247-20

NEW JERSEY DEPARTMENT OF EDUCATION

Agency Docket No.: 23-1/20

Ralph H. Colflesh, Jr., Esq.

Arbitrator

IN THE MATTER of TENURE CHARGES by

THE PISCATAWAY TOWNSHIP SCHOOL DISTRICT in the COUNTY OF MIDDLESEX,

Petitioner, against

JENNIFER RESIL-JOHNSON,

Respondent.

Appearances
For Petitioner:
David B. Rubin, Esq.
David B. Rubin, P.C. Attorney at Law
Metuchen, New Jersey For
Respondent:
Gail Oxfeld Kanef, Esq. Oxfeld
Cohen, P.C.
Newark, New Jersey

DECISION AND AWARD

Pursuant to NJSA 18A:6-10 and NJSA 18A:6-16, the undersigned Arbitrator was appointed to hear and determine the above captioned matter which was appealed to arbitration by tenured staff member Jennifer Resil-Johnson ("Respondent") after the Piscataway Township Board of Education ("Petitioner") terminated her employment.

Over Petitioner's objections, hearings were conducted using the ZOOM video conferencing platform on August 20 and 21, 2020 due to concerns about the COVID19 pandemic. During those hearings, both parties had an opportunity to call and confront witnesses, produce non-testimonial evidence, and make arguments. At the conclusion of the hearings, the

parties elected to submit post-hearing briefs in lieu of oral summations. The briefs have been received, and there being no procedural objections material to the substance of the case, this matter is ready for adjudication on its merits.

Background:

Respondent was employed by Petitioner as a substitute English teacher beginning late December 2004 at Petitioner's Conackamack Middle School and was eventually appointed as a permanent Language Arts/Literacy teacher, acquiring tenure in that position. That status is protected by what is known as the TEACHNJ Act adopted by the New Jersey legislature in 2012.

At some point Petitioner gauged her to be only a partially effective teacher,[1] an evaluation that caused her to be placed on Professional Growth Plans for the 2017-2018. Effective September 1, 2018, Respondent was moved from Conackamack to the Piscataway High School as an English teacher in a remedial behavior program called "Piscataway Students Seeking Success" (hereinafter "PS3"). Following similar evaluations of marginal effectiveness in subsequent years, Petitioner placed Respondent on such Plans for the 2018-2019, and 2019-2020 school years. Additionally, Respondent was subject to a salary increment withholding for the 2018-2019 school year and faced a threatened increment withholding for the 2019-2020 school year. Supporting all those actions were not only evaluations of poor teaching effectiveness but reprimands regarding deportment and classroom management in the 2017-2018 and 2018-2019 school years.

On or about December 19, 2019 Petitioner moved to end Respondent's employment and tenure based on her alleged conduct in the 2019-2020 school year. The claimed conduct included disregard for both Petitioner's cell phone use policy and its medication administration policy as well as making misrepresentations to Petitioner about such behavior, misuse of a sick day on November 15, 2019, and transporting a student in Respondent's personal vehicle that same day school day. Formal tenure charges were filed certified against her on December 20, 2019 and filed with the Commissioner of Education on January 22, 2020.

[1] Prior to the hearings in this matter, the undersigned granted Respondent's Motion in Limine to exclude evidence of any teaching ineffectiveness as that accusation was not cited as grounds for her removal. Those grounds only included conduct unbecoming both generally and by virtue of policy violations.

Respondent challenges Petitioner's allegations as unsupportive of removal.

Issue to be Determined:

Do Petitioner's charges justify Respondent's termination and removal as a tenured staff member under the TEACHNJ Act; and if not, what shall the remedy be?

Factual Contentions of Petitioner:

Petitioner called four witnesses at hearing, beginning with its Director of Human Resources, **Catherine Sousa**. Ms. Sousa's job responsibilities include personnel investigations and discipline, the latter of which involves recommending personnel penalties to upper level administration. (NT 12).

