

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

**IN THE MATTER OF THE ARBITRATION
OF THE TENURE CHARGES**

between

UNION CITY BOARD OF EDUCATION,

Petitioner

-and-

DOE DOCKET NO. 160-7/18

KATHLEEN Valencia,

Respondent

BEFORE: SUSAN WOOD OSBORN, ARBITRATOR

DATES OF HEARING: October 2 and 3, 2018

DATE OF AWARD: November 20, 2018

APPEARANCES:

For the Petitioner:

Law Offices of Susanne Lavelle, Attorney
(Elise DiNardo, of counsel)

For the Respondent:

Law Offices of Alan L. Zegas, Attorney
(Joshua Nahum, of counsel)

Witnesses:

Silvia Abbato, Superintendent of Union City Schools
Maranda Gordon, Confidential Secretary to the Superintendent
Isabelle Pereiras, Confidential Secretary to the Superintendent
Diane Capizzi, Assistant to Superintendent for Human Resources
Susanne Lavelle, Union City Board Attorney
Kathleen Valencia, Respondent
David Pressey, UCEA President and Administrative Assistant
Juana E. Arias-Dominguez, Union City Spanish Teacher
Rebecca King, Union City English Teacher

BACKGROUND OF THE CASE

On June 7, 2018 the Union City Board of Education (“Board” or “District”) served High School Teacher Kathleen Valencia (“Respondent” or “Valencia”) with tenure charges. Valencia is charged with engaging in unbecoming conduct for statements made in March 2018, video-taped and audio-taped by Project Veritas (“PV”) and publicly posted by PV online. The Board asserts that Valencia’s alleged statements are in violation of its Instructional Staff Policies 8462 and 3281. Further, it states that Valencia’s actions were egregious and in direct contravention of her duties, obligations and standard of conduct justly required in a profession inextricably linked to the shaping and teaching of young minds. The Superintendent expressed in Valencia’s Statement of Charges that,

. . . her alleged actions and statements were so disruptive and detrimental to the school district so as to require Valencia’s employment with the Board be terminated.

On June 7, 2018, the Board served Valencia with a copy of the "Statement of Charges" together with a copy of the "Statement of Evidence and Exhibits in Support of the Charges". Valencia was advised that pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(b), she had an opportunity to submit a written "Statement of Position" and a written "Statement of Evidence" with reference to the Board's filed charges. Both statements were required to be executed under oath and received by the Board within 15 calendar days from Valencia's receipt of the Board's letter.

Tenure Charges

By letter dated June 7, 2018, Tenure Charges (Statement of Charges, Statement of Evidence and Exhibits) were served upon Kathleen Valencia's attorney and Kathleen Valencia, respectively. The Statement of Charges provide as follows:

CHARGES 1-7

(Conduct Unbecoming)

Charge 1. In violation of UC Board Instructional Policy 8462, encourages the cover-up of an alleged assault on a student by creating a false scenario of the incident;

Charge 2. In violation of UC Board Instructional Policy 8462, encouraged the non-reporting of an alleged assault on a student, and instead recommends the teacher lie about the incident with the student if ever questioned;

Charge 3. Promotes the illegal, unethical and unprofessional actions of a teacher giving the student a passing grade to get him out of the class and move on in September;

Charge 4. In violation of UC Board Instructional Policy 3281, makes a derogatory reference about the students of Union City – students she has taught as a tenured teacher employed by the Union City School District – as “scumbags”;

Charge 5. In violation of UC Board Instructional Policy 3281, makes a derogatory reference about the homes of Union City residents that she visits during home instruction – as a tenured teacher employed by the Union City School District – as “shitholes”;

Charge 6. In violation of UC Board Instructional Policy 3281, makes a derogatory reference about the students of Union City – students she has taught as a tenured teacher employed by the Union City School District – as “dirt bags”;

Charge 7. In an effort to bolster her own credibility as UCEA President, makes false and misleading statements about the facts/discipline incurred by a teacher “who had sex with a student”.

Union City Board Instructional Policy 8462, which governs reporting potentially abused or missing children, provides in pertinent part, the “employees . . . working in the school district shall immediately notify designated child welfare authorities of incidents of alleged missing, abused and/or neglected children.”

Union City Board Policy 3281, which governs inappropriate staff conduct, provides in pertinent part, that “school staff shall not make inappropriate comments to pupils or about pupils.”

The Board advised Valencia that at the expiration of the 15-day period, it would consider the charges and the Statement of Evidence filed together with any Statement of Position and Statement of Evidence that Valencia had submitted.

By letter dated June 15, 2018, the Board advised Valencia that it would make its determination at the June 27, 2018 Board meeting as to whether there was probable cause to credit the evidence in support of the charges and whether such charges, if credited, were sufficient to warrant dismissal or reduction in salary; and, if so credited, whether Valencia should be suspended with or without pay pending the resolution of the charges. The Board informed Valencia that in the event of a determination of probable cause, the Board would certify the matter to the Commissioner of Education.

On June 25, 2018, Valencia filed an Answer with the Board in essence, denying all seven charges. Valencia's separate and affirmative defenses are provided as follows:

1. Petitioner has failed to state a claim upon which relief may be granted.
2. The charges, in and of themselves, lack a sufficient evidentiary basis to justify Petitioner's consideration of this matter. The charges must, therefore, be dismissed.
3. Petitioner has failed to comply with the procedural requirements of the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10, et seq., as amended and the regulations promulgated thereunder.

4. The charges fail to comply with N.J.S.A. 18A:6-11, in that they refer to documents and information obtained from third party sources that were not fully supplied to Valencia.
5. The charges violate the First Amendment right of Valencia under the United States Constitution.
6. The charges violate Valencia's due process rights.
7. The charges violate Valencia's statutory rights.
8. Valencia reserves the right to amend these separate defenses as may become necessary and appropriate after discovery has been completed, and to move for dismissal.

At its Board meeting on June 27, the Board voted to certify tenure charges against Valencia to the Commissioner of Education. It also suspended Valencia without pay effective September 1, 2018. By letter on July 2, the Board submitted the tenure charges together with its proofs to the Commissioner of Education. By letter of August 17, Valencia's attorney filed a written response to the tenure charges, essentially repeating the answer filed with the Board.

The Commissioner of Education reviewed the tenure charges and the Respondent's answer and deemed the tenure charges, if true, sufficient to warrant dismissal or reduction in salary and were referred to an arbitrator. Pursuant to N.J.A.C. 6A:11-6.3, I was appointed on August 29, 2018 as the arbitrator to hear and decide the tenure charges. An arbitration hearing was conducted on October 2 and 3, 2018, at which time eight witnesses testified

under oath. By agreement of the parties, witnesses were sequestered during the hearing. The parties also presented documentary evidence. The parties filed post-hearing briefs by October 19 and reply briefs by October 26. N.J.A.C. 6A:11-6.3 provides that the decision in this matter shall be issued within forty-five days of the beginning of the hearing, and that the decision shall be final and binding. On November 12, I requested an extension of time to submit my award. The Department of Education granted my extension request to November 20, 2018.

ISSUE IN DISPUTE

The parties stipulated that the issue in dispute in this matter can be framed as follows:

Did the Board of Education prove that tenure charges brought against Kathleen Valencia amounted to sufficient cause for termination?

