

152-20

STATE OF NEW JERSEY  
COMMISSIONER OF EDUCATION

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

between

**PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT**

Petitioner

-and-

**DOE DOCKET NO. 75-4/19**

**BRUCE BASSETTI ,**

Respondent.

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BEFORE: SUSAN WOOD OSBORN, ARBITRATOR

DATES OF HEARING: May 30-31, 2019

DATE OF AWARD: July 17, 2020

APPEARANCES:

For the Petitioner:

Comegno Law Group, P.C.

(Mark J. Toscano, Esq. and Jeffrey R. Caccese, Esq.)

For the Respondent:

Selikoff & Cohen, P.A.

(Keith Waldman, Esq. and Hop T. Wechsler, Esq. )

Witnesses:

CT, Student

NB, Student

GM, Student

BO, Student

CO, Student

JH, Student

KR, Student

Roy Steven Wright, Jr., Middle School Assistant Principal

Michael Ostroff, Director Curriculum and Instruction/AAO Officer

Zenaida Cobain, Superintendent

Bruce Bassetti, Respondent

Luis F. Amberths, Jr., Middle School Principal

Jennifer Lehr, Teacher, former President of Penns Grove-Carney's Point  
Regional School Employees' Association

### **BACKGROUND OF THE CASE**

This matter was assigned to me by the Commissioner of Education on March 24, 2020 following a remand of this matter by the Court after a prior arbitral award issued by another arbitrator was vacated, with a direction that a new arbitrator be selected.

I conducted two conference calls with counsel on March 9 and May 4, 2020. As a result of those calls, the parties agreed to a stipulated record in this matter, which was revised after the second conference call (Exhibits J-1 and J-2, respectively). The First Amended Stipulated Record (Exhibit J-2), which differs from the prior stipulation only in that it contains supplementary language at paragraphs 2, 6 and 13, provides as follows: <sup>1</sup>

1. On April 16, 2019 the Petitioner Penns Grove-Carneys Point Regional School District Board of Education (Board) certified tenure

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<sup>1</sup> I have omitted Paragraph 14 of Exhibit J-2, the First Amended Stipulated Record, because it deals with technical issues pertaining to the methods by which signatures of the parties could be obtained. Both Exhibits J-1 and J-2 were fully and properly executed by the parties.

charges and suspended Respondent Bruce Bassetti (Bassetti) for 120 days without pay in accordance with N.J.S.A. 18A:6-14. After the expiration of the 120 suspension without pay, Mr. Bassetti has and continues to be on a suspension with pay.

2. True and correct copies of the complete arbitral record (transcripts, exhibits, and post-hearing briefs) are included with this stipulation as Exhibit A. The parties specifically agree that the arbitral record for the present arbitration is the arbitral record as it existed before Arbitrator Peter Adomeit as of August 22, 2019, that the arbitral record including the charges, the statement of position and the answer (including all exhibits to the pleadings), the transcripts, the exhibits and the parties' post-hearing briefs.

3. On August 19, 2019, the Board voted to withhold Bassetti's employment and adjustment increments for the 2019-2020 school year. See Exhibit B.

4. At all times the Board has taken the position that termination is the only appropriate penalty in this case; however, the Board maintains that its decision to withhold Bassetti's employment and adjustment increments is a matter of procedure taken to preserve the arbitrator's ability to award an increment withholding prior to any contractual increases. The Board contends that this is the practice and procedure in any tenure case regardless of the facts of the case and is not in any way meant to imply that the Board believes that the withholding of Bassetti's increment is an appropriate penalty.

5. Bassetti disagrees with the Board's position and maintains that if you find that the Board has proven that he engaged in conduct unbecoming, that lesser discipline in the form of a suspension and/or an increment withholding is appropriate.

6. On or about September 3, 2019, the parties first became aware of Arbitrator Peter Adomeit's Opinion and Award, which was dated August 23, 2019. See Exhibit C. The parties specifically agree that Arbitrator Adomeit's opinion and award dated August 23, 2019 is not part of the present arbitral record.

7. On September 4, 2019, Keith Waldman, Esq., Bassetti's attorney, informed Arbitrator Adomeit of the Board's vote to withhold Bassetti's increments. On September 5, 2019, Arbitrator Adomeit responded that he has no jurisdiction to hear appeals from increments disputes. See Exhibit D.
8. On November 7, 2019, Bassetti filed a Verified Petition of Appeal, Docket No. 292-11/19, with the Commissioner of Education contesting the increment withholding. See Exhibit E.
9. On November 27, 2019, the Board filed a Verified Complaint with the Superior Court of New Jersey, Chancery Division, Salem, Cumberland, and Gloucester Counties, seeking to vacate Arbitrator Adomeit's Award under the New Jersey Arbitration and Award Act, N.J.S.A. 2A:24-8. See Exhibit F.
10. On January 2, 2020, Bassetti filed an Answer and Counterclaim with the Court. See Exhibit G.
11. On January 9, 2020, Bassetti withdrew his Petition of Appeal with the Commissioner. See Exhibit H.
12. On the same day, January 9, 2020, Bassetti withdrew Count II of his Counterclaim. See Exhibit I.
13. Following briefing, the parties appeared for oral argument before the Hon. Robert P. Becker, Jr., P.J.Ch., on February 27, 2020. After oral argument, Judge Becker issued a Order vacating Arbitrator Adomeit's award and referring the matter to the Commissioner for the selection of a new arbitrator. The Order also excludes from evidence all statements made by Bassetti without union representation during the Board's investigation of the allegations. The parties specifically agree that Judge Becker's Order was not the subject of any appeal and is binding. See Exhibit J. A transcript of Judge Becker's decision is also included as Exhibit K.

The tenure charges certified to the Commissioner by the Board on April 16, 2019, allege that Bassetti engaged in Unbecoming Conduct in violation of district policies when he used a racial slur in front of students.<sup>2</sup> The Board further charges Bassetti with Incapacity, alleging that the use of the slur makes it impossible for him to return to his teaching duties in the District, because such a return would cause “acrimony with students, staff and community”, thereby rendering him incapable of performing his duties. Finally, the Board charges Other Just Cause for termination of Bassetti’s employment with the District exists because returning him to the classroom would violate the public trust, and fail to ensure the well-being of students in a safe environment where they are not subjected to racial slurs.

An arbitration hearing was conducted on May 30-31, 2019, before Arbitrator Peter Adomeit, at which time thirteen witnesses testified under oath. Witnesses were sequestered during the hearing. The parties also presented documentary evidence. The parties filed post-hearing briefs. Arbitrator Adomeit issued an Opinion and Award dated August 23, 2019. The parties became aware

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<sup>2</sup> Portions of the tenure charges filed by the Board refer to and are dependent upon statements alleged to have been made by Bassetti during the Board’s investigation while he was not accompanied by an Association representative. Judge Becker’s Order excluded these statements from evidence, and I have therefore not referred to this material in the recital of charges made by the Board (Exhibit J).

of Arbitrator Adomeit's Opinion and Award on or about September 3, 2019 (Exhibit J-2 Para.6).

N.J.A.C. 6A:6.3 provides that the decision in this matter shall be issued within 45 days of the beginning of the hearing, and that the decision shall be final and binding. On June 11, 2020, I requested an extension of time to submit my award. The Department of Education granted my extension request to July 17, 2020.

### **ISSUE IN DISPUTE**

The record contains no information with respect to a stipulation by the parties or a formulation of the issue by the parties. In view of this, I have determined that the issue in dispute is as follows:

Did the Board of Education prove that tenure charges brought against Bruce Bassetti amounted to sufficient cause for his 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.

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

determination

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... 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

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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.

### **RELEVANT BOARD POLICIES**

Board Policy 4111.1, "Nondiscrimination/Affirmative Action/Sexual

Harassment" provides in relevant part as follows:

The Board of Education guarantees to all persons equal access to all categories of employment, retention and advancement in this district, regardless of any and all conditions or any of the protected classes as proscribed in NJSA 10:5-1, et.seq or any other federal or state law(s) and/or statutes.

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#### **Harassment and Favoritism**

The Board of Education is an affirmative action employer and holds all its employees responsible for maintaining a working environment that is free from all discriminatory practices. Harassment or



favoritism on any basis included in the Board's statement of equal access to employment, retention and advancement is prohibited. Board Policy 4119., "Duties/Responsibilities" provides in relevant part as follows:

Teaching staff members, because of their proximity to students, are frequently confronted with situations that, if handled incorrectly, could result in liability to the district and personal liability to the staff member. It is the purpose of this policy to direct the preparation of guidelines that would minimize that possibility. Major duties of each professional employee are delineated below:

- A. To carry out duties and responsibilities set forth by New Jersey statutes, Title 18A, and New Jersey Administrative Code.
- B. To abide by rules and regulations as established by the Board of Education.
- C. To carry out specific job responsibilities as established by the Board of Education.
- D. To uphold rules and regulations as established by the Superintendent of Schools and other school administrators.
- E. To properly channel all negative criticism about the district or its employees.
- F. To adhere to prescribed curricula and courses of study.
- G. To adhere to the specific job description for the contracted position.

It is the responsibility of the Superintendent of Schools to prepare regulations to ensure the maintenance of the following standards:

- A. Each teacher must maintain a standard of care for supervision, control and protection of students commensurate with assigned duties and responsibilities.

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Board Policy 4119.25 "Unbecoming Conduct" provides in relevant part as follows:

The personal life of an employee is not an appropriate concern of the Board except as it may directly prevent the employee from

performing his/her properly assigned functions during the workday or affect his/her professional relationship with the pupils.

Unbecoming Conduct

When an employee, either within the school or outside normal duties, creates conditions under which the proper operation of the school is affected, the Board, upon recommendation of the Superintendent of Schools, and in accordance with statute, shall determine whether such acts or lack of actions constitute conduct unbecoming a school employee, and if so, will proceed against the employee in accordance with law. Unbecoming conduct sufficient to warrant Board review may result from a single flagrant incident or from a series of incidents.

Board Policy 6121 “Nondiscrimination/Affirmative Action” provides in relevant part as follows:

No pupil enrolled in the district schools shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in any educational program or activity of this district on the basis of any and all conditions or any of the protected classes as proscribed in NJSA 10:5-1 et. seq or any other federal or state law(s) and/or statutes. The affirmative action officer shall be responsible for planning, implementing and monitoring the district’s affirmative action program with respect to school and classroom practices.

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**B. Staff Training**

He/she shall suggest a program of in-service training for school personnel designed to identify and solve problems of bias in all aspects of the school program. An affirmative action/equity in-service program shall be held for teaching staff annually; for each support staff member at least once every three years; and for parents and community members, as needed to facilitate participation and support.