Ms. Sousa introduced B-5[2], an exhibit which she described as the "Conduct" section of the Petitioner's Employee Handbook, and Petitioner's Exhibit B-24. The latter bears the signature of Respondent signaling receipt of the Handbook and by implication, the "Conduct" rules. (NT 15-16). Ms. Sousa asserted the Handbook and Conduct rules are available throughout the District and on the District's website. (NT 17). As for B-4, Ms. Sousa testified that in Policy 5141.21 Petitioner's rules on the administration of medication to students is explained (NT 19). She pointed out that those rules cover prescription as well as non-prescription drugs (NT 20) and that a set of regulations that follow are more specific than the medication policy. Ms. Sousa testified that Respondent had admitted to her that she had administered medication to two students in school year 2019-2020. (NT 125-126). Petitioner's dictates do not authorize teachers to give drugs to students.

Ms. Sousa further identified B-2 and B-3. The former defines "conduct unbecoming" of a school employee and gives the Petitioner authority to take appropriate action in response to such behavior. The latter which lays out Petitioner's rules on the use of electronic communication by

[2] References to exhibits herein are designated as "B_____" for Board (Petitioner) exhibits and "R_____" for Respondent Exhibits.

school staff. (NT 22). She contended the latter has been part of the Petitioner's conduct code since 2014. (NT 22, 23).

Turning to Petitioner's history with Respondent, which began with Respondent's hire in 2004 (NT 13), Ms. Sousa related that Respondent had been transferred from her job as a language arts/literacy teacher at Conackamack Middle School in June 2018 to a position in Petitioner's PS3 program at Piscataway High School.[3] (NT 24-25, 41, 111; B-12). Part of Respondent's duties there included motivating students to attend and stay in school. (NT 111). In addition, Ms. Sousa referenced B-11 which informed Petitioner that her salary increment raise was being withheld, *i.e*., denied, for school year 2018-2019. (NT 124-125). Importantly, Ms. Sousa introduced a Professional Growth Plan for Respondent which was effective in the 2017-2018 school year that stated, *inter alia*, "Curtail all use of your cell phone or other personal business to your designated lunch/prep periods in the faculty room or in an area which will reliably be free from student use." (NT 45; B-29).

On cross-examination, Ms. Sousa agreed that the policy does not contain an absolute prohibition against communicating with students by cell phone and that pupil transportation to and from school is "most definitely" a *bona fide* matter of school business as is pupil health and safety. (NT 113, 115, 118-119, 130; *c.f*., 116)[4]. She said she was unaware of any teacher having their tenure revoked for a "singular" use of a cell phone during the school day. (NT 121, 122, 123-124). However, she contended that she knew of staff members who had been disciplined for cell phone use during the school day. (NT 122).

In addition to the foregoing,, Ms. Sousa recounted that at the beginning of the 2017-2018 school year Petitioner sent Respondent a memorandum which Ms. Sousa characterized as a "written reprimand" (NT 45; B-9) for allegedly tolerating egregious student misbehavior in her room at Conackamack.

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[3] Ms. Sousa described the PS3 program as a self-contained classroom for problem students with attendance, highrisk behavior, and conduct issues in which the lead teacher, in this case Respondent, works with an aide and subject matter specialists who circulate in and out of the room to actually instruct pupils. (NT 42).

[4] Summarizing notes recorded at an interview with Respondent which Ms. Sousa did not attend, the latter said Respondent had told Petitioner that she gave her cell phone number to students for transportation and emergency usage. (NT 127). In connection with the latter use, a student had informed Respondent via cell phone text that he had seriously assaulted another student. (NT129). As for the former, Ms. Sousa noted a text to and from Respondent relating to bussing to school. (NT 128).

In the 2018-2019 school year, Ms. Sousa stated, Respondent was chastised in a memo for leaving her classroom allegedly unattended for a period of just under one minute. (NT 49; B-14). About five weeks later, according to Ms. Sousa, a meeting was held with Respondent, Superintendent of Schools Frank Ranelli, Ms. Sousa, and a union representative named Ted Simonitis. (NT 51; B-16). A memorandum of that meeting (B-16) indicates that although the Petitioner was on the verge of again withholding a salary increment from Respondent for the 2019-2020 school year, Superintendent Ranelli refrained "in the interest of providing [Respondent] the opportunity to be successful in [her] relatively new assignment," i.e., the PS3 self-contained classroom. (B-16; NT 59).