STATUTORY AND REGULATORY CONSIDERATIONS

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 sub article, 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 sub article provided.

* * *

N.J.S.A. 18A:6-16 Proceedings before commissioner; written response; determination

* * *

... If, however, [the Commissioner of Education] shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, . . .

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S.A. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

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c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S.A. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10.

STIPUATIONS OF THE PARTIES

The parties have stipulated the following facts:

- a. Kathleen Valencia was hired by the UC Board as a social studies teacher effective 9/1/02.
- b. Kathleen Valencia was elected UCEA President effective July 1, 2017.
- c. Kathleen Valencia resigned as UCEA President on May 3, 2018.
- d. Kathleen Valencia was suspended with pay effective May 4, 2018 as result of the Project Veritas video and her statements made therein.

e. Effective May 16, 2018 Kathleen Valencia was changed from a 12-month employee to a 10-month employee as [the] result of her resignation as UCEA President.

g. UC Board Policy 8462 – Reporting Potentially Missing or Abused children is a current Board Policy.¹ (B-8; B-8A)

h. UC Board Policy 3281 – Inappropriate Staff conduct – is a current Board Policy. (B-9)

i. On June 7, 2018, Tenure Charges (Statement of Charges, Statement of Evidence and Exhibits) were filed with the Union City Board of Education Board Secretary against Kathleen Valencia.

j. On June 8, 2018 and June 11, 2018, Tenure Charges (Statement of Charges, Statement of Evidence and Exhibits) were served upon Kathleen Valencia’s attorney and Kathleen Valencia, respectively.

k. On June 25, 2018, Kathleen Valencia filed her Answer to the Tenure Charges.

l. By letter dated June 28, 2018, Kathleen Valencia and her attorney were notified that at its meeting on June 27, 2018, the Board certified the tenure charges against her, and both her attorney and her (sic) were provided with the Board Resolution and Certificate of Determination.

¹ The parties were unable to stipulate to proposed fact “f”.

m. By letter dated July 2, 2018, the Tenure Charges (Statement of Charges, Statement of Evidence and Exhibits), Resolution and Certificate of Determination were filed with the Commissioner of Education and a copy sent to Kathleen Valencia's attorney and Kathleen Valencia.

n. By letter dated July 6, 2018, the Department of Education acknowledged receipt of the filed Tenure Charges with no deficiencies.

o. By letter dated July 16, 2018, Kathleen Valencia, by and through her attorney, requested a 30-day extension within which to answer to tenure charges. The extension was granted by the Commissioner of Education until 8/20/18.

p. By letter dated August 17, 2018, Kathleen Valencia, by and through her attorney, filed a written response to the Tenure Charges filed against her.

q. By letter dated August 29, 2018, received September 4, 2018, the Department of Education advised that after review of the tenure charges and the answer, the tenure charges were deemed sufficient, if true, to warrant dismissal or reduction in salary and was (sic) referred to an arbitrator.

FINDINGS OF FACT

Silvia Abbato is the current Superintendent of Schools in Union City, a position she has held for the past five years. Prior thereto, Abbato was the District's Assistant Superintendent for twelve years.

Kathleen Valencia was hired by the Union City Board of Education as a high school social studies teacher on September 1, 2002. Valencia achieved tenure on September 1, 2005. For approximately eight years she taught social studies in the Emerson High School. In Emerson, she taught a combination of honors classes and classes for at-risk students.² In 2009, Emerson High School was converted to a middle school and the new Union City High School was completed. Valencia was then reassigned to the Freshman Academy and held that assignment through June, 2017. In June 2017, Valencia was elected President of the Union City Education Association (“UCEA”), a position for which she was given full-time release with pay from her teaching duties.³ UCEA’s office is on the second floor of the District’s Central Registration Office. However, Valencia spent much of her time as Union president visiting its members in the various District’s schools. In addition to her Union responsibilities, Valencia also provided home instruction.

In January 2017, an under-aged student attending the Alternative Student Academy reported to the school director that one of the Academy teachers, “DP”, had some sort of a sexual encounter with her. She felt that DP was harassing her

² “At-risk” students are those who are at risk of not graduating because of attendance problems or behavioral problems.

³ The NJEA reimburses the BoE for one-half of the UCEA President’s salary.

via text. This encounter was then reported to the District's Superintendent who in turn asked Board Attorney Susanne Lavelle to investigate. Lavelle testified at the arbitration hearing that by the following day DP was suspended with pay from his teaching position while the police and prosecutor's office investigated. In October, 2017, the grand jury indicted DP on criminal charges. The teacher was eventually convicted and sentenced to probation and the District terminated his employment. The State Board of Examiners revoked DP's teaching certificate. At no time following his suspension was DP returned to the classroom.

Superintendent Abbato requested Valencia be assigned to provide home instruction to DP's victim because she believed that Valencia and the girl would be a good fit. Abbato stated that Valencia was not aware of the specifics of the girl's medical condition or the incident of sexual abuse by a District teacher; moreover, Abbato believed that Valencia would be a "stable force" for the student.

Project Veritas

According to Wikipedia,

Project Veritas ("PV") is an organization created by James Edward O'Keefe III, an American conservative political analyst. O'Keefe and PV produce secretly recorded undercover audio and video encounters with figures and workers in academic, governmental and social service organizations, purporting to show abusive or allegedly illegal behavior by employees and/or representatives of those organizations.

In this matter, Veritas sent an undercover operative for the purpose of obtaining damaging statements from Valencia. The operative posed as the concerned sister of a District teacher who allegedly assaulted a student. Veritas surreptitiously videotaped and audio taped the conversation.

March 2018 Meeting

In late March 2018 Valencia was preparing to leave the office for the day. Earlier that day Valencia had been downstairs on the first floor in the District's Registration Office helping a Union member with his retirement papers. She left her cell phone downstairs and went downstairs to get it. Upon retrieving her cell phone, she noticed that there were several missed phone calls from a number she did not recognize. Valencia's phone then rang with the same caller ID as the missed calls. Valencia answered the call and a female voice explained that she needed to meet with Valencia immediately about a very serious matter.

The woman, who was really a Veritas operative, came to Valencia's office right away and introduced herself as the sister of a District teacher. She explained that she was very concerned about her brother because he had assaulted a student. The woman was secretly filming and recording the entire meeting, which according to Valencia, lasted about an hour and a half. Over the next few months PV significantly trimmed the size of the recording, edited it for

content and added narration. After the editing, the video which is approximately seventeen minutes, was posted on YouTube on May 2, 2018.⁴

YouTube Video

The video begins with Valencia in her Union office speaking with the PV operative. The narrator, Edward O'Keefe, then cuts into the tape and says: Within minutes of meeting our journalist, Ms. Valencia boasted about how her Union protected a teacher who had sex with a teenage student.

Valencia explained at the arbitration hearing that the operative had identified herself as the half-sister of a newly-employed male teacher in the Union City Middle School who had an altercation with a student. Valencia tells the operative that everything they speak about in their meeting is hypothetical.

Valencia is showing the operative a file on her desk and says that this file is about a teacher who had sex with a teenage student. Valencia states to the operative:

You're not going to jail. You know what this whole file is about? It's about whether or not they get to keep their pension. Sex with a teenage girl. Is he going to jail? No. How come? Because the child's not pressing charges. They have no proof there was sex.

