin Lieb*, School District of the Town of West Orange, Essex County, 1985 S.L.D. 933 (teacher convicted of lewd conduct not removed).

In light of these well-established principles, and as set forth, *infra*, it is clear that Mr. Coe did not engage in conduct unbecoming a teaching staff member, and that, in any event, has done nothing to warrant the draconian penalty of removal from his tenured teaching position.

POINT TWO
THE PRIOR RECORD OF MR. COE

Mr. Coe has been employed by the Board as a Teacher of Special Education for the past 16 years. **T5:7:4-7**. For the past 10 years, he has served as a home instructor, and for the past seven years, he has provided a.m./p.m. services to the Board. **T5:7:16-8:1**.

"Long service with the company, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration. Arbitrators have recognized that the loss of seniority may work great hardship on the employee, and that it is not conducive to the improvement of relations between other workers and management." *Elkouri, supra*, 15-68.

Mr. Coe offered undisputed and unrebutted testimony that during his 17 years of service to the Board, he had never been subjected to any formal discipline, save the instant Tenure Charges, and that his performance evaluations over the years had ranged from "good" to "outstanding." **T5:50:3-12**. As such, he appears before this tribunal with a long and unblemished record of service to the students of the Trenton School District.

POINT THREE
MR. COE PERFORMED THE SERVICES FOR WHICH HE WAS PAID

Beyond the performance of his normal teaching duties for the Board, Mr. Coe performed several other duties and functions for which he was paid at an hourly rate. These duties included the supervision of students before and after the regular school day (referred to hereinafter as "am/pm duty"); participation in School Leadership Council ("SLC") and other meetings, and providing home-bound instruction to a student, [SB]. Mr. Coe was compensated at a rate of \$42.00 per hour for extra duties which involved student contact time (i.e., am/pm duty and homebound instruction) and at the rate of \$36.00 per hour for duties which did not involve student contact, such as attendance at SLC meetings. **T3:11:6-12:9; 79:5-18**.

Significantly, there is no evidence, nor does the Board even allege, that Mr. Coe did not completely and competently discharge the extra duties to which he was assigned. The Board does not claim, for example, that Mr. Coe ever left his am/pm duty before his students had gone home for the day. It does not allege that he ever arrived at an SLC meeting late or left a meeting before it had ended. As Principal Bethea testified, the SLC sign-in sheets did not contain start or end times, and thus provided no guidance on the actual length of those meetings. **T3:41:22-47:3.**

Moreover, as the testimony of [SB's] mother, [SGB], made abundantly clear, Mr. Coe always provided [SB] with all of the instructional time to which he was entitled, as reflected on Mr. Coe's timesheets. She testified that he spent "two and a half to three" hours at her house five days a week, and that he frequently stayed "longer than that." **T4:6:20-7:14.** She knew the times that Mr. Coe arrived and left, because she watched the same television shows everyday, and that Mr. Coe arrived before the end of "General Hospital," which ran from 3:00pm-4:00pm. **T4:48:19-49:13.** She was present during [SB's] instruction, and testified that Mr. Coe "never shortchanged" her son. **T4:50:2-12.**

[SGB] compellingly described the impact that Mr. Coe had on her son:

My son had a great deal of love for Mr. Coe. So did we. [SB] counted on Mr. Coe to come every Monday through Friday to teach him. If he didn't come -- which he never—[SB] was ready. They got there. They even named each other nicknames. When Mr. Coe didn't come⁸, [SB] got into depression because he couldn't get next to him. He couldn't call him. He couldn't see him. So he questioned us but we couldn't tell him. Trying to protect his feelings.

Before my son died he wanted Mr. Coe—he got his allowance and he wanted Mr. Coe to come—for us to call him so he could come and take him to lunch. We told Mr. Coe couldn't come. He got mad, he went in his room and a week later he died.

⁸ i.e., after he was removed from his assignment as [SB's] home-bound instructor.