That brought the parties to the 2019-2020 school year when, in November, Ms. Sousa said, she became aware of another problem with Respondent. This issue involved the review by Petitioner's Director of Administrative Services, Colleen Pongratz, of text messages sent to and from Respondent and some of her students in the PS3 program. (NT 60). That discovery resulted in Respondent being suspended, apparently with pay, for two days (NT 61) and two interviews of Respondent with administrators.

Ms. Sousa attended the first of those on November 26 and took notes. (B-16). Ms. Sousa testified about the portions of her notes that were admitted into testimony, namely the questions asked of and answers proffered by Respondent. Among the dialog between Respondent and Ms. Pongratz, Ms. Sousa recalled, was Respondent's claim that she only communicated with her students via cell phone about difficulties they were having with transportation to school.[5] But Ms. Sousa testified that she had since discovered that the claim was untrue. (NT 71, 85, 89). For instance, she testified to having seen a text from a student identified herein as "KP" that was given to her by Ms. Pongratz which Ms. Sousa indicated that KP and Respondent had exchanged texts about whether Respondent had Advil or not. (NT 86). Further, Ms. Sousa said the text messages indicated Respondent had given KP Advil and asked her not to tell anyone. (NT 87). Petitioner reported the administration of Advil to public agencies, but the agencies neither investigated nor took any action on the matter. (NT 132-133, 135, 136).

Further, Ms. Sousa contended she was present when Respondent was asked during an interview about test messages indicating she had taken one of her students, identified herein as

[5] Pupils in the PS3 program are brought to school each day on a dedicated bus used only for them.

"TW" shopping on a day Respondent had taken off on sick leave. (NT 89; B-21). Ms. Sousa noted on cross-examination that teacher sick leave use can be subject to a showing of medical excuse, but none was required by Petitioner for the day in question. (NT 119-120). Ms. Sousa averred that Respondent explained in an interview with administrators that she had learned TW was claiming she had no appropriate school clothes and therefore Respondent picked her up in Respondent's private vehicle, took TW to breakfast, and then took her shopping . (B-17; NT 9194). Ms. Sousa said Petitioner's policy regarding unbecoming conduct did not specifically proscribe transporting students in teacher's private vehicle. (NT 130).

In concluding her direct testimony, Ms. Sousa summarized the basis of Petitioner's tenure removal action as based on "the major issues." She described those as the administration of medication to students, sharing of Respondent's cell phone with students, theft of time by taking a sick day without evidence of illness or injury, and taking a student in her personal vehicle. (NT 106-107).

Petitioner's second witness was **Coleen Pongratz**, Director of Administrative Services, a position that directly supports the Superintendent of Schools as well as building principals and department heads. (NT 137). As did Ms. Sousa, Ms. Pongratz described the PS3 program as fitted for students with disciplinary and other issues that have not been remediated through less stringent measures. (NT 140-141).

Ms. Pongratz said she learned from another administrator in November 2019 that Respondent had exchanged text messages (BX 19) with students she supervised in the PS3 program. One set was exchanged the night before Ms. Pongratz learned of them and involved a fight between two boys. In those exchanges, a boy, referred to herein as AB, shared details of the fight with Respondent who in turn, voluntarily shared the messages with an administrator herself.[6] (NT 142, 144). Ms. Pongratz characterized the texts as an effort by AB to "reach out" to Respondent for assistance.[7] (NT 145). The messages revealed the fight was off school premises but that other students, including at two in the PS3 program witnessed it. (NT 155-156).

Ms. Pongratz then interviewed Respondent in the presence of High School Vice President

[6] As seen below, that administrator was Piscataway High School Vice Principal, Jonathan Bizzell.

[7] AB's texts indicate that he beat another student unconscious and was both remorseful and worried about the consequences of his actions. (BX 19).

Jonathan Bizzell, Ms. Sousa, school counsellor Shirley Aviles, and print shop teacher Ryan Ward. (BX 18; NT 146, 148, 149). Respondent's Association representative Ted Simonitis attended as well. (NT 154). During the interview, Ms. Pongratz and the other administrators discovered that Respondent had given her cell phone number to students who were both current and former members of the PS3 program. (NT 157, 158).