⁴ I infer from the length of the meeting as compared to the length of the YouTube video that the video recording must have been edited significantly. That inference is also confirmed by Valencia's testimony.

Narrator O'Keefe then cuts in again and says,

The Union City Education Association is aware that one of their teachers had sex with a teenage student and nothing is being done except to protect the teacher. Now the identity of this teacher obviously needs to be revealed. Here is the email and phone number for Ms. Valencia and the NJEA Headquarters. We need you in the audience to take action. Call them. Ask for the name of this teacher.

Next, the PV operative told Valencia that her brother pushed a middle school student after the student spit on him and called him a "n'ger". The operative explained that the encounter happened at a District school about two weeks ago. Valencia asked the operative if there was a witness or video of the incident and the operative responded "no". Valencia then replied, "Then nothing happened, the kid is fine, no scratches".

Valencia told the operative that "God forbid the student reports the incident to the principal or his parents" - - and then Valencia suggests to the operative that her brother should say that the student tripped and fell and that he did not push the kid. Valencia tells the operative, "*Your brother isn't going to admit to anything!*" The operative next asks Valencia if her brother should tell the principal about the incident - - in which Valencia responded, "Keep his f'cking mouth shut!" She goes on to tell the operative that,

Valencia: He's gonna give the kid a 65%, right? He's not gonna fail the kid?

PV Operative: No. No. No.

Valencia: No. He's not gonna fail the kid. He's gonna get that kid out of his f'cking classroom.

Valencia goes on to tell the operative that she knows the "scumbag" kids because she provides home instruction in their "shithole" homes. Valencia mentions that she has taught the "dirt bag" class at the high school and states that, "It's the biggest f'cking piece of shit". Valencia states that the kids are "wannabes" – "scumbags" and that they have no "balls".

Valencia's Account - March 2018 Meeting

Valencia described the YouTube video as being quite different from the full meeting with the Veritas operative. For one, Valencia noted that the full meeting lasted approximately an hour and a half. She also noted that the conversations which occurred in the meeting were in a dissimilar order from what was presented in the video, and the video was filled with repetitions and omissions.

Valencia testified that the meeting with the Project Veritas operative was held in the later part of March 2018. Valencia said that on the day of the meeting the PV operative came to her office near the end of the work day. She maintained that the woman sounded very distressed on the phone. Valencia stated that the woman arrived at her Union office appearing visibly shaken, distressed and agitated, and conveyed to Valencia that she was in desperate need of help. Valencia said that she wanted to make the woman feel better.

Valencia said that the PV operative told Valencia that the previous day she had flown up from Florida because she was worried about her brother. Valencia said that the woman told her a lengthy story about her half-brother who was African American, taught Math at the Jose Marti Middle School and was new in the District. The operative conveyed to Valencia that her brother had assaulted a student who had spit on him and called him "n'ger". Valencia maintained that the operative told her that her brother was possibly suicidal and was experiencing a tough time with his students. The operative stated that Union City was a bad place and the students were harassing her brother; one of the students spit on him and another student keyed his car on school grounds. Valencia said that the operative conveyed to her that her half-brother was in fear for his life.

The operative was also very concerned that her brother would be in serious trouble over the assault. Valencia testified at the hearing that the operative was very agitated and distressed and her goal during the entire conversation was simply to calm the operative down and Valencia was not worried about the consequences of her conversation since it was private. Valencia maintained that at the time of the meeting she was not sure if the altercation with the operative's brother was real.

After the operative told Valencia her story, Valencia suggested to the operative that her brother would not be in any trouble because “The student had not come forward; and, the brother could simply deny the allegation.” Valencia told the operative that, “The student had reason of his own not to report the incident because of his own conduct.” Valencia acknowledged that she advised the operative to tell her brother not to disclose the altercation with the student to the administration. Valencia maintained that if the operative’s brother was in the room she would not have given him the same nondisclosure advice. Valencia acknowledged that her advice was bad.

Valencia acknowledged that she used the word “n’ger” but defended that use by stating that the operative used the term first and she was merely quoting the operative. She explained that it was Project Veritas’s fault that the “n” word repeatedly appears in the video because PV edited that clip to show it repeatedly. Valencia stated that she was aware that students could be investigated for using the “n” word; however, she affirmed that no investigation would occur since the students use the term regularly to one another, but not in a mean way. She stated that she knew that the “n” word is a term that is intentionally used to dehumanize people.

Valencia admitted that she suggested to the operative that the half-brother pass the student with a 65%, "to get the student out of the classroom". Valencia testified that she gave the operative this advice merely to calm the operative down. Valencia maintained that she would never advise a teacher to change a student's grade.

Valencia admitted that she used some derogatory terms to describe Union City students. The operative expressed her concerns that the District's kids were affiliated with gangs and that she had heard Union City was a dangerous place. The operative expressed her concern that her brother might be attacked or worse by the students. In an effort to calm the operative down, and ally her concerns, Valencia told the operative that Union City's kids are basically good kids, are not involved in gangs (although some of them are "wannabes") and that even the worst of them are not that bad. She acknowledged that she referred to some of the Union City kids as "dirt bags" or "scumbags" and remarked that some of them live in "shit holes". Valencia denied ever previously referring to the kids in such terms before. She explained that she only did so in the conversation with the operative because she believed that is what the operative needed to hear at that time to calm her down - - Valencia stated that she meant no malice.

Valencia knew that the students were upset by her comments but stated that "she knows kids are forgiving, as are the parents." Valencia said that she was

not speaking to a Union member, not speaking to a licensed teacher and not speaking to any Union City Board employee but was speaking to someone who identified themselves as a family member of a District teacher.

Valencia explained that although the video begins with her holding the school's pedophile file and shows the same clip later on in the video, in reality that part of the conversation with the operative occurred near the end of their talk. Valencia stated that she was referencing a pedophile from a 2017 incident and was aware that the pedophile in that case was criminally charged and terminated from the District. She maintained that she wasn't referring to any "real" student or teacher that was currently having sex in the District. Valencia testified that the operative was belaboring, and she had to calm her down and make her feel better. Valencia agreed that holding up the school's pedophile file "denigrated" Union City. She admitted that she said what was on the video, but it was chopped up and out of context.

Valencia believed that she had sufficient information to be able to locate operative's brother. Valencia testified that she had planned on meeting with the operative's brother the next day and had no intention of actually advising the brother to lie. She said that she assumed the brother was not telling his family the whole truth and therefore, she wanted to speak to him personally.

Valencia agreed the majority of the conversation between the operative and her was not in the video due to PV editing. She believed that PV made 26 cuts to the video. She testified that PV intentionally omitted what the operative was saying and believed those omissions took the meaning of their conversation out of context. For example, Valencia testified that her frequent use of profanity during the conversation was to match that being used by the operative. Valencia also affirmed that the video was not in chronological order - - specifically two video clips were referenced depicting the transitioning and editing of comments in the video, clips at 5:40 through 6:20; and 7:53. Valencia testified that all the good things she said about Union City kids were edited out of the video. Valencia also noted that narration was added to the video.