He got plenty of messages on my phone calling Mr. Coe on the telephone just to ask him how he's doing. "I hope you feel good, buddy." "I hope you all right, buddy." Only teacher he ever opened up to. He ever cared about. He—I won't say care. I say love because you really had to get next to [SB] for him to care about you, for him to wonder what you doing.

T4:17:20-18:16. These are not the words of a parent whose child was disserved by his teacher. Rather, Mr. Coe more than met expectations in his tutelage of Stephon.

Mr. Coe's exceptional service to Stephon is not mere gloss. Rather, it forcefully demonstrates that Mr. Coe is fit to discharge the duties and functions of his position—the "touchstone issue" in this case. See *Grossman, supra*.

POINT FOUR
THE BOARD FAILED TO PROVE THAT MR. COE WAS NOTIFIED OF
AND SUBSEQUENTLY VIOLATED ANY BOARD POLICY OR
PROCEDURE

The testimony of the Board's witnesses was, effectively, limited to a recitation of the content of Mr. Coe's timesheets. Significantly, the Board offered no real evidence that it ever provided Mr. Coe with any policies, procedures, directives, trainings, or guidelines as to how those timesheets should be completed, or how he should track his time in connection with his performance of extra duties.

"[I]n the arbitration of discipline cases...there must be reasonable rules or standards, consistently applied and enforced and widely disseminated...An employee can hardly be expected to abide by the 'rules of the game' if the employer has not communicated those rules, and it is unrealistic to think that, after the fact, an arbitrator will uphold a penalty for conduct that the employee did not know was prohibited." *Elkouri, supra*, 15-70.

This is precisely the situation presented by this case. The Board's proofs in this regard would generously be described as scant, and realistically characterized as nonexistent.

Monique Harvey, the supervisor of Special Education, was responsible to "monitor and approve all time as it relates to home instruction." **T2:5:22-6:16**. Despite this, she "was not sure" whether any Director of Special Education had, in the past five years, issued any policies or procedures to be followed in connection with home instruction. **T1:27:14-28:15**. She claimed that home instructors did not receive compensation for preparation time or travel time (**T2:8:15-24**), but offered no evidence that this, or other timekeeping guidelines, had ever been communicated to home instructors. Lissa Johnson testified that "[School Business Administrator] Jayne Howard does a training every year on all of the finance procedures." **T1:90:2-3**. Jayne Howard, however, offered no testimony whatsoever about any such training. She claimed that administration planned to "write a manual and collaborate with the Special Ed Department" (**T3:62:8-17**), but no such manual was ever introduced into evidence, nor was there any testimony that it was actually created.

On the other hand, Mr. Coe provided credible and unrebutted testimony as to District practices pertaining to time recording. He testified that Mr. Pettola, a Vice Principal and later Interim Principal, instructed attendees at SLC and other meetings to "sign out for an hour" even if those meetings did not last for a complete hour. **T5:29:1-23**. He recalled that SLC meetings normally did not last for a full hour. **T5:32:21-22**. He further testified that Mr. Pettola had instructed staff to "round up" in connection with recording their time for am/pm supervision. **T6:11:7-12:5**. Throughout his testimony, Mr. Coe candidly acknowledged that he typically "rounded up" his am/pm supervision time to the nearest quarter hour, and then spent the "round up" time commuting to Stephon Bacon's house.