In addition to the foregoing, Ms. Pongratz testified that during her investigation of the foregoing she found out from Respondent that Respondent had exchanged text messages with another student in the PS3 program whom Respondent had taken shopping in Respondent's car and treated to breakfast so that the student could buy clothes for school. On that day, Respondent was off on paid sick leave. (BX 21; NT 162-163, 164).[8] Ms. Pongratz stated that Respondent admitted that she had sent/received all the text messages in question (NT 169,170) and acknowledged that in writing **(BX 23).** (NT 171).

Turning to another basis on which Petitioner seeks tenure removal, Ms. Pongratz testified that teachers are generally not permitted to give medicine to students except epinephrine through an "EpiPen" for anaphylactic shock. Instead, the teacher is to refer the student to the school nurse. (NT 172-173). That prohibition extends even when a parent has given permission for teacher-administered medicine. (NT 173). Yet, Ms. Pongratz said Respondent admitted giving Advil to female students suffering menstrual discomfort. (NT 174).

Jonathan Bizzell, the Assistant Principal at Piscataway High School and Respondent's direct supervisor (NT 200), appeared as Petitioner's third witness. He testified that he and another Assistant Principal, Maria Cetta, prepared a memorandum (BX 14) asserting Respondent had left her PS3 classroom uncovered for a time on May 9, 2019 during which a disturbance occurred that required Respondent's request for school security. Mr. Bizzell said he received in turn a written response from Respondent dated June 3, 2019 (BX 15) in which Respondent claimed she had asked a teacher in an adjoining classroom connected by a door to her room to supervise her class and further contending she left her class for a medical emergency necessitating the use of a lavatory. (NT 196-197). Mr. Bizzell explained that during his

[8] On cross-examination, Ms. Pongratz stated that Petitioner asked Respondent for medical support for taking sick leave that day and was told by the latter a note would be submitted, but it was not. (NT 183-184).

investigation of the matter, Respondent contended to him that she had asked the other teacher to mind her class but did not claim that teacher did so. (NT 199).

He further testified that late in November 2019, Respondent contacted him and forwarded text messages concerning a fight her student, AB, had been in. (NT 200-201, 202 222,). The text messages detailing the fight and AB's concern about it (BX 19) led to Respondent's disclosure of other text messages to and from her students on a variety of topics. (NT 203). This led Mr. Bizzell to investigate "the depth of communication that [Respondent] had with her students via text." (N 204). During the investigation, Mr. Bizzell recalled, he and a Dean, Ms. Eyler, interviewed the student correspondents. (NT 207-211).[9]

On cross-examination, Mr. Bizzell said that he and Respondent had several conversations with AB's mother and said the three had agreed that Respondent could text with AB "through his mother," meaning that AB's mother had to be aware of the communication. (NT 223; *also see,* NT 224-225, 227). Further, Mr. Bizzell denied Respondent had authorization to text other students and further denied knowing before the AB fight that Respondent had been texting students. (NT 225-226). However, he conceded that Respondent could contact a parent without permission from Respondent's superiors. (NT 229). He further agreed with Respondent's counsel that he was not in the classroom in May 2019 when Respondent allegedly left her students unattended and only knew what he saw on security cameras in the room at the time. He said they did not show another adult present during Respondent's absence. (NT 230). Neither did he have what he termed "a formal discussion," nor did he "officially" speak with, the teacher whom Respondent claimed to have asked to cover her room because that teacher did not want to discuss the matter with him. (NT 230, 231, 232, 233). Finally, Mr. Bizzell said he was unaware whether other teachers had been the subject of tenure removal efforts because of cell phone use during the workday. (NT 246).