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### **POSITIONS OF THE PARTIES**

The Board maintains that it had just cause to terminate Bassetti due to his use of a racial epithet during a class, and his refusal to accept responsibility for making the remark. The Board argues that he cannot return to a teaching position in the district due to the egregious nature of his conduct.

The Union urges that the Board has not met its burden of proving just cause for any discipline of Bassetti. The Union asserts that the Board conducted a procedurally defective investigation of the alleged incident, and that even if the allegation were proven, the penalty of removal is disproportionate to the conduct. Bassetti should be returned to the classroom.

### **FINDINGS OF FACT**

In reaching these findings of fact, I have reviewed the stipulated record (Exhibit J-2), the transcripts of testimony given over two days of hearing on May 30 and 31, 2019, and the exhibits entered into evidence. I have not read or considered any testimony which refers to statements made by Bassetti during investigatory proceedings where a union representative was not present. I have not considered any part of an exhibit in evidence which refers to such statements.

Bruce Bassetti testified that he had been employed by the Penns Grove-Carneys Point Regional school district for fifteen years during the 2018-2019

academic year (2T-294). He stated that he is certified as a teacher of “secondary biological sciences”, and that he had been employed in education for seventeen years (2T-294).<sup>3</sup> He testified that, other than a verbal warning for missing an afternoon duty station during the 2018-2019 school year, he had no prior disciplines (2T-295). Bassetti stated that his evaluations had been “Proficient” (2T-294 to 295).

Bassetti testified that on February 27, 2019, he was teaching a seventh grade science class at the District middle school (2T-298). The class was using Chromebooks, which were distributed to students for use during class, and returned to Bassetti at the end of class (2T-308). During class, Bassetti noticed JS<sup>4</sup>, who was seated in the back of the classroom. Bassetti noticed that JS’s computer was “teetering” on top of materials on JS’s work area. Bassetti asked that all the computers be placed flat on the desk. JS looked up at Bassetti, but did not alter the position of his Chromebook. After giving JS time to comply, Bassetti stated that he got up, walked to where JS was seated, and reached out to take the computer (2T-300 to 301). As he did so, JS slid the Chromebook across the table

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<sup>3</sup> IT refers to the transcript of the hearing on May 30, 2019; 2T refers to the transcript of the hearing on May 31, 2019.

<sup>4</sup> The names of the students are contained in the transcripts of the hearing, however due to their age and privacy concerns, they will be identified only by their initials in this decision.

to CO, who was seated next to him, keeping the computer out of Bassetti's reach (2T-300 to 301; 1T113).

The students in Bassetti's classroom are seated with up to four students at a table, rather than at individual desks. Bassetti's desk was at the front of the room, near the door to the classroom (2T-302; Exhibit Bassetti-11).

Bassetti stated that, rather than cause a disruption in the classroom, or engage JS, he went back to his desk and continued reviewing test papers (2T-301).

During class, Bassetti testified that he told the students that the science fair project which had been assigned would count for 50% of their grade, and would be posted on the interim reports for the marking period, with a comment if the project had not been turned in. Bassetti testified that about half the students had a look of "fear and panic"(2T-298 to 299).

Bassetti stated that at the end of the class period, students brought their Chromebooks to him so that he could check them back in(2T-301). He noted that JS had gotten up, leaving the computer behind. Bassetti testified that he asked JS to please bring the computer to him, and JS responded "are you lazy, come get it yourself" (2T-301). Bassetti stated that this occurred as the bell rang for the end of class, so he smiled at JS, who did a "double take"; Bassetti said he wanted JS to reflect on whether there would be some disciplinary action in response to his comment (2T-301).

I credit Bassetti's testimony as to the incident with JS and CO involving the Chromebook, as well as to the comment which Bassetti testified was made by JS about Bassetti being "lazy". I also credit Bassetti's testimony that he spoke to the class about the interim grade reports and the impact of the Science Fair project grade on those reports.

### Students Report Bassetti

Students CT, NB, GM and BO were all seated together at a table in Bassetti's classroom on February 27, 2019. CT and NB were seated closest to the aisle (1T-18). All four are seventh grade students at Penns Grove Middle School who were 13 years old at the time of the hearing in this matter (1T-15; 1T-50; 1T-71 to 72; 1T-90). All four testified at the hearing.

CT testified that approximately 15 minutes before the end of class, Bassetti said "I'm not dealing with you niggers". CT stated he and the others at the table "froze", and that they decided they would go to the principal's office after class (1T-18 to 19; 1T-25; 1T-41). CT recalled that Bassetti was standing about halfway between the table where JS was seated and the location of CT's table, at an approximate distance of 8 to 10 feet from CT when Bassetti made the statement in a low voice (1T-19 to 24).

After class ended, CT stated that he proceeded to the principal's office together with NB, GM and BO (1T-25).<sup>5</sup> The students met with Vice Principal Roy S. Wright (1T-25).

Roy Steven Wright, Jr.

Wright testified that he became a vice principal at Penns Grove Middle School in September 2017, having previously spent 22 years as a special education teacher in another district, and 3 years as an assistant principal and athletic director at Burlington City High School (1T-180 to 181). He testified that he holds a graduate degree in Education Administration (1T-180). Wright testified that his graduate degree in Education Administration did not include any training in Equal Employment Opportunity/ Affirmative Action, and that his training in that area was confined to an estimated three-hour workshop which took place while he was working for a previous employer (1T-196 to 197).

Wright stated that he was in his office on February 27, 2019 when 3 students appeared on their way to lunch, stating that they needed to speak with him about an incident which had occurred in Bassetti's fifth period class(1T-181; Exhibit Board-9). Wright did not recall the names of the students, but stated that he asked them what was going on, and they responded that Bassetti had used a

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<sup>5</sup> I note that CT's testimony that BO was with CT, GM and NB when the group proceeded to the Office immediately following Bassett's class is in conflict with the testimony of Wright and BO. I find that CT is mistaken in his recollection on this point.

racial epithet during class, directed toward another student (1T-183). Prior to their appearance in his office, Wright stated that he did not know the 3 students (1T-184). Wright testified that he told them he was going to have each of them write a statement; he then directed them to leave his office, and began calling them in one by one to take statements from the three students who had presented themselves to him (1T-183).

Wright stated that the first student he spoke with was GM (1T-183). He testified GM told him that the N-word was the epithet that the students attributed to Bassetti (1T-184). After he obtained statements from CT, NB and GM, Wright said that he sent the students back to either lunch or recess, depending on what period they had for lunch(1T-184).

Wright then contacted his direct supervisor, Principal Luis Amberths, to advise him about the situation, as well as his intention to get statements from the other students in the class. Wright's announced plan was to get a statement from Bassetti once the students had all given statements (1T-184 to 185).

#### CT Statement and Testimony

CT recalled giving a statement, and I will not repeat his testimony which is recounted above concerning the events of February 27, 2019 in Bassetti's classroom. CT stated that he and GM explained to Wright what had happened, then Wright gave them a form to write down what they heard. CT recalled that all



4 students, himself, GM, NB and BO were seated in chairs in the hallway when they wrote the statements (1T-26 to 27). CT stated that they did not discuss anything other than the spelling of each other's names (1T-27). CT recalled that Wright interviewed him for about 10 minutes after CT did the written statement, and that Wright asked only about what was said, not about anything else that might have happened in class (1T-38 to 39).

CT's statement recited that Bassetti said "I am not trying to deal with you niggers" (Exhibit Board-1 at 1T16). CT also recalled that NB and BO went to lunch prior to being interviewed by Wright (1T-39 to 40).

At arbitration, CT also identified a drawing he had made of Bassetti's classroom, but after reviewing it and another depiction done by Bassetti, CT agreed that Bassetti's was more accurate (Exhibit Board 2, 1T-19 to 20; 1T-31 to 32; Exhibit Bassetti-1). When asked to review an exhibit with the layout of the classroom, and place where Bassetti was when he first had the conversation with JS and CO, CT placed a "B1" near the desk occupied by JS and CO nearest to CO. He stated that when he heard Bassetti's remark, Bassetti was returning from the back of the room, facing toward the front of the room, and facing but behind the table where CT, BO, NB and GM were seated. CT marked Bassetti's location when CT heard the remark with a "B2". CT marked Bassetti's route of travel with a dotted line showing Bassetti proceeding down an aisle nearest to the door, and

finally ending near Bassetti's desk at a point CT marked as "B3" (1T-33 to 34; Exhibit Bassetti-1).

CT testified that as of February 27, 2019 he thought his grade in Bassetti's class was a C, and that it was now a B (1T-35 to 36). He stated that he turned in his science project late, after Bassetti followed up with CT and his mother (1T-36 to 37).

CT also stated that, in addition to discussing the need to report Bassetti's comment to the principal with his tablemates NB, GM and BO, he also spoke with JS and CO, the two students who were involved in the Chromebook incident (1T-43). CT also spoke with Board counsel in the presence of Superintendent Cobain in preparation for the hearing (1T-45 to 48)<sup>6</sup>.

#### NB Statement and Testimony

NB testified that on February 27, 2019 two students were not doing work, being "irritating" to everyone, and Bassetti started looking "aggravated", walked away and "said the n-word" (1T-52). NB stated that he heard Bassetti say the word, but kept doing his work, then discussed it with GM and CT who were sitting

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<sup>6</sup> Each student except KR was asked a series of questions about whether they had met with Board Counsel in the presence of Superintendent Cobain prior to the hearing, and all provided essentially the same responses, including that they had been directed to tell the truth. The students met individually with Counsel and Cobain. KR merely confirmed that a meeting with Board Counsel occurred in response to a single question.

with him at the same table(1T-53to 54). He discussed going to the administration, but nothing else with his tablemates (1T-55 to 56).

After class ended NB stated that he went to see Wright along with CT and GM (1T-56). NB testified that Wright did not ask him questions but told him to write down his statement, which said in part that "Mrs." (sic) Bassetti "very quietly" said "nigger" and I thought he did not really say it but my classmates heard him say it" ( 1T-63;Exhibit Board-3, 1T-22 to 23; Exhibit F to Board Statement of Evidence/Tenure Charges). NB testified that Wright did not tell him what to write, and that he did not discuss what happened with anyone other than his parents, CT and GM (1T-53;1T-57 to 58).

NB stated that the incident with JS and CO and the Chromebooks occurred about the middle of class, with approximately 10 minutes left in the class (1T-59 to 60). He testified that as of February 27, 2019 he was doing "pretty good" in Bassetti's science class with a C or D; he currently has a C in the class (1T-62). NB did not recall a science fair project (1T-62). NB testified that Bassetti had moved NB's seat "a couple times" for excessive talking, and was "pretty sure" that he had been seated near the sink at one point (1T-70 to 71). He was moved to the table he was seated at on February 27, 2019 after assuring Bassetti that he would continue working (1T-71).