Valencia testified that about ten minutes after the meeting with the operative, she was preparing to leave for the day. She began to wonder whether she had just been set up. Shortly thereafter on her way home she received a call from NJEA Field Representative Ed Stevens. Stevens explained to Valencia that she should be careful because PV was targeting the NJEA⁵ as an organization and particularly local NJEA affiliate organizations who had presidents on full-time paid release from duties. Valencia told Stevens about the meeting she just had, and

⁵ Stevens believed that PV was not targeting the Union City Board of Education.

Valencia and Stevens together concluded that it was likely a PV operative.

Stevens called NJEA Headquarters to alert his boss.

Valencia did not notify Abbato or anyone else from the District administration to the possible problem since both Stevens and she believed the video was directed towards its Union. Valencia explained that Stevens believed the video would be in a much larger montage and did not expect Valencia's video to be a solo video. Valencia testified that in hindsight she should have said something to the Superintendent after her meeting in March with the PV operative. She admitted that she did not speak with the Prosecutor's office concerning their investigation.

Valencia stated that she felt the video portrayed her as someone she is not. She acknowledged that she was inexperienced as a Union president and admits she should not have taken the meeting with a "non-member". Valencia stated that was never her intent to make Union City, or its students look bad. She testified that she knew a lot of the Union City people would be forgiving of her comments in the video. Valencia maintained that the video was selectively edited and left out all the positive things that Valencia said about Union City and its kids.

She stated that she wants to return to teaching in the District and characterized herself as a "model teacher". At the hearing Valencia testified that she was hoping the whole thing would just "go away". Valencia testified that she

believed the Union City Board should acknowledge that she is a victim of PV's conservation right-wing agenda to undermine unions and that PV deliberately sought to make Union City's education system look bad. She stated that she had no role in the making of the video nor was she threatened to make the remarks that she made. She stated that she believes the Board should be saying, "This video is not an accurate representation of Kathleen Valencia." Valencia testified, "I'm a victim." "I was targeted."

Media/Press - Central Registration

Late in the afternoon on May 2, 2018, Valencia was out visiting members in one of the schools. She received a call on her cell phone in which the caller told her that she needed to return to the UCEA office because they were attempting to deliver a package which needed her signature. Valencia was suspicious of this because she was aware that typically package delivery does not require her personal signature. Valencia returned to the UCEA office and called the building security guard from her car. She asked the guard to meet her at her car. Just as the guard met her, Project Veritas' creator O'Keefe and a camera man appeared and attempted to question her. Valencia stated that she said nothing and drove away. Valencia contacted Stevens and then Superintendent Abbato and told Abbato that the Project Veritas people were attempting to gain access to the Board buildings to obtain a statement from Valencia. Abbato was unaware of

Project Veritas; Valencia told Abbato that PV was a conservative group focusing on unions in general. Valencia testified that she did not provide Abbato with any details of the interview in late March.

The following morning, May 3, Valencia was driving to work when she was called by a reporter to ask her about her reaction to the Project Veritas video, which had been posted on YouTube. Valencia hung up on him and went directly to the Jose Marti Middle School. There she met with several Union officers and viewed the video together. Valencia took a personal day and went to the NJEA office to discuss the matter. Because the video had directed inquiries to Valencia's cell phone number, she received many local and long-distance calls that day inquiring about who the alleged perpetrator was on the sexual assault matter referred to in the video. She accepted none of these calls and changed her phone number. Stevens called the NJEA headquarters and Board attorney Lavelle who in turn, notified Abbato.

Superintendent Abbato's Testimony

Abbato testified that Valencia had called her on May 2 to tell her that the media was attempting to gain access to the Central Registration building. The Superintendent stated that Valencia told her that the press was following her with a microphone and trying to question her.

Abbato testified that on May 3, 2018 she received a phone call from Washington School's Assistant Principal Waleed Miqbel concerning the video. Miqbel told her that someone had sent him the link to the Project Veritas video. After viewing the video Abbato went to the District's office and called Board Attorney Susanne Lavelle and the Board members to discuss the video. She testified that Lavelle was instructed to contact the Chief of Police to investigate. The superintendent believed there may be another pedophile in the District that Valencia was aware of - - but unknown to the District's administration.

Abbato stated that the District was working with the Hudson County Prosecutor's Office and the Union City police to determine if there was currently a pedophile working in the school District. Moreover, she testified that the District's administration did not attempt to investigate the accuracy of the video, to determine whether the video was edited or not - - and it did not contact Project Veritas to obtain the original video. Abbato stated that her investigation including reviewing the video and obtaining comments from parents, principals, the Board counsel, and Board workers. She affirmed that the video "speaks for itself", "disparaging remarks were made whether they were in context or not".

Abbato said she was most concerned that another District individual may have engaged in sexual misconduct. Abbato testified that during the day on May 3 she received newspaper calls, TV station calls, and calls from out-of-state

individuals concerning the video. She stated that the calls continued from May 3 through May 14; in addition, there was TV and newspaper coverage about the video which Abbato found very embarrassing to the District. Abbato affirmed that the comments surrounding the video were disturbing to the District; that there was now a sense of impropriety with one of its teachers. She explained that the District's students were aware of the video and the atmosphere was extremely tense.

Abbato testified that on May 3 she met with the Board counsel and senior Union members (not Valencia) to prepare a collective message stating that the Board and Union were working together on the issue at hand. Abbato testified that a press release was prepared by Lavelle around 5:30 p.m. that day.⁶

Abbato stated that on May 3 she received a letter from Valencia resigning from her duties as President of the UCEA (B-2). Effective May 4, Valencia was suspended with pay pending an investigation (B-3). By letter dated May 4 to Stevens, Lavelle confirmed that Valencia waived her right to meet with the Superintendent to discuss the Project Veritas video and the possible resulting adverse effect on her employment in the District (B-4).

⁶ The May 3 press release is not in evidence.

On May 4, Abbato sent a staff memo to all District employees referencing Valencia's comments on the video. In the letter she reminded employees of the District's policy against making public comments to the media disparaging other employees or the District. Moreover, she cited the following, (B-12)

The comments made are deeply disturbing and inappropriate because they in no way reflect the views and our beliefs and our values of our school district or of the professionalism of our employees.

Union City is a highly-achieving urban school district that has received numerous national and state awards. I do not want this isolated incident to besmirch the reputation of the District and employees.

Abbato testified that she was contacted by the State Board of Examiners requesting the employment status of Valencia. She stated that the District received a subpoena dated June 20, 2018 from the New Jersey Grand Jury in reference to the matter at hand. In accordance with Schedule A of the subpoena, any and all records for Kathleen Valencia were requested. Abbato called its attorneys and they complied with the subpoena. (B-11) Abbato testified that all of this was very upsetting to her.

Abbato's Meetings with Parents

Abbato testified that on or about May 4 the mother of DP's sexual assault victim came to see her in regard to the video. She stated that the mother was upset, nervous, flustered and agitated. The victim's mother told Abbato that her

daughter was receiving calls from other students since the video went online. Abbato said that she tried to calm the mother down. The mother told Abbato that she was concerned that her daughter's sexual assault from the previous school year would be made public and her daughter would be identified. Abbato testified that the kids already knew about her daughter's incident from the prior school year.