Petitioner's last witness was its Superintendent, **Dr. Frank Ranelli**. Dr. Ranelli agreed that many of the allegations contained in the tenure charges against Respondent were beyond the scope of his personal knowledge but claimed familiarity with others. (NT 251). Of the latter was a 2017-2018 evaluation report (BX 10) for which he personally conducted a classroom

[9] As hearsay on a dispositive matter and without corroboration, the statements purportedly taken from the interviewed students and marked at hearing as BX 20 were not admitted into evidence.

observation of Respondent (BX 10; NT 252). Dr. Ranelli noted that he observed and recorded that Respondent was not in her classroom until 4 minutes after the period was to begin despite knowing that Dr. Ranelli would be observing her sometime around the date of the actual observation. (NT 254). There was no one covering her class for that time. (254-255). In a discussion about her tardiness after his observation, Dr. Ranelli recalled, Respondent told him she thought she thought she had a 504 Plan[10] and that it covered a medical issue which forced her to use a lavatory unexpectedly. (NT 269-270, 271). Dr. Ranelli said that Respondent told him she had tried to get someone to cover her class at that time in accordance with policy that required contacting the school office first but was unsuccessful. (NT 273). He said she did not tell him she had first attempted to call the school office (273-274) and in fact admitted that she had not done so. (NT 275).

Dr. Ranelli further testified about a meeting he conducted with Respondent on June 17, 2019 which was the subject of a memorandum he authored after the meeting[11]. (BX 19; NT 257). Dr. Ranelli said that given his prior experience with Respondent not being in her classroom for a period, he was concerned about her absence from class on May 9, 2019 for a brief period. (NT 258). Additionally, he said, he wanted to discuss other issues about Respondent's classroom management to assist her. (*Id*.). Dr. Ranelli said he was considering yet another increment withholding for Respondent in school year 2019-2020 but decided not to do that as what he called a "point of good faith" and instead resolved to "offer an olive branch" between her and the administration. (NT 258, 259). In his after-meeting memo, Dr. Ranelli noted that the discussion had covered, among other things, the Petitioner's policy on the use of personal cell phones, since he said video of her absence on May 7, 2019 showed her using her cell phone outside the classroom. Dr. Ranelli stated that when accused of that act, Respondent did not dispute it. (NT 261). He also testified that during the discussion he thought there was an understanding that Petitioner's policies were never again to be violated or disregarded by Respondent. (NT 264).

[10] Section 504 of a federal act known as the Rehabilitation Act of 1973 that affords protection for staff in designated educational settings against discrimination based on disability. (*See,* NT 270).

[11] Contrary to Dr. Ranelli, Respondent testified that the meeting at which Petitioner decided not to withhold her increment for school year 2019-2020 occurred not on June 17, 2019 but July 16 of that year (NT 330) and that she did not attend a meeting with Petitioners on June 17. (NT 330-331, 334).

Following an investigation into Respondent's alleged acts and omission during the first half of the 2019-2020 school year, Dr. Ranelli said, a memorandum was prepared by Ms. Pongratz averring several violations of policy by Respondent, including unauthorized administration of medication to students, sharing her personal cell phone number with students, theft of time for abusing sick leave on November 19, 2020, and conduct unbecoming for using her personal vehicle to transport a student during the same day. (BX 23; NT 265-266).

Concluding his testimony, Dr. Ranelli said the investigation convinced him that Respondent viewed Petitioner's policies as merely "suggestions" she could follow or ignore as she saw fit. (NT 267).

Factual Contentions of Respondent:

Respondent testified in her own defense. After describing the PS3 program into which she had been placed at the beginning of the 2017-2018 school year, she asserted that her responsibility in the program included assisting students in attendance and their social and emotional welfare. She maintained that that role included attempting to keep students in school and on good behavior. (NT 304, 305). Turning her attention to a June 29, 2017 reprimand for having an unruly classroom at Conackamack Middle School (BX 9), Respondent explained she had allowed students to be in her room for lunch to protect them against bullying in the cafeteria. She recounted that the students were there and that she was on her own lunch break when a group of unruly pupils entered the classroom and began what she called "horseplay." (NT 306). Respondent testified she ordered them out of her room and called the school's office which apparently produced a counselor about 30 minutes later. (NT 306-307). When the incident occurred, Respondent contended, she was watching a video in preparation for an up-coming lesson. (NT 307).

She said that when interviewed by administration about the matter she explained the roles of the students who had been eating in her room and the conduct of those who entered uninvited and that Ms. Sousa had dismissed the episode as "kids will be kids." However, her principal at the time advised her to, among other things, "Curtail the use of our cell phone to your designated lunch/prep periods in the faculty room or in an area reliable free from student use." (BX 9).