When shown an exhibit which depicted the layout of Bassetti's classroom, NB placed himself, CT, GM and BO at the table where they were seated, and also indicated where JS and CO were seated. He placed a "B2" at the location where Bassetti was when NB heard him make the remark, which was on the side of the room near the door, almost adjacent to the table where NB was seated. NB placed an arrow to show Bassetti's direction of travel, which shows Bassetti moving from the back of the room toward the front, where Bassetti's desk is located (1T-58 to 61; Exhibit Bassetti-2).

#### GM Statement and Testimony

GM testified that Bassetti walked over to JS and CO and told them to turn their Chromebooks off because class was ending and the computers were being collected. GM said that the Chromebooks were placed in a cart at the end of class (1T-88). When Bassetti walked away, GM stated that he heard him say "I can't deal with these n-word"(1T-74). After hearing this, GM testified that he stopped and looked at NB, CT and BO, but did not say anything (1T-75).

After class, GM went to the main office, and he, NB and CT went into Wright's office. He was unsure if anyone else was with them (1T-76). GM stated that all of them spoke with Wright, and he filled out a statement in the hallway outside Wright's office (1T-85; Exhibit Board-4 1T-73 to74). GM's statement said in part that Bassetti "said the N- word softly", and he testified that it was said

softly enough that the whole class could not hear it (1T-77 to 78). Specifically, the N-word he heard ended in "er" (1T-84). GM said that no one, including Wright, told him what to write (1T-78). He did not discuss what happened with anyone other than his parents (1T-78).

When directed to place a "B1" on a diagram of the classroom at the location where Bassetti was when he made the remark, GM placed Bassetti as standing in the front of the classroom in front of the table where GM was seated, along with BO, NB, GM and CT. GM then placed a dotted line indicating that after Bassetti made the remark he continued across the front of the classroom toward his desk, where GM placed a "B2" (1T-79 to 81; Exhibit Bassetti-3).

At the time of the incident, GM stated that he had a D or an F in Bassetti's class, and that he currently has a B in science (1T-85). GM did not turn in a science project to Bassetti (1T-86).

After obtaining the statements of CT, NB and GM, and touching base with Amberths, Wright started calling the other students from Bassetti's fifth period to his office. He directed each student to sit outside his waiting room to do their statements. He did not recall that students were waiting together in the hallway at any time (1T-201). When the statement was done, Wright read it over, and asked if there were any additions or deletions. Wright testified that he told each student not to discuss his or her interview with other students (1T-203). Wright

believed that it took him until 9:00 a.m. on February 28, 2019 to finish all 22 students who were in Bassetti's class (1T-185). Wright testified that he did not tell any of the students what Bassetti was alleged to have said prior to reading their statements (1T-186).

Wright testified that overall, he found the students' to be credible, however there were some he did not find credible. Specifically, he stated that he believed CS made the whole thing up, and did not see or hear anything. SH had told him that he wasn't in the room, and then made a statement that he heard it. JS provided a statement that he heard the comment after previously telling Wright that he did not hear himself being called the alleged word (1T-186 to 187).

With respect to the three students who initially came to his office, CT, NB and GM, Wright stated that they appeared to have been concerned or upset about something. Wright found all three to be credible (1T-187).

Among the students who were summoned after Wright received the information from CT, NB and GM, were the following:

#### Statement and Testimony of BO

BO also provided a statement about the events of February 27, 2019 (Exhibit Board-5; 1T-91 to 92). BO testified that February 27 was a normal day, until he saw his friend CO "playing around" and refusing to give a computer to Bassetti. BO stated that Bassetti "got mad" and said, "I'm done with you niggers" (

1T-93). BO's statement reflects that he "heard Mr. Bassetti say "I'm done with you niggers", and further that "Everyone in my table looked at each other and we were talking on how we heard the same word (1T-93; Exhibit Board -5).<sup>7</sup> BO recalled that Bassetti spoke "pretty softly" when he made the statement, but BO could not remember at what point during the class the statement was made (1T-99 to 100). BO stated that when Bassetti made the remark, he and his friends "just looked at each other in shock and just were like, oh, did you hear that?" (1T-93). BO clarified that the friends he was referring to were NB, GM and CT, and that the only further discussion was about reporting the comment to the office (1T-94; 1T-103 to 104).

When asked to place a "B1" on a diagram of the classroom where Bassetti was standing when he went to speak with JS and CO, BO placed Bassetti in the back of the room, nearest to the wall where the door is located, next to the table where he indicated JS and CO were seated. BO placed a "B2" where Bassetti was when BO heard the remark; BO placed it alongside the table where he was seated, on the right side of the room near the door, indicating that Bassetti had walked in a straight line from his "B1" position near JS and CO, toward the front of the room (1T-96 to 99; Exhibit Bassetti-4).

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<sup>7</sup> BO was sitting at a table with CT, NB and GM.

BO stated that after Bassetti's class ended, he proceeded to the rest of his classes until he was called to the office later in the day and asked to write the incident report (1T-94). BO later clarified that he actually was called to Wright's office to make a statement on February 28, not the day when the incident occurred. When BO went to the office, he encountered two other students, SA and J (no last name or initial in transcript)(1T-105). He met with Wright, who told him to write down what happened and make sure to put down the word that Bassetti used; Wright did not tell BO what word had allegedly been used (1T-95; 1T-105 to 106).

BO also stated that prior to the incident, he did not have any problems with Bassetti, who was "pretty nice" to him (1T-96). He first stated that he believed that he had a C in Bassetti's class in February 2019, but later said the grade was maybe a B or an A (1T 101; 1T109). He stated that he did not turn in a science fair project (1T-101). His current grade in science is an A (1T-108).

#### Statement and Testimony of CO

CO was seated next to JS, and stated that he and JS were "messaging around" passing the Chromebook back and forth because Bassetti wanted it "'cause it was on a book"(1T-113). CO testified that Bassetti was getting upset and then walked away and said he was tired of all these niggers (1T-113).



When shown a diagram of the classroom and asked to place a "B1" where Bassetti was standing when he was trying to retrieve the Chromebook, CO placed Bassetti in the aisle leading from the right of Bassetti's desk to the back of the room, at the front corner of the table where CO and JS were seated. CO placed a "B2" at the right side of Bassetti's desk in the front of the classroom when asked to show where Bassetti was standing when CO maintained he heard the remark (1T-118 to 119; Exhibit Bassetti-5). CO also place a "B3" near the doorway marking where Bassetti was at the end of class (1T-120; Exhibit Bassetti-5).

After class, while CO was at lunch, CO stated that CT came up to him and said he had heard the comment and had gone to Wright(1T-114; 1T-117). In addition to speaking with CT, CO also said that he spoke with JS, who had been seated next to him in class (1T-114). CO stated that JS told him that he also heard the comment (1T-114 to 115).

CO said that he was summoned to the office, and when he arrived several students were there, including CS, JH, J (no last name in transcript) and CT; CO stated that he did not have a discussion about what happened with any of them (1T-155 to 116). Wright directed CO to write a statement, but did not tell him what to write other than telling him to write the words he heard Bassetti say (1T-116; 1T-121). CO's statement said that Bassetti "mumbled under his breath..I'm done with these n\*\*\*\*" (1T-111 to 112;Exhibit Board 6; Exhibit H to Board

Statement of Evidence/Tenure Charges). CO could not remember how much time was left in class when the statement was made (1T-119).

CO could not remember if he turned in a science fair project or how much of his grade it would count for (1T-125).

### Statement and Testimony of JH

JH is 12 years old and was in Bassetti's seventh grade science class (1T-129 to 130). She provided a statement, which erroneously indicated that the incident occurred on 3/27/29; JH was unsure when the events happened but stated she was "pretty sure" in March ; however she later stated that she made the statement on the day after Bassetti made the remark(1T-130 to 132; Exhibit Board-7; Exhibit I to Board Statement of Evidence/ Tenure Charges; 1T-139 to 140).<sup>8</sup>

JH testified that two boys in the back of the room were on their Chromebooks and when Bassetti tried to take it they refused, and Bassetti got "mad" (1T-132). She stated that Bassetti walked away "mumbling" that he was "tired of putting up with us niggers"(1T-132 to 133; 1T-139). When Bassetti said it JH stated she was sitting in the middle row of the classroom (1T-133). She placed

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<sup>8</sup> JH noted that there was some writing on the statement which was not hers in the portion of the statement for person's name and persons in conflict (1T-141 to 142).

AS, L (no last name or initial in transcript), and GM at a table to her right and CT, J (no last name or middle initial in transcript) and BO at a table to her left (1T-134).

When asked to mark "B1" at the place on a diagram of the classroom where Bassetti was during the Chromebook incident, JH placed Bassetti in the aisle closest to the right side of his desk, at the corner of the table where she placed CO, JS and S (no last name in transcript). JH placed a "B2" at the spot where Bassetti was when she heard him use the racial epithet, which was in the same aisle where he had been standing when he went to get the Chromebook, closer to the front of the room between the table where she was seated and the table across the aisle, where she placed BO and CT (1T-137 to 139; Exhibit Bassetti-6).

JH stated that she did not react when Bassetti made the statement, and did not speak with anyone about it after class (1T-134 to 135).

When JH was called to the office, she stated that she met with Wright, gave him an account of what happened, and then wrote her statement (1T-147 to 149). The statement recited that Bassetti said "I am tired of putting up with these niggas" (1T-141; Exhibit Board ; Exhibit I to Board Statement of Evidence/Tenure Charges; 1t-). However, JH maintained that the actual word Bassetti used was "niggers" not "nigga"(1T-141).

JH testified that other than her mother and counsel, she did not speak to anyone after she wrote her statement about what happened (1T-135 to 137).

However, JH then stated in response to a question that she had given an interview to a television station about the incident (1T-146; 1T-160 to 162).

JH stated that she had been “doing fine” in Bassetti’s class before the incident and that she had handed in her science project. She denied that her grades were lower than they had been in the past or that there had been a discussion about her science project having been poorly completed (1T-144).

#### Statement and Testimony of KR

KR is a 12-year-old seventh grade student at the Penns Grove Middle School (1T-164). She stated that when she was leaving Bassetti’s classroom on February 27, 2019 Bassetti was walking to his desk and she heard him “say something under his breath”. KR testified that she did not recall the “first part” but thought she heard him say “the N-word” (1T-166). She stated that Bassetti made the remark quietly, “like he was talking under his breath” (1T-167).