Testimonies of Superintendent's Secretaries & Board Counsel

Miranda Gordon

Confidential Secretary to the Superintendent, Miranda Gordon, testified that on May 3, 2018 she had received a call from Jersey Journal's reporter Terence McDonnell somewhere around 8:00 a.m. to 8:30 a.m. She stated that McDonnell forwarded the link to the Project Veritas video for Gordon to give to Abbato. Gordon stated that it was very chaotic that day. She maintained that the Board policy was not to make statements to the press. According to Gordon, around 10-15 calls came in that day seeking the identity of the teacher referenced in the video and asking whether that teacher was still employed by the District. The secretary stated that calls continued the next day; however, no one wanted to leave a return phone number. Gordon testified that the calls stopped by the following Monday. She affirmed that most of the parents who had contacted the school were concerned about the pedophile reported in the video and that most

of the comments were negative. Gordon explained that many students saw the video and particularly, two juniors in the District were very upset about Valencia's negative comments in the video. Gordon stated that a press release was issued.

Isabel Pereiras

Confidential Secretary to the Superintendent Isabel Pereiras testified that May 3 was a chaotic day. Pereiras stated that she first learned of the Project Veritas video when Dan Alexander from New Jersey Radio Station 101.5 called to inform her that a video was posted online at YouTube. The secretary said that after viewing the video she spoke to Abbato; Abbato told her that she was aware of the video and was currently working on the issue. Pereiras stated that there was ongoing chatter and buzzing going on in the office over the video. She stated that she received about 25 anonymous local and out-of-state calls that day. Pereiras maintained that the parents and the press were primarily concerned about the pedophile and the name calling exhibited by Valencia in the video. She explained that parents were dismayed and shocked over Valencia's remarks. Pereiras explained that morale was down because "we" [the District] were shown in a negative light. She attested, "We take our jobs seriously."

Pereiras testified that on May 3, Abbato held an impromptu meeting with the Union's vice-president, secretary, and others to provide damage control over the online video. Pereiras stated that Abbato issued a press release and by the

following Monday the phone calls had subsided⁷. Pereiras stated that on May 4, the mother of DP's victim came into the office to see Abbato. The secretary stated that the mother was crying, distraught and concerned about the impact of the online video on her daughter.

Human Resources, Diane Capizzi

Assistant to the Superintendent for Human Resources Diane Capizzi testified that its instructional/non-instructional employees are aware of Board's Policy 8462 – Reporting Potentially Missing or Abused Children (B-8) through annual training; and its instructional employees are aware of Board Policy 3281 – Inappropriate Staff Conduct (B-9) through the employees' opening day packet. Capizzi believed that inappropriate conduct is anything that would be harmful to others. She explained that she did not know if the child abuse referenced by Valencia in the video was real.

Board Counsel, Susanne Lavelle

Board Counsel Susanne Lavelle testified that on May 3 she received a call from Union Representative Stevens informing her that there was a video on YouTube concerning the District. Stevens told Lavelle that an anti-union group

⁷ Both Gordon and Pereiras separately testified that by Monday the calls had subsided; Abbato testified that they continued for weeks. I credit the confidential secretaries because they are in fact, the one who receive incoming calls. I believe Abbato was simply mistaken.

captured the Union president on video and that Valencia said some things that she should not have said. After speaking with Abbato, Lavelle viewed the video. She met with Abbato after which she drafted Valencia's statements of charges, evidence and exhibits, a memo to the Board members and employees, and a press statement.

Lavelle stated that the police chief was contacted and that she spoke with the Assistant Prosecutor for Special Investigations maybe the following day (May 4). She indicated that Grand Jury subpoenas were served on June 20, 2018. Lavelle believed that the police may have reached out to Valencia's attorney for an interview.

Lavelle testified that she personally conducted an investigation of the alleged sexual assault by DP in 2017 and then turned the matter over to the police for criminal investigation. DP was immediately suspended with pay and after his indictment, his suspension became without pay. Eventually DP plead guilty to the criminal charges and was sentenced to probation. He was also terminated from his teaching position with the District.

Lavelle stated that the District's climate after May 3 was hectic and crazy going into the following week. She observed how tense the atmosphere was in the District. Lavelle testified that law enforcement was moving on with the investigation and was receiving the District's cooperation. Lavelle stated that she

contacted the DCJ Deputy Attorney General and suggested they talk to the Prosecutor's Office. She indicated her coordination with the police department and prosecutor's office lasted about ten days. Lavelle stated that she discussed the investigation with the Board but did not recall speaking to Valencia.

Lavelle testified that by letter dated May 4, Valencia waived her right to attend a meeting with the superintendent to discuss the Project Veritas video and the resulting adverse effect on her employment in the District (B-4). Lavelle also indicated that Valencia refused to speak with the police. She acknowledged that she did not request Veritas to supply the District with a copy of the full video since the Union had also requested a copy but to no avail.

Lavelle explained that she did not know what the District attempted to do to determine the veracity of the statements on the video. Lavelle stated that Valencia put a "mark" on the District and brought disruption to the District. Lavelle testified that the New Jersey Division of Criminal Justice (DCJ) became involved and a Grand Jury subpoena was served to Superintendent Abbato on June 20, 2018 (B-11). She stated that DCJ had not contacted the District as of the day of the hearing in this matter with a status update. By letter of June 28, Lavelle advised Valencia that the Board had certified tenure charges against her and that she was being suspended without pay effective September 1, 2018.

Character Witnesses' Testimony

President UCEA/Admin Assistant, David Pressey

Union City's Administrative Assistant David Pressey became the President of the UCEA on May 3, 2018 when Valencia resigned from the position. Pressey stated that his position consists of mostly administrative work in the District's main office and that his position is non-instructional. He added that he does not participate in supervisor/teacher performance reviews. Pressey testified that he never witnessed Valencia's home instruction duties.

Pressey maintained that he had worked with Valencia at the Jose Marti Middle School and that Valencia's attitude was always upbeat, and positive and he believes she is a wonderful person. He said that he has heard from students and staff that Valencia was a good teacher. Pressey believed that Valencia may have been named teacher of the year.

Spanish Teacher Juana Arias-Dominquez

Juana Arias-Dominquez has been a Spanish teacher in the District since 2002 and started her teaching assignment at the same time that Valencia started; both were new to the teaching profession. She stated that she is currently the UCEA grievance chairperson and secretary. Arias-Dominquez testified that Valencia and she worked together at the Emerson School for about seven years. From 2009 on Arias-Dominquez and Valencia were assigned to different schools. She stated that she has looked up to Valencia for a long time. The character

witness stated that both Valencia and she were chosen to be teacher's leaders as part of the District's Professional Learning Community initiative tasked to provide advice, guidance and counseling for teachers. She testified that Valencia is an excellent leader provides guidance to her students. She further stated that she frequently hears from her high school students that Valencia is a good teacher.

Arias-Dominquez said that she was upset when she viewed the video; and, that name calling was not part of Valencia's character. She averred that the YouTube video had not changed her opinion of Valencia. Arias-Dominquez testified that she considers Valencia a friend.