Mr. Coe testified that he never billed the Board in connection with "travel time" to or from Stephon Bacon's home. **See, e.g., T6:66:6-9; 74:6-8; 76:11-12**. In the absence of any policy, procedure, or directive to the contrary, it would have been reasonable for Mr. Coe to do so. In fact, the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq., requires an employer to pay employees who are traveling from one workplace to another during the work day. Specifically, 29 C.F.R. 785.38, Travel that is All in the Day's Work, provides:

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

This being the case, Mr. Coe's "rounding up" his am/pm duty to the nearest quarter hour is ultimately of no moment: since he was traveling from am/pm duty to home instruction with Stephon Bacon, he was entitled, as a matter of law, to be paid for that period of time. Mr. Coe further testified that there was never any "round up" in connection with his homebound instruction services. **T6:37:19-23.**

Clearly, the Board promulgated no work rule which Mr. Coe knowingly violated. Even if, *arguendo*, Mr. Coe should have known (despite his supervisors' directives to the contrary) that he should not "round up" his am/pm or SLC meeting time, the Board's failure to enforce any such existing rule or policy mandates against the imposition of discipline here. "Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is tolerated by management." Hence, "Arbitrators have not hesitated to disturb penalties where the employer over a period of time has condoned the violation of the rule in the past." *Ekouri, supra*, 15-74. The Board's failure to take basic steps to assure employee compliance with its alleged policies over a period of years cannot, at this late hour, be foisted upon Mr. Coe.

POINT FIVE
THE BOARD FAILED TO PROVE THAT MR. COE HAD BEEN
CORRECTED, WARNED, OR REPRIMANDED IN CONNECTION
WITH HIS TIMESHEETS

For all the reason set forth, *supra*, Mr. Coe provided credible, consistent, and reasonable explanations as to the manner in which he recorded his extra duty time. He freely acknowledged that, in a limited number of instances, his incorrectly misreported small amounts of time—which mistakes were not brought to his attention until the Tenure Charges were commenced against him.

Where an employee has accounted for himself in a such a reasonable manner, it is incumbent upon the employer to demonstrate that the employee had been warned of the impropriety of his conduct. "Failure to give prior warnings may be one of the reasons for the refusal by an arbitrator to sustain disciplinary action (particularly discharge)." *Elkouri, supra*, 15-73.

Despite this, it is not disputed that Mr. Coe was not advised, either formally or informally, of any concerns vis-à-vis his timesheets until on or about January 10, 2017 (T1:83:20-86:3)—well after the period of time contemplated by the allegations in the Tenure Charges.

Indeed, Principal Bethea testified that she reviewed Mr. Coe's am/pm vouchers "every pay period" (T3:34:1-8), yet never notified Mr. Coe that there was any issue with the way they had been prepared. Jayne Howard testified that the "State Department" conducted an extensive audit of the District's home instruction and after-duty payments for the 2007-2008 and 2008-2009 school years. T3:53:18-54: 6. Notwithstanding this, there was no evidence that Mr. Coe was ever informed that there was any concern with his submission of timesheets.

Under all of these circumstances, there was simply no reason for Mr. Coe to believe that he was doing anything improper in connection with his submission of time records. Having failed to advise him to the contrary, the Board cannot now seek the draconian penalty of termination against a

long-serving, unblemished employee. [Respondent's Brief, pp. 3-15].

Based upon the above, and the entire record, the Respondent requests that the charges be dismissed, that he "be reinstated to his tenured teaching position with full back pay, benefits, and emoluments." [*Id.* at 44]. The Respondent is willing to refund the Board the amount of \$63 for the errors he made in his timesheets for August 3, 2015, March 14, 2016, and October 5, 2016. [*Id.*].

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation * * * 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." I have carefully reviewed the entire record of this proceeding. The Board must prove the basis for the tenure charges against the Respondent by a preponderance of the credible evidence that the Respondent committed unbecoming conduct and other just cause including, but not limited to, willful and intentional misconduct, falsification of time sheets, theft of time, theft of services, and theft of public funds. [See Ex. B-39].

The Respondent has been employed by the Board for 17 years. The evidence does not suggest or show that he was the recipient of a negative evaluation or any written discipline. As the record indicates, the Respondent performed several extra-curricular duties outside of the regular student school day. The Board's decision to dismiss the Respondent from his tenured teaching position was based upon the conclusions it drew from the Respondent's timesheet records. There is no evidence that the Respondent failed to perform or appear for his assigned duties. The Board's case-in-chief rests on the Respondent's timesheets that, on their face, include inconsistencies and areas

of concern for the Board such as overlaps in time on various assignments or the lack of a break in time between assignments. These are said to support the Board's charges that the Respondent engaged in the conduct set forth therein.