Respondent also testified to her Summative Evaluation for the 2017-2018 school year in which she was graded as "Partially Effective." As a result of that grade she was denied a salary increment for the next school year and placed on a remedial Professional Improvement Plan. (BX 10).

The evaluation that triggered those measures included the four-minute absence from the beginning of her classroom, as observed by Dr. Ranelli, above. Respondent explained her absence then as the result of her medical problem for which she had to make emergent use of a lavatory but only after, as she testified, she had tried calling the office to get another teacher to cover for her. (NT 311). Respondent also averred that in the past she had gotten emergency coverage from administrators and the school secretary, but that she had not known nor asked for inclusion in a 504 plan. (NT 311-312). Respondent said that during that 2017-2018 school year she had frequently used her cell phone to communicate with other teachers on school business. (NT 313). It was after that school year she was transferred to the PS3 program. (NT 312).

According to Respondent, cell phone use for school matters became more important after she transferred to the PS3 program to communicate with administrators, staff, deans, and parents because she had no privacy using her desk phone. (NT 314). Respondent gave the impression pupils in the PS3 program were not tractable at times, explaining that she eventually had to ask for a walkie-talkie to communicate with school security. (NT 316). Nevertheless, she testified, she continued to communicate with school staff using her cell phone and text messages, a practice she was encouraged to use in lieu of the walkie-talkie when necessary. (NT 318-319).

Respondent also spoke to the accusation that she left her class unattended May 9, 2019. (BX 14). Not contesting the fact she left, she said she needed an emergency bathroom break, Respondent vigorously insisted that she had asked the teacher in the adjoining room, Alexandria Artist, to cover for her after unsuccessfully trying to reach her own paraprofessional who was on a school errand, school security on the walkie-talkie, and the school office. (NT 323-324). She said that Ms. Artist stood in the doorway between their two classrooms as Respondent went through the door to the lavatory. (NT 325-326). Respondent said she thought she had a 504 plan in place at the time but was told by Ms. Sousa that the plan had expired previously. (NT 327328).

Respondent further testified that prior to the 2019-2010 school year she was not aware of a Petitioner policy that prohibited texting to and from students (NT 335) and said that she had only "probably glanced" at the policy, in evidence as BX 3, after she received her tenure charges. (NT 336, 337). She also contended that she did not "receive a physical copy" of the Petitioner's policy covering unbecoming conduct. (BX 5). (NT 337). As for the former, Respondent said she thought cell phone communication with students was to be kept to "school business." (NT 338). She said she gave students her cell phone number primarily to keep in touch with them about transportation issues since the PS3 pupils can only get to and from school on a special bus. (NT 339, 340). She further claimed she only used her cell phone to communicate with students "approximately" three times. (NT 340).

Respondent more specifically testified about her communication with student AB via text messages (BX 19) about homework, a social media post involving a girl, and ultimately about a fight he had with another student identified as AB. (NT 340-344). Respondent said she had received permission from his mother to text him and in fact communicated with the mother "just about every single day of the week." (NT 346).

Also, Respondent acknowledged texting with a female student named TW who had left the PS3 program but was considered a candidate for re-induction. (BX 21; NT 344-345)[12]. She further stated that she shared email with TW with administration (RX 5; NT 360- 361) and was not asked at the time why she was texting with the student. (NT 361, 362).

Respondent acknowledged that on November 15, 2019, a day Respondent had taken off sick, she did take TW shopping[13] and for breakfast. (NT 365, 367). Respondent said she did so with TW's mother's compliance "through the student." (NT 370). As for her own absence from work that day, Respondent explained she had an appointment to see a specialist that had been made two months in advance. She agreed she only submitted the notice of the absence the night before she took off, but that that met compliance with the collective bargaining agreement between her Association and Petitioner. (NT 365-366). She said she was never asked for a note

[12] Communication between Respondent at TW included texts about dental treatment as a cause of absence from school. (NT 359-360).