English Teacher Rebecca King

Rebecca King is currently an English teacher in the District and has known Valencia since 2002 when they both worked at the Emerson School. King testified that she has observed Valencia as a teacher and that Valencia has an amazing ability to take abstract concepts and make them real and tangible for the students. In addition, King stated that Valencia had positive interactions with students in school and at games and events; students found her maternal. King stated that she and Valencia worked closely together integrating each other's subject areas. King upheld that Valencia is one of the hardest workers she has known and that she has never known Valencia to disparage Union City and the District's kids.

King said that Valencia worked different ends of the spectrum - - honor students to at-risk students. King said that Valencia had respect for all of the students and that she gave at-risk students a sense of self-worth and opportunity. King testified that Valencia and she sometimes socialize outside of school. She stated that she did not view the YouTube video.

ANALYSIS

Board's Position

The Board takes issue with Valencia's claims that she was a victim of Veritas and that she should be excused for her conduct in the video. The Board points out that Valencia claims she was merely repeating the derogatory names used by the undercover operative and that her positive comments about Union City students were edited out of the video. The Board asserts that, no matter how much the video was edited, Valencia's derogatory remarks about the students she claims to adore remain as evidence. The Board notes that Valencia used those terms voluntarily and without coercion. It contends that Valencia made the choice to use those words and the fact that she did so with someone she does not know, leads to the inference that such terms are part of Valencia's vernacular.

As to the portion of the video concerning the pedophile, the Board notes that this subject matter was not brought up by the operative, but rather Valencia herself. The Board contends that Valencia lied about how the sexual assault

allegations were handled and the result was that the sexual allegations as reported by Valencia caused upset and disruption within the District “for weeks”. The Board also avers that Valencia acted inappropriately by failing to notify the District administration about her meeting with the Veritas operative.

Finally, the Board argues that Valencia failed to show any remorse regarding her conduct either in her resignation letter to the Association or at the arbitration hearing. The Board maintains that should Valencia be returned to her teaching position, it would be unable to assign her to any classroom in the District. It argues that Valencia lacks the temperament and character to protect pupils’ health, safety and welfare.

Respondent’s Position

Kathleen Valencia maintains that she was victimized by Project Veritas when its operative assumed a fictitious identity and tricked her into making comments which Veritas would later edit and publish on YouTube. Valencia had no reason not to believe the Veritas operative’s story about her brother assaulting a student.

The Respondent asserts that the Board has not proven the charges against Valencia by a preponderance of the evidence. It contends that the YouTube videotape offered at the arbitration hearing is of no probative value as it was not authenticated and was obviously and significantly edited from the original tape of

the conversation with the Veritas operative. Further, it notes that the Board failed to submit the original tape.

As to the specific charges, the Respondent argues that her conduct should not be found to be unbecoming conduct. Tenure charge number 1 alleges that Valencia violated Board policy 8462 by encouraging the cover-up of an alleged assault. The Respondent alleges that Valencia could not have violated this policy because the entire story was a fiction of the Veritas operative and therefore, there was no actual teacher, no student and no abuse. Further, it argues that Valencia had every intention of fully investigating the alleged abuse by talking to the teacher involved the following day.

Charge number 2 alleges that Valencia violated policy 8462 by recommending that a teacher avoid reporting the assault incident to authorities. The Respondent argues that the policy mandates reporting an incident and does not concern itself with what advice a union president might give a union member.

Charge number 3 asserts that Valencia promoted the idea of giving a student a passing grade to insure his removal from the class at the end of the year. However, the Respondent notes that in fact, there was no student and there was no teacher. Additionally, the Respondent argues that the evidence does not show that any student was not getting a passing grade, nor that Valencia encouraged the passage of any student who was otherwise failing.

Charges number 4, 5, and 6 allege that Valencia violated policy 3281 by making derogatory remarks about Union City students, including referring to them as “dirtbags”, “scumbags” and referring to their houses as “shitholes”. The Respondent argues that Valencia’s remarks were not intended for public consumption. No students or coworkers were present, and the comments were made in a private office in what Valencia believed was a private conversation with a distraught woman. Finally, the Respondent argues that the Board’s policy does not regulate the private thoughts of individuals and Valencia did not violate the policy.

Charge number 7 contends that Valencia “made false and misleading statements about the facts/penalty/discipline incurred by a teacher who had sex with a student”. The Respondent argues that the allegation has not been supported by the evidence; specifically, there was no credible evidence that what Valencia said about the pedophile was false information. Valencia accurately recited that the teacher was not going to jail and there is no record evidence to establish that her comment about a pension dispute was not legitimate.

The Respondent maintains, even if I find Valencia guilty of an unbecoming conduct, the totality of the circumstances does not justify her dismissal. It asserts that the kind of charges which lead to termination from a teaching position are not present in this case. The Union cites in the matter of the tenure arbitration of

Eric Deering, docket number DOE38-2/18; 257-18 in which a teacher repeatedly referred to a student as “ugly” and stated that he would hit the student if it were not prohibited. In that matter the teacher was not dismissed from his position. Further, it argues that Valencia has shown remorse for her comments and pointed out that her intention was not to insult or belittle students but merely to calm down a distraught woman. Lastly, the Union notes that there are many mitigating factors weighing in favor of Valencia, including her 15-year service record and her unblemished disciplinary record.

DISCUSSION

The threshold question is whether the YouTube video can be relied on to determine whether Valencia is guilty of the tenure charges lodged against her. The Respondent argues that the Board failed to authenticate the YouTube video and that it is of limited value because it was so extensively edited, the order rearranged, and some segments were repeated several times.⁸ Therefore, the Respondent maintains, it is impossible to put Valencia’s remarks into any context. The Board says, regardless of the editing and the context of her remarks, Valencia said what she said as was portrayed on the video.

⁸ It must be noted that the video (E-6), came into evidence without objections from the Respondent.

The Board argues that the Respondent failed to prove that the original tape was edited before being published on YouTube. However, Valencia testified that the original conversation with the PV operative lasted for about an hour and a half while the YouTube video was approximately 17 minutes in length. She also described at hearing that conversation occurred in a specific sequence which is completely dissimilar from that seen in the YouTube video, and narration was added. Therefore, I find that it is reasonable to infer that PV significantly edited the video before publication.

Further, the record does not demonstrate that the Board made any effort to obtain the full recording from Veritas. Rather, it stated that it did not attempt to obtain the tape when it learned that the Respondent's similar request was ignored. The Board could have made the request and also could have requested that a subpoena be issued to obtain it. In the absence of the full videotape in evidence, I agree that Valencia's comments lack context. Further, to some extent, the YouTube video, combined with the absence of a complete, unedited version of the entire conversation, mitigates against findings that Valencia engaged in unbecoming conduct.

However, in discerning whether Valencia is guilty of unbecoming conduct as alleged in the tenure charges, it must be remembered that the real question is what Valencia actually said to the PV operative; the issue is not how the video

was edited and narrated, nor that it was published, nor whether that publication impacted the District's school community.

In addition, it must be remembered that the whole premise of the "interview" with the PV operative was contrived. PV concocted the fictitious circumstances for the purpose of enticing Valencia into saying what PV wanted to publish. Further, she was duped into believing that she was having a one-on-one conversation with a distraught woman. She had no idea during the interview that she was being recorded, nor did she have any role in editing the video and releasing it for publication.

