

281-20

NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF
TENURE CHARGES BY

THE WOODBRIDGE TOWNSHIP
BOARD OF EDUCATION
MIDDLESEX COUNTY, NEW JERSEY,
Petitioner

and

NICHOLAS

CILENTO,

Respondent

Agency Dkt #282-
10/19

Appearances:

For the Petitioner: Ari Schneider, Esq.
Busch Law
Group

For the Respondent: Edward A. Cridge,
Esq. Mellk O'Neill

Before: Barbara C. Deinhardt
Arbitrator

Hearing held August 31 and September 1, 2020

INTRODUCTION

In accordance with the TeachNJ statute, NJSA
18A:6-16, the tenure charges brought by the

Woodbridge Township Board of Education, Middlesex County, New Jersey (“the Petitioner,” “the Employer,” “the District” or “the Board”) against Nicholas Cilento (“Respondent”) were referred to me for review by the Commissioner of Education. A hearing was held on August 31 and September 1, 2020, during which the parties were accorded the right to examine and cross-examine witnesses, the right to present evidence, and the right to make arguments in support of their respective positions in this matter. The hearing was closed upon the receipt of post-hearing briefs on October 23, 2020.

ISSUE

Has the Board proven by the preponderance of credible evidence that Respondent is guilty of conduct unbecoming a teaching staff member, insubordination and/or other just cause warranting his dismissal? If not, what discipline, if any, is warranted?

BACKGROUND

The facts are essentially undisputed. Respondent, Nicholas Cilento, is a tenured teacher who has been employed by the School District since September 2007. His evaluations were effective to highly effective. Prior to May 2019, the only negative conduct reference in his record was a memorandum in April 2017 for

holding a cell phone while testing was taking place.

On the morning of May 21, 2019, Mr. Cilento was assigned to front lobby supervision, beginning at around 7:30 AM, after which he was to perform his regular teaching. That day was a testing day, so classes didn't start until 10:00. Around 7:20 that morning, a department chair brought to the attention of Principal Kenneth Pace that she had been told that Mr. Cilento had been drinking alcohol on duty the morning before. Principal Pace went to where Mr. Cilento was sitting and noticed a small water bottle on the floor by his seat. Mr. Cilento first said, "That's not mine." Mr. Pace smelled the bottle and concluded that it was alcohol. The bottle was almost full, with what Mr. Pace described as perhaps a few mouthfuls gone.

He took Mr. Cilento to his office and, once there, admonished him not to lie. Mr. Cilento requested access to the Employee Assistance Program and was tested for alcohol at approximately 10:00, when he tested negative (0.00%). He was driven home and put on leave. Respondent testified that he had been struggling with alcoholism for many years. He sought treatment for his illness four or five times, including Alcoholics Anonymous and Employee Assistance Program, but eventually relapsed each time. He

had been sober for several years prior to the events at issue here, but following a particularly stressful interaction with his wife, from whom he was separating, he began drinking again on May 19. He admits that he brought a small plastic water bottle of vodka to school on the mornings of May 20 and 21 and had several sips of vodka each day. He enrolled in an inpatient rehabilitation program, followed by an outpatient program, several months in a sober living facility and then into active participation in Alcoholics Anonymous.

On or about October 22, 2019, the Board certified its tenure charges against Mr. Cilento to the Commissioner of Education, as follows:

Charge I: Unbecoming conduct and/or other just cause, including insubordination—consuming alcohol during work in violation of established standards of professional behavior.

Charge II: Unbecoming conduct, insubordination, and/or other just cause—publicly consuming alcohol during work in violation of state law.

Charge III: Unbecoming conduct, insubordination, and/or other just cause—possessing alcohol during on [sic] school grounds in violation of municipal law.

IV:
and

Charge
Insubordination
unbecoming

conduct

and/or

other just cause—violations of District policy
Charge V: Pattern of course of unbecoming
conduct over protracted period of time

I find, based on the undisputed evidence, including Mr. Cilento's own admissions, that Respondent possessed and used alcohol on school premises while on duty on May 20 and 21, 2019. Respondent did not contest that drinking on duty on school grounds is prohibited. I find that such conduct is contrary to established standards of professional behavior, Board policies, New Jersey State Law, and Woodbridge Municipal Code, and constitutes conduct unbecoming a teacher, but not insubordination. I also find that Respondent knew that such conduct was improper. He had been trained in the Board policies and he engaged in behavior on May 20 and 21 that demonstrated that he was trying to hide his conduct, itself evidence that he knew what he was doing was wrong. Charges I-IV are sustained.

I do not find, however, that Respondent engaged in a "pattern or course of unbecoming conduct over a protracted period of time." The only evidence is that he had a few sips of alcohol at school on two consecutive days. The Board describes this as "at least two independently egregious

acts over the course of one school year [sic].” I disagree. He is charged with, and I find that he committed the act of misconduct on two occasions over the course of two days. This is not a “protracted period of time.”