[13] TW had told Respondent she had nothing to wear to school and was indigent. (BX 21; JRX 4; NT 363). [14] In brief testimony, KP's mother confirmed she had given such permission. (NT 429-430).

documenting the absence (NT 368) and contended that she was never shown a copy of a Petitioner policy prohibiting the transportation of students in teacher vehicles. (NT 369).

Respondent further testified that she gave KP Advil with the consent of the latter's mother. (NT 370)[14]. She explained that she told KP not to tell anyone because she did not want to create a practice of students seeking medication from her. (NT 371). She further explained that she did not refer KP to the school nurse because students in the PS3 program will take advantage of out-of-classroom permission to avoid doing work in class. (NT 372). Respondent admitted that in hindsight she would not do the same again. (*Id*.). She said she did the same thing for AB, but only to keep him in school and with the consent of his mother. Further, in AB's case, he had brought the medicine to school with him. (NT 373).

Also testifying for Respondent was the mother of student "AB," designated herein as **"CB."** She testified that her son was in Respondent's PS3 class for over a month in the fall of 2019 (NT 349) and that she communicated with Respondent about AB's academics and attendance. (NT 350). In addition, CB said that Respondent contacted her about giving AB Advil for a headache and that she gave Respondent permission to do so. (*Id.*). However, CB said she did not provide Advil to Respondent nor did her son. (NT 351,352). CB explained she had no knowledge of Petitioner's policy toward the administration of medicine by staff. (NT 353, 354). She added that she authorized Respondent to text AB directly to encourage his attendance. (NT 351).

Arguments of Petitioner:

Petitioner acknowledges that New Jersey's teacher tenure statues, as amended by the 2012 TEACHNJ act, are aimed at protecting public school employees from dismissal for lack of proper cause. *Wright v. Bd. Of Educ. Of East Orange*, 99 NJ 112, 118 (1985). Petitioner says that cause for dismissal may consists of conduct unbecoming a teacher, *In re Riddick*, 93 NJAR 2d (EDU) 345 (1993), as well as violation of specific school district policies. *In the Matter of the Tenure Hearing of Carol Ziznewski, School District of the Township of Edison,* (August 2010) https:www.nj.gov/education/legal/commission/2-1; *In the Matter of the Tenure Hearing of Paula*

Weckesser, School District of the Township of Woodbridge, OAL Dkt. No. EDU 09195-12, Agency Dkt.No. EDU 09195-12; adopted by Commissioner September 16, 2013.

Petitioner further says Respondent obviously exhibited unbecoming conduct and disregard of Petitioner's policies throughout the 2019-2020 school year, an attitude that was a continuation of her flaunting of rules in prior years. For example, the administration of drugs to students by her was expressly forbidden by Petitioner's policy as well as New Jersey school regulations. Yet Respondent did exactly that regarding both AB and KP, the latter of whom was put in Respondent's PS3 class for drug abuse. What is even more egregious, Petitioner says, KP had allegedly been to the school nurse and could have been given another medication by the nurse that Respondent would not know about when she gave KP Advil. Moreover, Petitioner argues, Respondent acknowledged that she knew she was violating policy when she texted KP not to tell anyone. Equally telling of Respondent's consciousness of fault is the fact Respondent never informed the school that she had administered medication on an emergency basis. In addition to the administration of over-the-counter drugs, Petitioner says, Respondent violated Petitioner's cell phone policy by texting AB, KP, and TW repeatedly. The offended policy was in keeping with NJSA 18A:36-40, which requires local school districts to propound policies regarding communications between teacher and students.

Moreover, Petitioner says, Respondent committed a grave fault in taking TW to breakfast and shopping on a school day when Respondent had claimed a sick day. This would be true, Petitioner argues, even if Respondent had the permission of the student's mother, as she claimed she did. That junket, Petitioner says, violated not only the general unbecoming conduct standard but also the Petitioner' prohibition against the transport of students in personal vehicles, and what the Petitioner asserts was misuse of its sick leave requirements.

As to the final alleged offense, Petitioner derides Respondent's claim that she asked for and procured the presence of another teacher to watch her class on an occasion when she claims to have needed use of the restroom. Petitioner points out that at hearing, Respondent did not call the teacher she claimed had watched her class as a witness. Petitioner asks that an inference to be drawn that such testimony would not have supported Respondent's case.