Specific Charges:

The Board charged Valencia with seven tenure charge counts of unbecoming conduct . The first two charges can be discussed together. They are,

Charge 1. In violation of UC Board Instructional Policy 8462, encouraged the cover-up of an alleged assault on a student by creating a false scenario of the incident;

Charge 2. In violation of UC Board Instructional Policy 8462, encouraged the non-reporting of an alleged assault on a student, and instead recommended the teacher lie about the incident with the student if ever questioned.

On the video, Valencia is heard telling the PV operative, posing as a teacher's sister, that the brother/teacher should fabricate an alternative story about the supposed assault incident. More specifically, she advised that the

teacher, if asked about the incident, he should say it was an accident – the student tripped and fell – and there was no assault. She also encouraged the PV operative to tell the brother/teacher not to report the incident to anyone.

Policy 8462 provides,

employees . . . working in the school district shall immediately notify designated child welfare authorities of incidents of alleged missing, abused and/or neglected children.

Valencia testified that she believed the “sister” was telling her an accurate version of the incident as she had heard it; however, she also knew the “sister” only knew what her brother had told her. Valencia testified that she wanted to investigate further by talking to the “brother” before deciding what to do. Since it was very late in the school day, she intended to find the brother/teacher the next morning, talk to him, and perhaps obtain a more accurate version of what happened. At least she could obtain a first-hand account.

Valencia is accused of encouraging the operative to tell her “brother” not to mention the incident to the District administration and to fabricate an alternate story concerning the alleged assault. She testified that she did not intend to actually tell the brother/teacher to fabricate an alternate story. Similarly, her advice to the operative about not reporting the alleged assault to the administration was not intended for the teacher. She insisted that she only told the PV operative these things because she wanted to calm her down. I find

that it was appropriate for her to first talk to the teacher involved before dispensing any advice to her Union member. Of course, that never happened because that evening while driving home she learned from the NJEA Representative that the “interview” was a con game – there was no teacher, no student and no assault. Therefore, by that point, there was nothing further for her to investigate.

Valencia admitted that she gave the PV operative bad advice and acknowledged that it was wrong. Her advice to the PV operative for the brother to deny the assault and to instead claim that the incident was accidental is troubling and demonstrates a lack of good judgement. Although she testified that she had no intention of giving a unit member that advice, she risked the “sister” repeating Valencia’s advice that evening. But the fact is, that advice was never given to a teacher or district staff member because there was no teacher, no student and no assault. I conclude Valencia did not violate Board policy 8462 and did not actually encourage any real member of the district’s faculty to fabricate an alternative story about the assault or avoid reporting the incident.

At hearing the Board also seemed to argue that Valencia herself also violated this policy by failing to notify authorities about the alleged abuse of the student. However, this allegation was not listed in any of the tenure charges the Board pressed against Valencia. Therefore, Valencia cannot be found to have

engaged in unbecoming conduct by allegedly failing to report the alleged assault herself. Moreover, as Valencia explained at hearing, the conversation with the PV operative did not end until well after the end of the school day and therefore, there would not have been anyone available to report the incident to.

Charge # 3 states,

Promotes the illegal, unethical and unprofessional actions of a teacher giving the student a passing grade to get him out of the class and move on in September;

I find that this charge is not supported by the facts in the record. The video tape reveals that Valencia asked the operative "He's gonna give the kid a 65, right? (apparently the minimum passing score) Is he going to fail the kid?" The operative responded, "No, no, no." Valencia then said the student needs to "get out of that f'cking class and move on in September." However, there is nothing in these statements to indicate that the student was failing the class or even in danger of failing. Just because the student called the supposed teacher names, one cannot necessarily infer that he is a poor performer academically. I conclude that the record does not support this charge and that the Board has not proven conduct unbecoming with regard to this charge.

The next three charges concern derogatory comments made about the students of Union City School District:

Charge 4. In violation of UC Board Instructional Policy 3281, makes a derogatory reference about the students of Union City – students she has taught as a tenured teacher employed by the Union City School District – as “scumbags”;

Charge 5. In violation of UC Board Instructional Policy 3281, makes a derogatory reference about the homes of Union City residents that she visits during home instruction – as a tenured teacher employed by the Union City School District – as “shitholes”;

Charge 6. In violation of UC Board Instructional Policy 3281, makes a derogatory reference about the students of Union City – students she has taught as a tenured teacher employed by the Union City School District – as “dirt bags”;

This is a set of very serious allegations. Respect for others engenders respect in return; a lack of respect shown to the students will trigger students’ lack of respect for teachers and authority figures generally. It defies logic that Valencia would have made these comments about students that she claims she loves and adores. This is particularly so when Valencia testified that she does not actually believe these statements and made them just to calm the distraught woman in front of her. It is possible that having these comments in the context of the whole conversation might have provided a wider view of the circumstances leading to these comments. Nevertheless, the comments were undoubtedly made, and they were mean and hurtful to the residents, parents and students of Union City. They undoubtedly damaged Valencia’s reputation among her students and tarnished the reputation of the Union City School District and its

staff as well. I would note that, according to Valencia, she made the comments to calm one distraught person whom she had never met before – to the detriment of all of the students of Union City.

I conclude that the Board has proven Charges 4, 5 and 6 in that Valencia engaged in unbecoming conduct by her derogatory remarks about the children of Union City and their housing. I find that this conduct amounts to unbecoming conduct and violates Board policy # 3281.

In charge number 7, the Board alleges Valencia engaged in unbecoming conduct as follows:

In an effort to bolster her own credibility as UCEA President, makes false and misleading statements about the facts/discipline incurred by a teacher “who had sex with a student”.

Part of Valencia’s conversation with the PV operative focused on Valencia’s claim that a file on her desk concerned a District teacher who had sex with an under-aged student. Valencia raised the file folder and told the operative that the issue in that case was a dispute over the teacher’s pension. Second, she also stated that the teacher was not in jail. She also said that the student had not pressed charges and there was no proof of sex.

The Board has not demonstrated that any of these statements were false. There is no evidence that there was no pension dispute with regard to the teacher. Board Attorney Lavelle admitted that the 2017 pedophile involved with

the sexual assault was indicted, convicted and sentenced to a period of probation and no jail time. The Board has not proven that Valencia's statements were false. But Valencia also told the PV operative that there was "no proof of sex" and the student had not pressed charges. I infer from the facts in evidence – that teacher DP was indicted, convicted, and sentenced to probation -- that Valencia's statements were not necessarily untrue. DP could have pled guilty thus eliminating the need for proofs and charges could have been brought by law enforcement authorities rather than the minor child.⁹

In addition, the record of DP's criminal charges and the resulting outcome are matters of public record and therefore, Valencia was not divulging any confidential information. Further, she did nothing to jeopardize the identity of the student involved. Therefore, the Board has not proven tenure charges in number 7.

However, it was Valencia's statements about the pedophile published on the YouTube video that caused the most concern to the Board and, arguably, to the school District community. Apparently, the main concern to parents was that perhaps there was currently another teacher engaging in sexual activity with a

⁹ Valencia testified at the arbitration hearing that she was not referring to the DP case but rather a fictitious case she had made up. I do not credit this. She would not have had a file on her desktop about a fictitious character. And her comments closely resemble the DP assault fact pattern.

student. Perhaps, the narrator on the YouTube video contributed to this concern by his comments on the video,

. . . Valencia boasted about how her office protected a teacher who had sex with a teenage student. . . . The Union City Education Association is aware that one of their teachers had sex with a teenage student and nothing is being done except to protect the teacher. The identity of this teacher obviously needs to be revealed. We need you in the audience to take action.