When she was asked to indicate on a diagram of the classroom where she was sitting on February 27, 2019, KR placed herself at the aisle side of a table at the back of the room, in the same row where JS and CO were seated, but at the opposite side of the classroom. She placed herself at the door of the classroom when she heard Bassetti make the remark by adding “K2” to the diagram, and

Bassetti at the right side of his desk when he made the remark, but adding "B2" to the diagram. She also placed her route of travel from her seat to the door by adding a dotted line connecting "K1" and "K2." She also placed Bassetti near the corner of JS and CO's table during the Chromebook incident by adding "B1" to the diagram, and indicated that he moved from there to the front of the room by his desk at the position she had previously designated "B2" (1T-174 to 175; Exhibit Bassetti-8).

She was called to Wright's office on February 28. KR testified that from the time that Bassetti's class ended until she was called to Wright's office, she did not speak with anyone about the incident, and did not talk to her parents about it until she went home after being called to Wright's office (1T-168). When KR arrived in Wright's office, she stated that BO, S (no last name in transcript) and SA were already there. She testified that she did not speak to the other students about what happened in Bassetti's class (1T-168).

KR testified that when she met with Wright, he said that it had been reported that Bassetti had said something and that it might have been a bad word (1T-169). Wright did not tell her what the word was. KR stated that she told Wright that she heard Bassetti say a bad word, but did not repeat the word because she didn't want to say it (1T-169).

KR wrote a statement which stated in part that while leaving the classroom “it sounded like he said a bad word but I don’t know if he was talking to a student cause I was leaving the classroom” (1T-165; Exhibit Board 8; Exhibit K Board Statement of Evidence/Tenure Charges). After she gave her written statement, KR testified that she spoke with some other students asking if they had been called to the office (1T-171).

KR stated that during Bassetti’s class, a student did not put a Chromebook away. She did not recall who the student was, and did not hear what Bassetti said other than to put the Chromebook away (1T-172). She stated that she guessed that about 5 minutes passed between the time of the Chromebook incident and the comment she heard Bassetti make while she was leaving the classroom (1T-172 to 173; 1T-178).

After carefully reviewing the testimony and statements of the students, I find their testimony about Bassetti’s use of the word “nigger” to be credible. In reaching this conclusion, I am mindful of the inconsistencies in their testimonies, including differences among them about where Bassetti was standing when he muttered the word, the time in class when he made the statement, and the exact sentence that he formulated. Despite these inconsistencies, I find that the immediacy of the students’ response to Bassetti’s use of the word “nigger” and the manner in which they expressed their reactions persuasive; for example, BO

said that when Bassetti said the word, he and the students at his table “just looked at each other in shock”(1T-93). Three of the students immediately went to the office to report what happened, which seems courageous, since middle school students were reporting serious misconduct by a teacher to high level administrators and could not know if they would be believed.

I also note that the testimony from the students is absolutely consistent that the racial slur was used, and that it was made in a soft voice, which may partially account for the differences in what was heard by students in the rest of the sentence. The word which riveted their attention was “nigger.” The lack of absolute consistency in what they report about the other muttered words tends to support their credibility rather than undermine it. Identical testimony in this situation would more likely be the product of rehearsal than recollection.

While there are differences in where the students say that Bassetti was located when he used the racial slur, with the exception of GM, KR and CO, the students place Bassetti toward the rear or middle of the classroom, proceeding toward the front of the classroom (Exhibits Bassetti -1 through 6; Bassetti-8).

I also am not persuaded that some of the students were motivated to lie about Bassetti due to their failure to produce a Science Fair project. While their grades would clearly be negatively impacted on their interim reports by virtue of a failure to hand in the project, the remainder of the marking period would

provide time to counteract that failure and raise a low grade. In addition, in order to carry out such a plan, the students would have had to conceive of a story about Bassetti using a racial slur, persuade other students to join the plan, and then carry it out through a process which included questioning by Vice Principal Wright, and testifying under oath. That is simply implausible in view of the age of the students, and the number of co-conspirators which would be required in order to carry out the plan.

Wright concluded the interviews with the students in Bassetti's class about 9:17 a.m. on February 28, 2019 (1T-179; Exhibit Board 9).

Wright testified that he did not request or assist the student who came to him with the initial complaint about Bassetti-whom he believed to be GM-in making a written claim of discrimination (1T-200). Wright acknowledged that the students he interviewed were not completely consistent about the words Bassetti spoke before or after the racial epithet, but stated that it was attributable to the circumstance that the students were 11, 12, and 13 years old (1T-206 to 207; 1T-212 to 213). He did not attempt to resolve the inconsistencies in the statements (1T-207). Wright testified that he encouraged the students to write the actual words that Bassetti uttered, but did not tell them what Bassetti was alleged to have said (1T-207).

Wright and Amberths Meet With Bassetti



On February 28, after obtaining statements from the students in Bassetti's class, Wright testified that he spoke with Principal Luis Amberths, and went over the statements with him (1T-188). Wright testified that he believed Amberths spoke with Superintendent Cobain, but he was not a party to that conversation.

Wright stated that Bassetti was called to come to Wright's office sometime in the afternoon on February 28<sup>th</sup>. Amberths was also present at the meeting (1T-188 to 189). Wright conducted the meeting, and Amberths acted as a witness (1T-189). Wright testified that the purpose of the meeting was to get a verbal statement from Bassetti about what transpired and to follow up with a written statement from Bassetti (1T-189). Wright stated that when Bassetti arrived, he explained the reason for the meeting, told him what the alleged remark was, and advised him of the need for a verbal statement followed up by a written statement. Wright testified that he told Bassetti that "if it will go any further...you will be called back and at that point you can have union representation" (1T-189 to 190; 1T-210). Wright also shared the name of the alleged victim with Bassetti (1T-190). He did not provide Bassetti with a written complaint, including a District Affirmative Action Form (1T-208). Wright stated that the meeting lasted approximately 10 minutes (1T-191).

Due to the judicial Order with respect to statements made by Bassetti without union representation, as stipulated by the parties, I make no findings with

respect to Bassetti's participation in the meeting other than to note that he cooperated by providing an oral and written statement. I have not considered the content of either the transcript or any exhibits which concern Bassetti's verbal or written statements arising from this meeting (Exhibit J-2, Paragraph 13).

Wright testified that a few days after the meeting with Bassetti, he became aware of a rumor that there may have been a video of the incident. Wright stated that he brought the students in, and no one was able to corroborate that there was a camera or a phone taking pictures or video. After completing this follow up, Wright stated that he compiled everything and gave it to Amberths. Wright testified that he was interviewed by Michael Ostroff, the District's Affirmative Action Officer about the meeting with Bassetti (1T-192 to 193).

Wright stated that although he was unsure about whether he could make a determination about whether Bassetti should go back to the classroom, he believed that it would be impossible for Bassetti to return to a classroom in the Middle School due to community outrage about the incident (1T-193 to 194). Wright also stated that he felt that it would not be a "good situation" for Bassetti's "personal safety" since threats had been made against him (1T-194). He stated that he was familiar with the Board's policy concerning allegations of harassment, but had not memorized Board Policy 4118.1, Title IX (1T-197 to 198;

Exhibit Bassetti-9).<sup>9</sup> Wright testified that he was not the EEO/AA Coordinator for the District, and that when an allegation of harassment is made, the District's Affirmative Action Officer should be notified and would conduct an investigation (1T-198).

Wright stated that in following up on the complaint from the students about Bassetti, he was not conducting an Affirmative Action investigation, but gathering evidence (1T-212). He maintained that when an allegation of sexual or racial harassment or discrimination came to him, he would "take a look at it" first before referring it for an investigation by the EEO/AA Officer (1T-215; 1T-216 to 218).

#### Superintendent Zenaida Cobian

Superintendent Cobian has been in her current position since 2014, following a period of serving in the capacity of interim Superintendent. She holds a Masters and doctoral degree in educational leadership. Prior to becoming Superintendent, she was a teacher, an assistant principal at the Penns Grove High School, and the Director of Curriculum and Instruction in the District. As part of her duties in that position she was the Affirmative Action Officer (1T-242 to 243).

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<sup>9</sup> Wright later testified that Board Policy 4118.1 did not apply to students (1T-212).

As Superintendent, she oversees all educational operations, including finance, facilities, personnel, curriculum and instruction staff, and students. She also is responsible for district public relations (1T-243).

Cobian testified that she became aware of the alleged incident in Bassetti's classroom on February 27, 2019 when she received a phone call from Middle School Principal Luis Amberths. She stated that Amberths told her that students had made a claim that Bassetti had used a racial slur (1T-244 to 245). Cobian said that she asked if there were statements, and directed Amberths to finish investigating and get back to her by the end of the day (1T-245). She testified that Amberths came to her office at the end of the day on the 27<sup>th</sup> and advised her that they had a few statements from students, but would need additional time to finish. Cobian agreed, but said she asked Amberths what the word was, and he responded it was the "N-word" (1T-245).

Cobian testified that once Amberths told her what the allegation was, she directed him to send her the statements that were available so that she could read them, noting that she would see the Board's labor relations advisor and the Board president that evening and could "make a determination" (1T-245 to 246).

After she read the statements Amberths provided, Cobian stated that she was concerned that the word had been used in the presence of young students (1T-246). Following an evening negotiations session, Cobian said she consulted

with labor relations counsel and then advised the Board president that it would be best if Bassetti was removed from the classroom. The Board president acquiesced and approved a suspension with pay for Bassetti (1T-246 to 247).

Cobian stated that she decided at that point to suspend Bassetti the next day, and called Jennifer Lehr, then Association president, on her way home to give her a “heads up” that Cobian would probably be calling Lehr the next day to advise that she would be suspending Bassetti (1T-248 to 249).

The following day, February 28<sup>th</sup>, Bassetti and Lehr came to Cobian’s office. Cobian testified that she asked Bassetti, after advising him of the accusations made by the students “do you have anything to say?” (1T-249 to 250). Cobian said that Bassetti looked at the floor and Lehr said that Bassetti would not answer any questions (1T-250). Cobian then read the letter formally advising Bassetti of his suspension, and provided him with a copy (1T-247; 1T-250 to 251; Exhibit Board 11). Cobian stated that she advised Bassetti that the letter would also be sent to him by regular and certified mail (1T-251).

When Cobian was provided with all of the students’ statements, she testified that she reviewed them and determined to recommend tenure charges to the Board. In reaching this decision, Cobian stated that the word used had an impact on the students, and actually denigrated and belittled them. Cobian testified that Bassetti’s use of the racial slur violated his duty as a teacher to care

for his students (1T-252 to 253). She stated that she is familiar with the concept of progressive discipline, and is aware that Bassetti had no prior written discipline (1T-261). She testified that she did not follow progressive discipline in this case because she concluded that the damage done to the students, staff and to the community was pervasive, and that progressive discipline would not suffice. Cobian noted that the incident caused the attention of “outsiders” to be directed to the district (1T-262).