The Board asserts that it has defined a “pattern of unbecoming behavior, not over a course of years [as discussed in the cases precedent], but over a course of days—i.e. the 20th and 21st of May, as well as every day thereafter until he was caught if he had not been caught on the 21st.” I decline to infer simply from the fact that Cilento had had an alcohol problem that extended over a protracted period of time that he engaged in a pattern of unbecoming conduct during that same time. I similarly decline to assume, as the Board would have me do, that Mr. Cilento would have continued to drink at school had he not been caught. Maybe he would have and maybe he wouldn't have. There is no evidence and he is not charged with any days other than May 20 and May 21. Charge V is dismissed.

The only real question before me is whether dismissal is the appropriate penalty under all the circumstances.

POSITIONS OF THE PARTIES

According to the District, Respondent's conduct was so egregious as to necessitate dismissal. On two days he brought vodka to school in a water bottle and consumed it on the premises while in charge of supervising the front door and hallways. On the first day he also taught 20 special education students after or while consuming the alcohol and then drove himself home. Had he not been caught, he "absolutely intend[ed] to continue such a pattern," the District argues. His conduct was premeditated and implemented in such a way as to permit him to surreptitiously consume alcohol while on duty. By his own admission, this was his fourth or fifth alcohol-related relapse. Arbitration decisions and court decisions have held that a teacher cannot rely on a medical condition to excuse and/or mitigate such misconduct, the District asserts. There is no guarantee that Respondent will not start drinking again. This is not a one-time mistake, but "an unmistakable pattern of poor judgment and unlawful behavior that would certainly have continued had Respondent not been caught."

To return him to the classroom would send a dangerous message to young and impressionable students and would put them at risk, given the likelihood of future misconduct, the District

argues. Mr. Cilento's conduct directly injured not only his own reputation, but the reputation of the District and undermined the trust of the District and the parents. Further, according to the District, Mr. Cilento exhibited "no remorse" for his misconduct. His alcohol addiction should not serve to mitigate the penalty warranted. The welfare of the children must be paramount.

Therefore, the District argues, dismissal is the only appropriate penalty. Mr. Cilento cannot "get a free pass to violate the law, on multiple occasions," just because he has a disability related to alcohol. To not dismiss him would send a message to the students and parents and to Respondent that he can use and possess alcohol at school with no serious repercussions, so long as he can rely on his alcoholism to get him off the hook. The Board's decision to terminate Respondent must be upheld, Petitioner argues.

Respondent, on the other hand, argues that the Board has not demonstrated that he has engaged in conduct unbecoming a teacher, warranting his removal from his position. Rather, Respondent contends, some lesser penalty, if any, should obtain.

Mr. Cilento was not intoxicated, there is no evidence that he failed to perform his teaching

duties, no student was aware of his conduct, and, once confronted, he accepted responsibility and got help. According to Respondent, citing *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967), when evaluating whether dismissal is appropriate, the arbitrator must consider the nature and gravity of the offense, the impact on the teacher's career, any extenuating or aggravating circumstances, and the harm or injurious effect the conduct may have had on the proper administration of the school system. "The touchstone of the determination lies in the teacher's fitness to discharge the duties and functions of her position," Respondent contends.

Respondent argues that in making this determination, the arbitrator should consider Mr. Cilento's many years of exemplary service and outstanding evaluations, all earned while he was managing his alcoholism. Also significant are the efforts he has made throughout that time to manage his disease and the efforts he has made since the events of May 20 and 21, 2019. He is "doing the work" necessary to make himself capable of continuing to provide exemplary service to the students of the Woodbridge Township School District, Respondent asserts.

Respondent also notes that he was not aware that his conduct would result in termination. He was

not trained on the specific consequences of having alcohol on school grounds and other teachers with substance abuse-related misconduct at school were afforded second chances.

OPINION

There is no contention that there was any problem with Mr. Cilento's performance as a teacher. His evaluations were all effective or highly effective. He was described as a very good special education teacher by Superintendent Robert Zega. The Board is correct, however, that even a good teacher, one protected by tenure and with long years of service, may still be dismissed even for a first offense if the misconduct is sufficiently egregious and the other factors for evaluating just cause are met. I must therefore review these factors and the *Fulcomer* standards.

In evaluating the egregiousness of the conduct, I note that while there can be no question that **any** consumption of any amount of alcohol at school, especially while on duty, is unacceptable, Mr. Cilento consumed a very small amount on May 21—four sips--such that he did not register any alcohol in his system when he was tested. His testimony was that he consumed the same amount the day before. There is no evidence to the contrary. He

did not demonstrate any signs of impairment and there is no evidence that his teaching or his performance of other duties was impaired.

There is no evidence in the record that any student or parent was aware of what had happened.