These comments suggest that there was a current situation with a teacher assaulting a student and nothing was being done. These comments may have heightened the concerns of the school District community.

Valencia was unaware that she was being taped during the interview. The editing, the addition of narration on the video, or its publication on YouTube was in any way the doing of Valencia. Valencia testified that she only brought up the topic to calm the “distraught sister” down. We do not know whether she had any other intention. But we do know, because she was unaware that the video was being made, that it was not her intention to cause chaos in the District, have normal school operations disrupted, or upset parents. Moreover, there was nothing confidential about the criminal fate of DP, the pedophile of 2017. It was a matter of public information.

I conclude although Valencia exercised poor judgement in raising the issue of DP’s 2017 assault on a teenager to a complete stranger. The Board has not proven

that her statements were untruthful or malicious, nor did they rise to the level of unbecoming conduct.

The Investigation

Before an employer makes a determination that discipline is appropriate, it is expected that the employer will conduct a fair and thorough investigation. Further, an employee facing major discipline or possible termination is entitled to due process. Ordinarily, due process includes the employee's right to have his/her side of the story heard before the employer makes a decision that wrongdoing has occurred.

Here, the Board representatives conducted only a limited investigation. The Superintendent and Board Attorney Lavelle viewed the YouTube video. They were most concerned with the portion of the video in which the sexual assault of a student was mentioned. Lavelle contacted the local police. The Hudson County Prosecutor's office was also brought in. The Prosecutor's office directed the Board to let law enforcement officials conduct the investigation concerning the pedophile. It is unclear what steps law enforcement officials took to determine that Valencia was not referring to a current or ongoing sexual encounter in the school but rather something that happened last year. In any event, there is no record evidence that the Board representatives took any steps -- beyond watching the video -- to investigate the video's other components of possible wrongdoing.

One thing it should have done was to attempt to secure a copy of the original unedited videotape from Veritas. On the other hand, by letter of May 4, 2018, Lavelle confirmed to Valencia's NJEA representative that Valencia was waiving her contractual right to meet with the Superintendent before disciplinary measures were taken. Therefore, it cannot be said that Valencia was deprived of her right to have her side of the story heard.

Aggravating Factors

The aggravating factor here is that, while Valencia apologized several times at the arbitration hearing, she seemed to put a greater emphasis on blaming Veritas and painting herself out as a victim than expressing her remorse for what was said. As the Board said in its brief, had she never made the comments she did, there would have been nothing for Veritas to publish.

Mitigating Factors

There are several mitigating factors present in this matter. First, the entire premise of Valencia's conversation with the distraught "sister" was a fiction. In essence, the role of the Veritas operative was to play the distress card as long as it took to get Valencia to say something damaging. Valencia took the bait and was duped into believing the fake brother assaulting the student was genuine.

Further, Valencia reasonably believed she was having a private one-on-one conversation with the distraught relative of one of the District's teachers she

represents. It should be noted that Valencia's comments, especially those derogatory comments about the students and their homes, were not made in the classroom or other educational setting. Moreover, they were not said directly to students and no students, faculty members or members of the public were present when she made them.

Second, as mentioned earlier, Valencia had nothing to do with the editing or publishing of the video. It was the publishing of the video that resulted in community concern and disruption of normal operations in the district.

Third, arguably Valencia is facing tenure charges in part, for her conduct as a union officer. An employer has every right to pursue discipline for an employee's inappropriate conduct but it is not free to discipline an employee for union activities, even if the activities include conduct the employer disagrees with. During most of Valencia's conduct during the conversation with the PV operative, she was functioning in the role of union president, not in the role of Union City classroom teacher. The exception is her remarks about Union City students and their housing when she called the students dirtbags and scumbags and referred to their housing as "shitholes." These expressions of her opinion emanate from her home instruction assignments – in other words, her teaching duties. Thus, this charge is certainly fair game for the Board to criticize and for which it could seek to discipline.

The most important factor, however, is that Valencia is a 15-year career employee with the District with a discipline-free record. She is, by all accounts, a skilled and exemplary teacher. There is no credible evidence of student or parental complaints against her. She has never before during her employment with Union City expressed such condemnation against students. This factor mitigates against such harsh punishment as termination and loss of tenure.

It is a common principle in evaluating whether there was just cause for discipline that the penalty should be based upon progressive discipline pursuant to the employee's record. According to Norman Brand, Discipline and Discharge in Arbitration, The American Bar Association, Chicago, (1998),

... the purpose of progressive discipline is to put employees on notice of improper behavior in order to give them a chance to correct their behavior; it is clearly proper to increase the severity of discipline where the employee has previously committed the same offense. [However, where the prior discipline was for a completely unrelated infraction,] the nature of the prior violations, the discipline imposed and the employee's response to discipline will also be considered....It is fair to say that as violations accumulate, arbitrators are likely to uphold heavier penalties.... The employer must show that the employee had notice of the consequences of continued misconduct and that a reasonable attempt was made toward rehabilitation through the use of progressive discipline. [Ibid, pp. 90-91]

Finally, Valencia definitely showed remorse for her actions at the arbitration hearing. She admitted she gave the PV operative bad advice and acknowledged she should never had said derogative statements about her

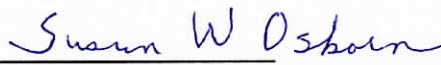
students. She stated that, although she suggested to the “sister” that brother’s assault on the student should be denied, she states that she only told the woman that to calm her down. Further, she stated that she would not have given an actual bargaining unit member the same advice. These are indications that she understands the gravity of her actions and regrets them. I believe that she is very unlikely to repeat the conduct shown on the video again.

CONCLUSION

I conclude that Valencia violated Board policy 3281 by making derogatory remarks about Union City’s students and their housing. I conclude that the Board has proven tenure charges 4, 5 and 6 and that Valencia thereby engaged in unbecoming conduct. I conclude that the Board has not proven tenure charges 1, 2, 3 and 7 and those charges are hereby dismissed. However, given the mitigating circumstances present here, including and most especially Valencia’s long and blemish-free record, her exemplary service as a Union City teacher, and her expressed remorse, I find that termination is too harsh a penalty. Instead, I order the following:

AWARD

Kathleen Valencia shall be reinstated to a teaching position in the Union City School District¹⁰ immediately after the winter break. Valencia shall not be entitled to any back pay for the period she was on leave of absence between May 4 and her return to work. In addition, Valencia shall permanently forfeit her salary increment for the 2018-2019 school year.


 Susan Wood Osborn
 Arbitrator

DATED: November 20, 2018
 Trenton, New Jersey

State of New Jersey }
 County of Mercer }

On this 20th day of November, 2018 before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.



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| PAMELA J SUTTON-BROWNING Commission # 50074695 Notary Public, State of New Jersey My Commission Expires January 11, 2023 |
|--|

¹⁰ In the 2017-2018 school year, Valencia was not assigned to a particular school because she was on release time as the UCEA President.