Cobian reviewed the Affirmative Action Report prepared by Michael Ostroff in his capacity as Affirmative Action Officer, which is dated March 22, 2019 (1T-254 to 255; Exhibit Board-10). She stated that some affirmative action policies which the Report concluded had been violated by Bassetti were included as part of the tenure charges (1T-255). Cobian testified that she determined that Bassetti had violated Board Policy 6121, Paragraph 1, “Nondiscrimination/Affirmative Action” which provides that no student will be subjected to discrimination in any educational program of the district, by uttering a racial epithet while teaching (1T-255 to 256; Exhibit Board-12). Cobian also stated that Bassetti violated Board Policy 4119.3, “Duties/ Responsibilities”, specifically a teacher’s responsibility to maintain a standard of care for supervision, control and protection of students commensurate with the teachers’ assigned duties and responsibilities (1T-256 to 257; Exhibit Board -13). She stated

that the manner in which Bassetti addressed the students and failed to care for them also violated Board Policy 4119.25 “Unbecoming Conduct” (1T-258 to 259; Exhibit Board-14). Finally, Cobian stated that Bassetti violated the first sentence of Board Policy 4111.1 “Nondiscrimination/Affirmative Action/Sexual Harrassment”, which provides in part that the Board guarantees “equal access to all categories of employment, retention and advancement” in the district without regard to whether an individual belongs to a protected class (1T-258 to 261; Exhibit Board 15).<sup>10</sup>

Cobian testified that she did not file tenure charges due to community pressure to do so (1T-262 to 263). She stated that Walter Hudson, a former Board member, is a community activist (1T-263). Cobian testified Hudson is permitted on school property only when he has a child in a school due to claims he had an incident with a teacher (1T-263 to 264). She stated that there was an incident between Hudson and a police officer which she thought resulted in criminal charges; there was a civil judgment against Hudson arising from the incident (1T-264).

Cobian could not recall if Hudson appeared at a Board meeting to call for immediate action to fire Bassetti , but stated that he has publicly called for

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<sup>10</sup> I note that Cobain testified that her determination about a violation of Board Policy 4111.1 was based in part on a statement alleged to have been made by Bassetti which are excluded from evidence. I have not considered this aspect of her testimony.

Bassetti to be fired (1T-264-265). She testified that she was aware of numerous posts by Hudson calling for Bassetti to resign (1T-265). Cobian reviewed a packet containing 14 documents including Hudson's internet posts, and selected those which which she had previously seen (1T-265 to 272; Exhibit Bassetti-10).

Cobian identified the following documents from Exhibit Bassetti-10 which she had previously seen: Hudson post with biblical quotation and an attached video of a Board meeting with subtitle referring to Board's response to Bassetti incident (page 3 of Bassetti-10); Hudson post with picture of Bassetti with "Bruce Bassetti Resign Now" printed across the picture (page 5 of Bassetti-10); Hudson post with Bassetti picture as described above and post purporting to be from a student in the class (page 6 of Bassetti-10); Hudson post with pictures of Bassetti and "school district tries to fire tenured teacher over alleged racial slur" (page 11 of Bassetti-10); Hudson post commenting that if Association president Lehr fights for Bassetti, Hudson will have media and activists in front of Lehr's house and the middle school and "WE WILL SHUT IT DOWN !" (page 13 of Bassetti-10; capitalization in original).

Cobian testified that she did not consider the posts in deciding whether to file tenure charges because she had already made her decision to do so before she saw the posts (1T-272 to 273). Cobian maintained that Hudson calls for the termination or resignation of teachers in the district "all the time" (1T-285). She



stated that she was repeatedly contacted by the media about the Bassetti incident, including NJ.Com, Courier-Post, and Channel 6, but testified that she was not influenced by these contacts in making her decision to file tenure charges (1T-273 to 274). Cobian also stated that she gave no statements to the press because it was a personnel matter (1T-274).

With respect to Board Policy 4111.1, Cobian testified that this policy is for staff, but applies to “all”, and that students may file a grievance under this Policy (1T-275; Exhibit Board 15). She maintained that the first paragraph of Board Policy 4111.1 is a general statement, and while it does not mention students, the word “student” is “implied” (1T-278 to 279).

She stated that when students make claims against staff members, the complaint goes to the principal, because principals are part of the Affirmative Action subcommittees in the schools (1T-276). She maintained that although Wright had testified that he had approximately 2 hours of EEO training, she was not concerned that he might be able to reconcile inconsistencies in statements, because he consulted with the principal, who had training (1T-276).

With respect to the steps she followed in crafting tenure charges, Cobian stated that she worked with counsel to draft the charges, which are then presented to the Board along with all the evidence, and the Board then decides whether to file the charges (1T-282). A statement of position from Bassetti is

requested by counsel for the Board, and that statement is part of the material considered while the Board deliberates about proceeding with tenure charges (1T-282 to 283).

Cobian stated on cross-examination that she made the decision about whether to file tenure charges against Bassetti on February 28, 2019 when she had all the statements in hand, not on the previous evening following negotiations (1T-284).

#### Affirmative Action Investigation

Michael Ostroff is the Director of Curriculum and Instruction in the Penns Grove-Carneys Point Regional district, a position he had held since August 2018. He is also the Affirmative Action Officer for the district (1T-223). Prior to his employment with the Board was employed by the Mount Holly school district, where among other duties he was the Affirmative Action Officer (1T-223).

Ostroff testified that his training in being an Affirmative Action Officer is limited to guidance from the superintendent in Mount Holly and Cobian, both of whom had served in that capacity prior to Ostroff assuming the role (1T-223 to 224). He stated that he also read policy, regulations, and handbooks. (1T-232).

Ostroff prepared an Affirmative Action Report, dated March 22, 2019, on the Bassetti incident (1T-224; Exhibit Board-10). At the portion of the Report captioned "Allegations" the phrase "per attached sheets" appears, which he

testified were student, administrator and teacher written statements (1T-225).

The Report states that Bassetti violated the “affirmative action policy” by uttering a racial slur, but does not specifically refer to any Board Policy by number or title (Exhibit Board-10),

Ostroff stated that he was not present for any of the student interviews conducted by Wright, nor did he interview Bassetti (1T-227). He testified that he made a judgment call not to re-interview the students, because he felt their statements, together with Bassetti’s,<sup>11</sup> were a “complete picture” of the claims (1T-229). He testified that he did not interview Bassetti because Bassetti was suspended (1T-231).

Ostroff stated that if someone made a complaint about an offensive comment which would fall under the affirmative action policies of the district, the complaint would go directly to him if the victim or the person claiming the offense reported it directly to him (1T-234). He testified that if that sort of allegation were reported to someone else, the allegation should be reported to him, but he maintained that in some circumstances, the building administrators had the right to investigate a claim made by a student(s) about a teacher (1T-235).

### Bruce Bassetti

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<sup>11</sup> Bassetti’s statement is excluded from evidence based on the judicial Order which is previously referenced in the Joint Stipulation (Exhibit J-2, Paragraph 13).

Bassetti testified that he did not use the word “nigger” during his fifth period class on February 27, 2019 (2T-288; 2T-309<sup>12</sup>. He stated that the accusation has caused him to become upset, angry and worried (2T-288 to 289; 2T-324).

Bassetti testified that on February 27<sup>th</sup> he mentioned to his fifth period science class that the science fair grade was to be posted on the interim reports for the marking period, and that the project counted for 50% of the grade. That year there was a school directive sent to parents advising that the projects were mandatory. He estimated that science fair projects take 3 to 4 months to complete, and noted that in 2019 he had 10 student who had done projects which were good enough to be considered to go to the Salem County Science Fair (2T-298). Bassetti testified that the deadline for submission of the project had passed, and noted that he had extended the deadline for his students (2T-298 to 300).

On the 27<sup>th</sup>, Bassetti stated that he had just passed back the tests he had graded, and gave the students an opportunity to correct the test grade so that they could perhaps raise their grade for the interim report (2T-299).

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<sup>12</sup> In fact, he denied that he made any comment about students.

Bassetti reviewed a diagram, not to scale, that he had prepared showing the tables and where students in his classroom were sitting on the day in question (2T-302 to 304; Exhibit Bassetti-11).

The diagram shows Bassetti's desk at the end of the room near the door, and three rows of tables with up to four students seated at the tables. There are aisles from the front to the back of the room (Exhibit Bassetti-11). Bassetti testified that when the incident with the Chromebook and JS and CO, he was at first seated at his desk, then walked up the aisle between the tables occupied by CT, NB, BO and GM, which would have been to his right as he walked toward the back of the room; the table across from them was where JH was seated as well as two other students (2T-305; 2T-325). NB and GM were seated directly across from CT and BO, with their backs to where JS was seated. CT and BO were seated facing toward JS (2T-327). Bassetti stated he stopped at the back of the room and stood in the aisle beside JS, then turned around to face the front of the room while attempting to see what JS was working on (2T-305 to 306).

After Bassetti attempted to grab the Chromebook, but was thwarted when JS passed it to CO, Bassetti testified that he retraced his steps down the aisle and back to his desk (2T-306; Exhibit Bassetti-11). He stated that the incident occurred about halfway through the fifth period class (2T-307).

Bassetti testified that CT was seated facing the back of the room where JS was seated, and GM faced the front of the room where Bassetti's desk was located (2T-306 to 307).

Bassetti testified that he was summoned by security to a meeting with Wright on February 28th, and that Amberths joined the meeting. He stated that Wright informed him that Amberths was there as a witness. Wright informed him that a student had accused him of using the N-word (2T-310). Bassetti's responses are not in evidence; however he stated that Wright and Amberths directed him to fill out a written statement, and I find that Bassetti complied with their direction. I also find that no union representative was present at the meeting, since the testimony of both Wright and Bassetti establishes that only Wright, Bassetti and Amberths were present (1T-188 to 189; 2T-310 to 312).

Bassetti stated that he is involved in community activities, and that he volunteers his time at programs for at-risk youth in the community. He testified that he is also a merit badge counselor for the Boy Scouts of America (2T-313). Bassetti maintained that his involvement in supporting at risk students bolsters his assertion that he is not a racist (2T-313).

On February 28<sup>th</sup>, Bassetti testified that he was escorted off the middle school property and told to go to the district office. He was met there by NJEA Representative Jennifer Lehr who told him they were going to see the

Superintendent. Bassetti stated that Lehr informed him the Cobain would read a letter to him, and give him a copy. He testified that Lehr told him that all he should say is that he understood what Cobian read to him (2T-314).