The factors listed by the Board in evaluating just cause for dismissal include whether the employee was forewarned of the consequences of his actions and whether the rule was applied fairly and without discrimination. There is no evidence that he was given any training on the specific consequences of consuming alcohol at school. While he certainly knew (or should have known) that it was prohibited and that there would be penalty, there is no evidence that he was advised in advance that dismissal would necessarily follow. In fact, Policy 4419.23, which prohibits “[u]se of alcohol beverages in school worksites,” lists a number of possible disciplinary actions, including “nonrenewal, suspension or termination at the discretion of the board.” Thus it appears that termination is not the automatic penalty.

There were no cases precedent cited that were identical to the one before me, i.e. a tenured employee found to have used or possessed alcohol at work. The cases that came the closest involved tenured employees

who were found to be under the influence of alcohol while at work. Tenured secretary TM was suspended for suspicion of being under the influence of alcohol at work. She was returned to work. Then after testing positive again for alcohol while at work, she was given a Last Chance Agreement. The third time she failed an alcohol test she was terminated. According to the District, this case was distinguishable because the employee did not use the illegal substance at work nor did she use on two consecutive days.

JP, a tenured teacher, was suspended for being under the influence of alcohol at work. He went into a rehabilitation program and following his release was permitted to return to work.

JS, a tenured teacher, was suspended for suspicion of being under the influence of alcohol at work and was allowed to return to work under a Last Chance Agreement. When she subsequently failed a drug test, she was terminated.

(The only other cases cited involved employees arrested for use or possession of illegal drugs on a weekend, not on school property, and bus drivers who failed random drug tests who were terminated or suspended and then resigned.) The above cases, which occurred during Mr. Cilento's tenure, would not put him on notice that any use of alcohol at work would lead to immediate dismissal for a first offense. I

do not find the District's attempted distinction between intoxication at work as opposed to use of alcohol at work to be persuasive. Rather, It appears to me that Mr. Cilento was treated unjustifiably more harshly than others in similar circumstances.

While the District asserts that Cilento was not at all remorseful, the record proves otherwise. He immediately went through inpatient and outpatient rehabilitation programs, moved into sober living for several months, is working through the AA 12 steps and faithfully attending AA meetings, and has kept in close contact with his AA sponsor. At the hearing he testified, "It was totally unprofessional. I let a lot of people down." I find that his actions after the events of May 20 and 21, 2019 reflect an acceptance of responsibility and a sincere desire to live a sober life.

The District also argues that Respondent could relapse. That is true. Mr. Cilento admits that it is true. He cannot guarantee that he will never drink again. However, he was sincere and persuasive in his commitment to immediately call out of work and seek treatment were he to relapse and not to report to school either under the influence or in possession of alcohol.

I find after a review of the entire record, and considering the arguments cited by both parties, that

dismissal is not warranted in this case. While I agree with the District that Mr. Cilento cannot think that he can violate the school policies and state and municipal laws with impunity, I believe that a three-month unpaid suspension and reinstatement on a Last Chance basis, is the appropriate penalty for Mr. Cilento's misconduct. This penalty is sufficient to make clear to Mr. Cilento that his conduct was unacceptable and that a recurrence could lead to dismissal. The District has the right to impose whatever random testing requirements it feels are necessary to ensure that Mr. Cilento does not use alcohol at school or report to work under the influence of alcohol.

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been duly designated by the Commissioner of Education from the Panel of Arbitrators in accordance with the TeachNJ statute, NJSA 18A:6-16, and having considered the evidence and arguments presented by the parties, awards as follows:

1. Petitioner has met its burden of proving, by a preponderance of the evidence, the allegations in Charges IIV, with such conduct constituting conduct unbecoming

- and providing just cause for discipline, but not dismissal;
2. Petitioner has not met its burden of proving the allegations in Charge V;
 3. Respondent Nicholas Cilento shall be reinstated to his position as a tenured teacher in the Woodbridge Township Public School District and resume his duties in the District, such reinstatement being on a Last Chance basis;
 4. Respondent shall be made whole for all loss for his time out of service, with the exception of a three-month unpaid disciplinary suspension;
 5. The undersigned shall retain jurisdiction for the limited purpose of resolving any disputes concerning the remedy herein.

SO ORDERED.



Barbara C. Deinhardt

Neutral Arbitrator

Dated: December 5,

2020

STATE
CONNECTICUT

OF
)

: SS

COUNTY OF LITCHFIELD)

On this the 5th day of December, 2020, I, Barbara C. Deinhardt, swear that I have executed and issued the foregoing as my Opinion and Award in the abovematter.

Barbara C. Deinhardt

On this the 5th day of December 2020 before me personally came and appeared Barbara Deinhardt, known to me to be the individual described herein, who executed the foregoing Opinion and Award and she acknowledged that she executed the same.

NotaryPublic