The State's Office of Legislative Services performed an audit of the school district in 2010. The audit resulted in findings that led to the discipline, in some instances dismissal, of Board employees. The Respondent was not within the scope of the audit. The evidence does not suggest or show that the Respondent was targeted or involved in any way during the audit or the personnel actions that later ensued against other employees. Nor does the evidence suggest or show that the Board shared the audit findings with employees, implemented a written policy on recordkeeping, or provided specific training to employees subsequent to the OLS audit.

In November 2016, the Board conducted an internal audit in anticipation of the Office of Legislative Services returning to perform for a 10-year audit. The internal audit caused concern to the Administration in that it revealed several inconsistencies in the Respondent's timesheets (Payroll Vouchers, Weekly Work Records, etc.). Based upon the manner in which the Respondent recorded his time, these records on their face appeared to the Board to show that the Respondent was performing more than one duty at once, and sometimes in

more than one location at the same time and being paid for the overlap in time.

The Respondent admitted that some of his timesheets contained errors. The evidence also shows that the Respondent's methodology of calculating his hours by rounding up his time caused him to be paid for time that he did not actually perform certain duties. The Respondent admitted that his rounding up had this effect, but he denied that he was willfully attempting to receive compensation for services that he did not perform. From his perspective, his recordkeeping was regular and consistent with the manner in which he had done so for at least two (2) years without any question ever being raised that his understanding was not accurate or not consistent with any policy. I am persuaded that the Grievant was forthright in his testimony notwithstanding the fact that his explanations for some inconsistencies in his timesheets were not clear or consistent.

Given this record, the evidence does not establish that the Respondent deliberately falsified his timesheets which, if proven, would reasonably provide the Board with a basis for his termination. The Respondent calculated his time in a substantially similar manner for several years without written notification, review or determination from the Administration that his methodology was inconsistent with the manner expected by the Board. Given the presence of his

practice, and the absence of a written policy or administrative directive to the contrary, I am not persuaded that the Respondent's actions were a deliberate, willful attempt to falsify his timesheets.⁹ The Respondent testified to errors that he made. The explanations that he provided during the tenure proceedings were, at times, inconsistent. But the evidence does not compel me to conclude that the Respondent was consciously attempting to falsify his time records. I attribute the Respondent's lack of a consistent response in some areas of his testimony to be from his failure to recall the duties that he performed on specific dates that date back to the beginning of the 2015-2016 school year.

I have considered all of the charges proffered by the Board. The record does not demonstrate that the Respondent committed acts of conduct unbecoming and/or other just cause for dismissal.¹⁰ Based on the foregoing facts and the applicable law, I conclude that the Board has not sustained its tenure charges against Respondent Michael Coe. The Respondent shall be immediately reinstated to his tenured teaching position and made whole in all respects.

⁹ Nothing herein shall be construed as preventing the Board from promulgating and implementing a written policy concerning the methodology of record keeping that is required.

¹⁰ To reiterate, the alleged conduct includes, but is not limited to willful and intentional misconduct, falsification of time sheets, theft of time, theft of services, and theft of public funds. None of these charges are supported by the evidence.

DECISION

The Board has not sustained its tenure charges of conduct unbecoming and/or other just cause against Respondent Michael Coe. The charges are dismissed in their entirety. The Respondent shall be immediately reinstated to his tenured teaching position and made whole in all respects.

Dated: November 10, 2017
Sea Girl, New Jersey



Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 10th day of November, 2017, before me personally came and appeared Robert C. Gifford 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.

Linda L Gifford
Notary Public
Expres 1-10-21