Bassetti stated he and Lehr then went to the meeting with Cobian, who read him a letter, which he confirmed that he understood. He stated that he sensed that the meeting was a formality rather than an investigatory session (2T-315).

With respect to GM, Bassetti testified that GM might be motivated to lie because Bassetti was in “constant contact” with GM’s mother about whether GM was on task in class. Bassetti stated that due to his repeated contacts with GM’s mother, GM was “a little afraid” of Bassetti. Bassetti stated that GM had not turned in a science fair project (2T-315).

Bassetti reviewed a gradebook spreadsheet of the students in his 5<sup>th</sup> period science class as of May 29, 2019 and testified that the grades were not an accurate depiction of the grades of the students as they existed on February 27, 2019 (2T-316 to 317; Exhibit Bassetti-13). He stated that the science fair project grade that he entered had been removed(2T-317). Bassetti explained that if a student turned in a satisfactory project, he gave a grade of 90 or 100. If the project was less than satisfactory, the grade was 80. If no project was turned in, the lowest grade he gave was 50 (2T-317). He stated that in the gradebook the numeric grades he entered had been replaced with Es (2T-317; 2T-343). Bassetti

clarified that the area which was altered was on the last page, under the column that says SF final project test (2T-318).

Bassetti stated that CO did not do any work in class, and that he had been in email contact with CO's mother about his work; he maintained that CO's mother was unable to motivate him (2T-319). Bassetti testified that CO had not turned in a science fair project (2T-319 to 320). He also described an incident when CO took the pencil sharpener cover which was full of filings and shook them out over the head of a female student. Bassetti stated that from his vantage point, it appeared that the female student had been hit in the head with the sharpener cover, so he reported it to the office. Security then took both CO and the other student to the office, however Bassetti was later advised that the female student said she had not been hit in the head with anything other than the pencil shavings (2T-320).

Bassetti maintained that CT had a "long history" of mishearing things in class, to the point that Bassetti had to contact his mother. He stated that he had a long string of email history with CT's mother(2T-322). According to Bassetti, CT refuses to write directions down and then mixes them up. When Bassetti contacts CT's mother and provides directions, Bassetti testified that CT convinces his mother that the directions are wrong, and then does "what he wants to do" (2T-



322). He stated that CT was “more apt to misconstrue directions” than other 12-13 year old students (2T-341; 2T-348).

JH talks constantly in class, Bassetti stated, and gets nothing done due to her continual conversation. (2T-323).

Bassetti testified that during the 2018-2019 school year, there was no computer cart in his classroom. During the 2017-2018 school year, he had a computer cart in his classroom (2T-321). He also stated that of the students who had testified, CT, GM, BO and KR had been in his class for more than one year (2T-321).

Bassetti stated that the students were mistaken about hearing him say “nigger”, but agreed that if he had walked between the desks where CT, NB, BO, GM and JH were seated, the students would be able to hear something that he said “if the room was quiet enough” (2T-328).

Bassetti stated that it was inappropriate to use the word “nigger” in class, and that someone who did so should be disciplined and probably should not be a teacher (2T-342). He also stated that he made the statement from the perspective of a teacher that would be suffering from burnout, and did not consider whether the teacher had an otherwise blemish free career or the body of relevant case law (2T-349 to 350).

I credit Bassetti's testimony, with the exception of his denial that he made a statement in the 5<sup>th</sup> period science class on February 27, 2019 which included the word "nigger" or "niggers."

#### Jennifer Lehr

Jennifer Lehr, then president of the Association, testified that when she arrived for the meeting with Cobian and Bassetti, she went into Cobian's office and was briefed by the Superintendent, and advised that Bassetti would be receiving a letter of suspension (2T-362). She stated that she left Cobian's office, spoke with Bassetti, and then they returned to her office and began the meeting. Lehr testified she had told Cobian that she had advised Bassetti to just listen to what Cobian said, answer only direct questions, and not to give a statement at that time (2T-362).

Lehr recalled that when Cobian spoke with them, she explained the allegations, and then said that Bassetti would be suspended with pay. She stated that Cobian gave Bassetti a copy of the letter of suspension, and advised him that he would be able to get his personal items. Lehr did not think that Cobian read the letter out loud, but stated that she read it while sitting in the meeting (2T-365).

Lehr testified that to the best of her recollection, Cobian did say that she would like to know what happened, but understood that the advice of the

Association was not to make a statement at that time (2T-363). Lehr stated that she was unsure about the exact words Cobian used, and specifically whether Cobian said that she was aware that the Association had advised Bassetti not to give a statement. Lehr testified that it was the understanding at the time of the meeting among the three participants that Bassetti would not give a statement (2T-363 to 365).

#### Luis F. Amberths

I note that Luis F. Amberths, principal of the Penns Grove Middle School, testified briefly. The primary purpose of his testimony was to authenticate a document he prepared to summarize the meeting he and Wright had with Bassetti on February 28, 2019 (2T-358 to 359; Exhibit Board-16). I find that Amberths testified that he was at the meeting.

#### Tenure Charges

On April 16, 2019 the Board certified tenure charges against Bassetti and suspended him for 120 days without pay pursuant to N.J.S.A. 18A:6-14 (Exhibit J-2, Para. 1).<sup>13</sup> The tenure charges are as follows:

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<sup>13</sup> After the expiration of the 120 day suspension without pay, Bassetti has been and continues to be on a paid suspension (Exhibit J-2, Par.1).

**Charge One (Unbecoming Conduct):** Bassetti used the word “nigger” in front of a class of 7<sup>th</sup> grade science students, which is intolerable conduct requiring the termination of his employment.

**Charge Two (Incapacity):** Bassetti’s use of a racial slur in the presence of students makes it impossible for him to effectively teach in the District. His return would cause acrimony with students, staff and the community; therefore, he is incapable of continuing his employment with the Board.

**Charge Three (Other Sufficient Cause):** Bassetti’s use of a racial slur mandates that his employment with the Board must be terminated because his return to teaching would violate the public trust to ensure the care and well-being of the students and maintain a safe environment where they are not subjected to racial slurs by their teachers.

### **ANALYSIS**

On February 27, 2019 Bruce Bassetti was teaching a science class at Penns Grove Middle School. During class, two students, JS and CO, frustrated Bassetti’s efforts to retrieve a Chromebook, which was placed in a precarious position on top of a pile of materials in front of JS, by passing the computer out of his reach. As Bassetti returned from his fruitless errand, he muttered under his breath words to the effect that he “was done dealing with these niggers”, a remark

which was heard by students. Bassetti denies having made any remark at all, and I have already found that the seven students who testified that they heard the racial slur are credible. I will not repeat the reasons which were outlined as part of that finding of fact here, but simply restate that despite inconsistencies as to where Bassetti was when he made the remark, the time during class when it was made, and the exact sentence he uttered, I find the testimony of the students and their written statements more credible than Bassetti's assertion that he said nothing at all.

The use of the racial epithet, the Board maintains, and Bassetti's deceitful refusal to acknowledge or accept accountability for his actions, make it impossible for the Board to trust that he will use good professional judgment in the future. In addition, the Board urges, Bassetti's comment is widely known in the community as well as by staff and students, rendering him incapable of functioning as a teacher in the District. The Board maintains that despite Bassetti's lack of a disciplinary history, the only appropriate penalty for his actions is removal, since his continued employment in the District has the potential to compromise the safety and well-being of students.

The Union maintains that the Board has failed to meet its burden of proving just cause for the termination of Bassetti's employment with competent credible

evidence. The Union asserts that the students' testimony lacks credibility, due to the multiple inconsistencies present in the testimony of the students, together with the motivation of some of the students to remove Bassetti from the classroom and thus improve their grades.

Additionally, the Union urges that the Board's investigation was flawed because it was not conducted by the Affirmative Action Officer, but instead by Wright, who lacked both training and objectivity.<sup>14</sup> The Union points out that when Ostroff learned of the allegations made by the students, he failed to interview the students or Bassetti, but merely relied on the students' written statements. The Union urges that the Board's investigation was procedurally and substantively deficient, and inherently unfair to Bassetti. The tenure charges should be dismissed.

The Union also argues that even if the Board proved the allegation against Bassetti, the penalty of termination would be unwarranted. Consistent with case law, the Union maintains, factors including the impact of termination on Bassetti's teaching career, his 14 year record of good evaluations and no discipline, as well as the provocation of JS and CO's classroom misbehaviors should weigh in

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<sup>14</sup> The Union also makes an argument concerning violation of Bassetti's Weingarten rights during the course of the investigation. However, in view of the Order which excludes from evidence any statements made by Bassetti during the investigatory process when he was without union representation, I will not discuss this issue, since the Court's remedy essentially renders the issue moot.

Bassetti's favor and preclude his removal. The Board failed to follow progressive discipline, the Union argues, in seeking Bassetti's termination, and the penalty is both disproportionate to the alleged conduct, and inconsistent with penalties imposed for similar conduct in recent tenure cases. If the Board sustained its burden of proof, which the Union does not concede, it asserts that a lesser penalty of suspension would be reasonable based on recent precedent.

### Investigation

The Union argues that the Board's investigation was not impartial, and that the manner in which it was conducted was procedurally deficient. The Association maintains that due to the deficiencies in the investigation, it did not produce facts which support just cause for the tenure charges against Bassetti. To be sure, the investigation was flawed in some respects.

The investigation effectively began on February 27, when NB, GM and CT arrived in the main office and were directed to Wright. Faced with their unannounced arrival, Wright met with each of them, and directed that they reduce their complaints to writing.

It does not appear that NB, GM and CT were sequestered from each other during the period that they were in the vicinity of Wright's office, although it is clear that Wright spoke with each student individually outside the presence of the other students. In retrospect, Wright should have assured that the students were

not in a position to discuss their recollections of what had occurred while they waiting to see him, however as a practical matter, once students left Bassetti's classroom and continued with their schedules, they were free to discuss what had happened as circumstances permitted. However, Wright could not have known in advance the nature of the students' complaints, and took the course of getting their recollections reduced to writing quickly, while still fresh in their minds.

Wright shared what had happened with Amberths, who approved Wright's proposed plan of action, to get the statements of the other students in Bassetti's class; Amberths then discussed the situation with Cobian, who directed that statements be taken promptly. There is nothing in the record which indicates that either Amberths or Cobian thought to reach out to the Affirmative Action Officer to assume responsibility for the investigation. I note that Cobian testified that she had been the District's Affirmative Action Officer prior to Ostroff assuming the job, and that Amberths had received training in affirmative action (1T-276).

Wright completed meeting with and procuring statements from the other students in Bassetti's class by the morning of February 28. Wright and Amberths met with Bassetti later in the day on the 28<sup>th</sup>.

Ostroff did not learn about the complaint against Bassetti until the weekend after the incident (1T-228). Although he was out of the office at training, there is nothing in the record which indicates that an attempt was made



to reach out for him or to seek his assistance prior to that time. Ostroff himself had no specific training in conducting affirmative action investigations, other than some advice and mentoring from a superintendent for whom he had previously worked, as well as Cobian (1T-223 to 224). Ostroff's report indicates that he did not speak with any of the students, or with Bassetti. The only interview he conducted was with Wright (Exhibit Board-10).

Although the Report concluded that Bassetti had violated the District's affirmative action policies, it did not specify those policies by name or policy number. Neither Board Policy 4111.1 "Nondiscrimination/Affirmative Action/Sexual Harassment" or Board Policy 6121 "Nondiscrimination/Affirmative Action", which Cobian maintained had been violated by Bassetti's comment, contain any procedures concerning the processing of complaints, or the conduct of investigations (Exhibits Board 15 and 12). The only reference to student complaints in Board Policy 4111.1 pertains to the filing of sexual harassment complaints by students (Exhibit Board-15, Section B, paragraph 5, page 3).

The testimony from Ostroff and Wright concerning the proper procedure for reporting complaints of affirmative action violations was contradictory, with Ostroff testifying that he would conduct investigations when complaints were made directly to him, but that building administrators were also empowered to conduct investigations of complaints made by students against teachers(1T-234

to 235). Wright testified that when a complaint came to him from a student, he would investigate it before referring it to the Affirmative Action Officer (1T-215; 1T 216 to 218). Based upon the record before me, it does not appear that the District has clear procedures in place for the processing of affirmative action complaints. The investigation was essentially completed once Wright had obtained statements from the students, and met with Bassetti.

However, the Association's argument that the investigation was so flawed and lacking in objectivity that the Board failed to meet the just cause standard in preferring tenure charges against Bassetti misses the mark. The Board had credible evidence from multiple students which supported the conclusion that Bassetti had used a racial epithet in the classroom. The Board's investigation, which was primarily conducted by Wright, proceeded quickly to get the statements of students while the incident was fresh in their minds. The students who testified all stated that Wright directed them to write down what had happened, and did not tell them what word Bassetti was alleged to have said. Wright testified that he did make some credibility assessments, and did not merely take each student's statements as factual (1T-186 to 187). The record reflects that Wright conducted himself in an objective fashion while interviewing and collecting statements from the student witnesses. Wright testified that when rumors of a video which pertained to the Bassetti incident may have existed, he

followed up by checking with students, and determining that he could not corroborate that a video existed (1T-191 to 192). Whatever his personal feelings may have been with respect to what Bassetti may have said, he clearly gathered information in a thorough manner.

I also note that the investigation of the Bassetti matter was not complex, since it involved a single statement, at a known place and time, with a defined universe of potential witnesses. In a more complex situation, the kind of procedural missteps which were present here might be fatal to the integrity of an investigation.

### **Unbecoming Conduct**

Count 1 of the tenure charges alleges that Bassetti's use of a racial epithet during a class is intolerable, and caused a loss of credibility with students and staff.

I have already made credibility findings which substantiate that Bassetti used the word "nigger" during a 5<sup>th</sup> period science class on February 27, 2019. In reaching this determination, I considered the arguments about the students' credibility which were raised by the Association, but did not find them persuasive. I have articulated my reasoning in the factual findings section of this decision, and will not repeat them here.

The charge of “Unbecoming Conduct” is an elastic term which includes conduct which “adversely affects the morale or efficiency of [a school district or that] has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services,” Appeal of Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (quoting Zeber Appeal, 398 Pa. 35, 43 (Sup. Ct. 1959)). Behavior which constitutes unbecoming conduct does not have to violate a specific rule or regulation, but can be based on “the implicit standard of good behavior which develops upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992)(citations omitted).

Bassetti is a tenured teacher; the tenure statute is designed to protect educators from dismissal for “unfounded, flimsy or political reasons.” Wright v. Bd. of Educ. Of E. Orange, 99 N. J. 112, 118 (1985) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962) cert. denied 371 U.S. 956, 83 S. Ct. 508 (1963)). Tenured teachers must act in a professional manner and serve the welfare of the students in their care. Tenure charges may be sustained based upon a pattern of unprofessional conduct, or a single incident which is found to be “sufficiently flagrant.” In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

Board Policy 4119.25 “Unbecoming Conduct” (Exhibit Board 14) provides that when an employee “creates conditions under which the proper operation of

the school is affected”, the Board, with the recommendation of the Superintendent, will determine whether the conduct constitutes conduct unbecoming a school employee. The Policy further provides that a “single flagrant incident” may be sufficient to warrant Board review of an employee’s conduct.

It is apparent that when Bassetti used a racial slur while conducting a class with students present, his conduct violated norms of professional behavior and common decency. Teachers not only communicate information; they are role models for the students in their care. Teachers are expected to maintain appropriate and professional conduct as a legitimate requirement for employment due to their position as both role models for students and public employees. In re Sammons, 1972 S.L.D. 302; Saunders v. N.J. Dep’t. of Educ., 91 N.J.A.R. 2d (EDU)12.

Bassetti’s use of the term “nigger” had no legitimate pedagogical purpose, and was evidently an expression of his annoyance at the misbehavior of JS and CO. NB, BO, CO and JH all testified that Bassetti appeared to be “aggravated” (NB; 1T-52), “got mad” (BO;1T-93; JH; 1T-32) or “upset”(CO; 1T-113) after the Chromebook incident. I infer that Bassetti was annoyed by the disrespectful behavior of JS and CO, annoyance which was justified. However, when he chose to express that annoyance by muttering words to the effect that he was done

with those “niggers” he crossed a line. The students’ behaviors were objectionable, and deserved to be admonished. Behaviors can be corrected, but immutable characteristics, such as race or sex, cannot. By using a racial epithet to admonish behavior, Bassetti communicated to the class that individual behavior was the result of belonging to a particular race, rather than to choices about conduct. Simply put, he modeled racism.

As the Commissioner observed in Sammons,

By virtue of the unique position they occupy, educators must be held to enhanced standards of behavior. [Teachers] are professional employees to whom people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. In re Sammons, 1972 S.L.D. 302, 321

I have used the word that Bassetti uttered-“nigger”- throughout this decision to underscore the brutality and potency of the term. Words have power, and I note that this particular word is so reviled that even adults who testified in this proceeding often elected to use the term “N-word” instead of what Bassetti actually said. Bassetti himself conceded that use of the slur in a classroom by a teacher was inappropriate (2T-342).

The Board also alleges that Bassetti’s conduct violated Board Policy 4119.3 “Duties/Responsibilities.” Cobian testified that Bassetti’s comments violated his

duty to maintain an appropriate standard of care for supervision, control and protection of students (1T-256 to 257; Exhibit Board 13, Paragraph 3 A). I find that Bassetti's conduct violated his duty to protect the students under his care by subjecting them to racially discriminatory language directed toward members of the science class.

Ostroff's Affirmative Action Report stated that Bassetti had violated the District's Affirmative Action policies by uttering the racial slur, but did not specify which policies were implicated. Cobian testified that she concluded that Bassetti's comment violated both Board Policy 4111.1 "Nondiscrimination/Affirmative Action/Sexual Harassment" and Board Policy 6121 Nondiscrimination/Affirmative Action" (Exhibits Board 15 and 12).

With respect to Board Policy 4111.1, Cobian stated that although the Policy is intended for staff, the inclusion of students is "implied" (1T-278 to 279). The first paragraph of the Policy is a general statement which states that the Board guarantees equal access to employment, retention and advancement in the district without regard to any condition or membership in protected classes as defined by state and federal law. It also covers Harassment and Favoritism, Sexual Harassment and Whistleblower Protection. The only mention of students occurs in the Sexual Harassment portion of the Policy, which provides that students, as well as employees, may file formal sexual harassment grievances. The Policy is

clearly directed toward employees of the district, rather than toward students. I decline to include them by inference, as proposed by Superintendent Cobian. The Policy is clear and unambiguous in its language. While Bassetti's comment was discriminatory in impact, I do not believe that it violated the provisions of Board Policy 4111.1.

I conclude that the Board has met its burden of proof that Bassetti's use of a racial epithet in the classroom on February 27, 2019 violated Board Policies 4119.25 "Unbecoming Conduct", 4119.3 "Duties/Responsibilities", and 6121 "Nondiscrimination/Affirmative Action." The Board did not meet its burden of proof that Bassetti's statement violated Board Policy 4111.1 "Nondiscrimination/Affirmative Action/Sexual Harassment."

The Board also maintains that Bassetti violated the provision of Board Policy 6121 "Nondiscrimination/Affirmative Action" which states that "[n]o pupil enrolled in the district schools shall be...subjected to discrimination in any educational program or activity of this district on the basis of any and all conditions or any of the protected classes" defined by state or federal law (Exhibit Board Policy 12). Cobian testified that Bassetti's use of a racial slur subjected the students in his science class to a discriminatory statement which violated the Policy (1T-255 to 256). There can be no doubt that the use of a racial epithet in the circumstances here is an act of discrimination which violates the Policy.



## **Incapacity**

Charge Two alleges that Bassetti's use of a racial slur in the classroom makes it impossible for him to effectively return as a teacher because it would cause acrimony with students, staff and the community. In view of this concern, the Board maintains, Bassetti is incapable of continuing his employment with the District.

The Board argues that the focus of the term "incapacity" in the statute is broad, and considers not only classroom proficiency, but also a teacher's impact and effect upon the students. In re Grossman, 127 N.J. Super. 13 (App. Div. 1974). In the Board's view, once Bassetti uttered a racial epithet in the classroom, he compromised the integrity of the District. In addition, the Board maintains, his refusal to acknowledge his conduct removed any chance at remediation. Bassetti's return to teaching, in the Board's view, had the potential to compromise the safety and well-being of students.

The record reflects that Bassetti had been employed by the Board for 15 years when the incident occurred, and that he received "Proficient" evaluations during that time (2T-294 to 295). He has no disciplinary record, but testified that he was verbally counseled on one occasion for missing an afternoon duty station (2T-295). The record also reflects that Bassetti was an engaged teacher who maintained contact with the parents of GM and CO in an effort to increase their

motivation in class, and with CT's mother to clarify confusion about directions and assignments (2T-315; 2T-319; 2T-320). Bassetti also testified that he volunteers in community programs providing support to at risk children (2T-313).

Incapacity generally connotes a lack of ability. On the facts before me, there is no evidence that Bassetti cannot competently teach. The Board's position that he is incapacitated rests on a concern that Bassetti would make another similar comment to future students, and that there is thus the *potential* for harm to future students of his. This is purely speculative. Based on the entirety of Bassetti's otherwise unblemished record of conduct, it is at least equally likely that he would not repeat the conduct which has been substantiated here.

I note that the facts in Grossman, which is the sole case cited by the Board in support of its legal position, are distinguishable from the instant matter in one important aspect. Grossman was a teacher who transitioned from male to female and sought to continue teaching in the same district after the transition was completed. The Court determined that Grossman's mere presence in the classroom as a woman posed a continuing danger to students unrelated to her academic proficiency. Grossman, supra at 32. I note that the case was decided in 1974, at a time when issues of gender fluidity were less openly discussed or accepted. I infer that the Court agreed that students would have difficulty being in

the presence of a transgender teacher, supporting the Board's position that Grossman was incapacitated from teaching.

The Board's justifications for deeming Bassetti incapable of teaching are more supportive of their proposed penalty-termination-than of a charge of incapacity. The Board's arguments in support of Bassetti's incapacity are essentially circular; Bassetti's comment requires that his employment be terminated, and because he must be fired he cannot teach.

The Board has not met its burden of proving that Bassetti is incapacitated from teaching. Charge Two is dismissed.

### **Other Just Cause**

The Board maintains that Bassetti's use of a racial slur in the presence of students violated the public trust, which requires that the District ensure that students learn in a safe environment, where they are not subjected to racial epithets.

The record reflects that the allegation that Bassetti used a racial slur in the classroom was the subject of one televised news story as well as a newspaper article (1T-145 to 146; Exhibit Bassetti-7). A community activist and former Board member also urged that Bassetti be fired in multiple Facebook posts which were seen by the Superintendent (1T-266 to 273; Exhibit Bassetti 10). In her capacity as

the public face of the District, Cobian testified that she was contacted repeatedly by various media outlets about the Bassetti incident (1T-273 to 274).

Wright testified that he could not support Bassetti's return to teaching in the middle school due to community outrage about the incident. Wright also stated that "some threats" had been made against Bassetti, which caused Wright to feel concerned about Bassetti's physical safety if he returned to the building (1T-193 to 194). Cobian testified that Bassetti's comment had not only damaged students and staff, but had created a "bad perception" which permeated "into the entire community." (1T-262). She also expressed concern that Bassetti's presence in the district would be detrimental to him. I note that the perceptions of both Wright and Cobian are based in part on information which has been excluded from the record.

I am persuaded by the evidence before me that Bassett's conduct has become well known to the school community, and the community at large. That information would be of concern to parents and students alike, as well as to the staff and school administrators. I conclude therefore that Bassetti has created a circumstance where public trust and confidence in the Board's ability to provide an educational environment which is free from racial slurs has been impaired. The Board has met its burden of proving that Other Just Cause to discipline Bassetti has been met.

## **Penalty**

The parties have strongly held positions with respect to the appropriate penalty for the substantiated conduct which are reflected in the stipulated record. The Board stipulates that it has always taken the position that termination is the only appropriate penalty, and that the Board's decision to withhold Bassett's employment and adjustment increments was merely procedural (Exhibit J-2, Par.4). The Association disagrees with the Board's position and maintains that even if the Board's tenure charges are proven, the appropriate penalty is a suspension and/or increment withholding.

The Association points out that the Board failed to follow progressive discipline in seeking to terminate Bassetti's employment. The Board does not dispute that it did not utilize progressive discipline with respect to the penalty it seeks to impose for Bassetti's conduct.

Progressive discipline is a foundational principle of public sector discipline in New Jersey. West New York v. Bock, 38 N.J. 500, 522 (1962). Underlying the concept of progressive discipline is the idea that discipline is designed to correct behavior, rather than to punish. The incremental disciplinary steps are designed to permit time for the employee to correct the problematic behavior before increasing the sanction for failing to do so. However, tenure charges can be

sustained if a single incident of unbecoming conduct is “sufficiently flagrant.” In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

Superintendent Cobain testified that the decision she made to recommend termination of Bassetti’s employment rather than to follow progressive discipline was based on her assessment that his conduct was “so pervasive that progressive discipline will not suffice” (1T2-61 to 1T-262). She stated that as she read the students’ statements, she “was just completely taken away.” (1T-252 to 1T-253). Cobain was so concerned with the content of the students’ statements that she discussed the situation with the Board president and labor counsel, and received approval from the Board president to suspend Bassetti on the evening of the 27<sup>th</sup>, prior to the meeting Bassetti had with Wright and Amberths (1T-245; 1T-246 to 248). I credit her testimony that she effectively decided to suspend Bassetti on the evening of the 27<sup>th</sup> (1T-248). On her way home, Cobain reached out for the Association’s president to provide her with notice that it was likely she would be suspending Bassetti on the 28<sup>th</sup> (1T-249). I infer from Cobain’s testimony that her reaction to the student statements she read on the 27<sup>th</sup> was both immediate and visceral. As she testified, Cobain found Bassetti’s use of a racial slur in the presence of students both denigrated and belittled them (1T-252 to 253).

Based upon Cobain’s assessment of the seriousness of Bassetti’s conduct and its impact upon the students, as well as on the community, I conclude that

Bassetti's use of "nigger" in the classroom is an instance of conduct which is sufficiently flagrant to warrant a sanction which is inconsistent with progressive discipline.

The Association also urges that the Board's recommended penalty of termination is grossly disproportionate and unwarranted under both the Fulcomer standards, and when compared with other recent tenure cases which involve the use of a racial slur.

Under the Teacher Effectiveness and Accountability for the Children of New Jersey Act, (TEACHNJ Act)), L. 2012, c. 26 (N.J.S.A. 18A:6-117 to 129), as well as its predecessor, the Tenure Employees Hearing Law (TEHL), L. 1967, c. 271 (N.J.S.A. 18A:6-1- to 18.1), a fact finder in a tenure hearing should consider when determining the appropriate penalty "the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and ...any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." Fulcomer, 93 N.J. Super. at 422. In addition, Fulcomer also establishes additional criteria, including "the impact of the penalty on [the teacher's]...career" as well as the teacher's record and teaching ability, together with any prior discipline. Id.

With respect to Bassetti, the record establishes that he is a teacher with no prior discipline, good evaluations, and a lengthy career with the Board. The racial epithet he used was in response to disrespectful behavior by two students, JS and CO, and doubtless provoked by their conduct. Although I have found that a single incident of unbecoming conduct occurred, the incident is serious and had a significant impact on the students in his class, as well as on the larger community, including at the very least the families of the students who heard the remark. The termination of his employment by the Board for unbecoming conduct would have a deleterious impact on Bassetti's teaching career.

The Association and the Board have provided decisions by fact finders which involve allegations similar in nature to Bassetti's comment in support of their respective positions. I have reviewed and considered all of them. The Association urges that recent tenure cases involving allegations that a teacher used the word "nigger" or a related term resulted in lesser discipline than termination, or involved more serious repeated conduct than Bassetti's single instance of inappropriate conduct.

Some of the cases cited by the parties are distinguishable based on their facts. There is no suggestion that the use of the racial epithet by Bassetti occurred as part of a relevant discussion of curricular material, or any credible evidence that the students who testified in this matter were motivated by Bassetti's



demanding academic standards or strict classroom management. (See In re Tenure Hearing of Regina Dzwonar, Agency Docket No. 246-10/13 (Feb 20, 2014) (Brent, Arb). The racial epithet used by Bassetti was not directed toward another staff member, but in front of students. (See In re Tenure Hearing of Lauren Cooke, OAL Dkt. No. EDU 74-09, Agency Dkt. No. 357-12/08, 2010 WL 2947135, initial decision (July 22, 2010); 2010 WL 8020415, Comm'r. Decision (Nov. 22, 2010). While racist comments made to peers are objectionable, they do not have the same impact as when made by a teacher to students; teachers are role models for impressionable students, a consideration which is not necessarily present among colleagues.

Other cases involved teachers who had committed multiple acts of inappropriate conduct, some related to racial epithets, but received lesser penalties than termination (See In re Tenure Hearing of Barbara Emri, OAL Dkt. No. EDU 4579-00, Agency Dkt. No. 18-6/00, 2002 WL 31042788, initial decision (Aug. 30, 2002); 2002 WL 32590922, Comm'r. decision (Oct. 21, 2002 discipline final decision (Dec. 5, 2003); )(racially inappropriate comments and multiple acts of inappropriate behavior involving students, colleagues and parents, insubordination, failure to follow progressive discipline); In re Tenure Hearing of Adelpia Poston, OAL Dkt. No. EDU 03876-05, Agency Dkt. No. 78-3/05, WL 2645094, initial decision (Aug. 15, 2006) (use of homophobic slur); In re Geiger,

No. A-1409-13T2, 2015 WL 7261458 (N. J. Super. Ct. App. Div Nov. 18, 2015)(Appellate Court noted past decisions in Emri, Cooke, Poston, supra established lesser sanctions than dismissal for comments the Court deemed to be less pejorative and also noting that the teachers did not address their comments to students who overheard them).

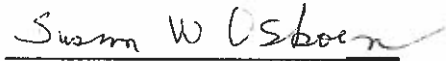
In contrast, other cases where terminations were upheld involved teachers who had made multiple comments which were derogatory or demeaning, and had been the subject of progressive discipline (In re Tenure Hearing of Demetrio Surace, OAL Dkt. No. EDU 04400-12, Agency Dkt. No. 82-3/12, 2013 WL 8170523, initial decision (Sept. 16, 2013), made Facebook comments characterizing her first graders as “future criminals” and maintained that her conduct was not inappropriate (In re O’Brien, No. A-2452-11T4, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013)).

While the determinations of other finders of fact may be instructive, facts in the record before me are the most relevant and persuasive in reaching a determination not only as to whether the charges alleged have been proven, but also in assessing an appropriate remedy. I am persuaded that in this case the Board’s proposed disciplinary sanction of termination is warranted.

In reaching this conclusion I have considered all of the Fulcomer criteria, including Bassetti’s lack of any disciplinary record, the fact that the conduct

**AWARD**

The grievance is denied. Penns Grove Carneys Point School District is directed to terminate the employment of Bruce Bassetti.



Susan Wood Osborn  
Arbitrator

DATED: July 17, 2020  
Trenton, New Jersey

State of New Jersey    }  
County of Mercer        }

On this 17th day of July 2020 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.



JOHN PELLIZZARI  
NOTARY PUBLIC OF NEW JERSEY  
Commission # 50109398  
My Commission Expires 7/24/2024