Petitioner closes by noting Respondent was on her third consecutive Professional Improvement Plan when she was fired, a result Petitioner claims of three straight years of

substandard performance[14], which included reporting late for class even though she had been told she would have a classroom observation that day. And, Petitioner notes, Respondent showed no signs at hearing of acknowledging her behavioral short-comings and taking responsibility for them. For that reason, Petitioner argues, even had she had an unblemished record, she should not be immune from discharge. *In re Parezo, 2013 WL 4525436 (App. Div. 2013).*[16] Respondent's attitude as well as her past conduct weigh heavily against any reinstatement based on a theory of progressive discipline, according to Petitioner. Such a reinstatement order would ignore Respondent's actual past record which is tainted by her own acts of unbecoming conduct, Petitioner concludes.

Arguments of Respondent:

Respondent rejects Petitioner's claim that administration of medication to students supports removal of her tenure. She does not dispute the administration to KP and AB, but maintains she did so for altruistic reasons, *i.e*., to keep them in school and more particularly on task in her room rather than leaving school or going for medicine to the school nurse where they could malinger and miss assigned classwork. All the same, Respondent says she has expressed remorse, something that she says is evident in her responses to Petitioner during its investigation and at hearing before the undersigned. In fact, Respondent has made clear that she would not do the same thing again and called her action a poor choice, however idealistically motivated it may have been.

In the same manner, Respondent asserts her text messaging with students was done for their own good and not from some nefarious motivation she had to become involved with them socially. Respondent argues strenuously that she was not fully aware of Petitioner's anti-testing policy and emphasizes that the employee handbook cited by Petitioner is silent on the question of

[14] Although the evaluations are part of the record, prior to the hearing, the undersigned ruled on a motion in limine that only those portions of the evaluations relating to alleged unbecoming conduct would be admitted at hearing. (NT 4). [16] "[P]articularly disturbing here is [appellant's] refusal—even at this late date—to recognize the seriousness of her actions or take responsibility for them. Rather she continues to view the whole incident as *de minimis* in nature and scope…Given her steadfast attitude in this regard the Commissioner is not persuaded that such conduct would not be repeated in the future. Under these circumstances, the Commissioner cannot entertain the prospect of [appellant's] return to the District…"

texting with students. Although the policy has now been called to her attention, Respondent says it is one of what even Petitioner acknowledges are an innumerable quantity of restraints and as such can hardly be known. Importantly, Respondent points out, the record does not contain evidence she ever received training on the implementation of texting rules. Even more critically, Respondent stresses that the policy relied on by Petitioner as a basis for her tenure removal does not expressly exclude all texting with students. That failure is underscored, Respondent reasons, by the fact that Vice Principal Bizzell knew she had texted with students long before Petitioner ever took action against her for doing so because he had received copies of Respondent's text communications with a student regarding dental problems. Respondent theorizes that Mr. Bizzell's lack of action on that knowledge implies either that the policy was not intended to block all texting between pupils and staff or was not important enough to enforce. In either case, Respondent reasons, the policy cannot now be considered grounds for her removal. And, even if taken seriously by the Petitioner, Respondent asks, how could she be censored for alerting Mr. Bizzell to a student fight in which one of the participants (both being students at Piscataway High School) was so seriously injured that he was rendered unconscious and his assaulter was seriously worried about sanctions for his action?

Respondent further says she never tried to hide her text communications with students—all or nearly all of which—were initiated by the students themselves and that such contact was necessary because of problems PS3 students had with the transportation that exclusively served them in both coming to and returning home from school. The latter issues Respondent says, were perfectly permitted as cell phone subjects between staff and students under Petitioner's practices and policy. Respondent avers this is evident from what she said was were frequent cell phone interchanges between teachers and pupils even during the school day. Moreover, Respondent says the record does not disclose any warning to her from Petitioner about cell phone communication with students in either voice or text format. Rather, what ever criticisms Petitioner communicated to her focused on the time and place of her cell phone usage, were a selective enforcement given the leniency of treatment toward her colleagues.

As for Petitioner's averment that Respondent misused or "stole" sick time, Respondent says there is no support for that argument. Respondent insists that she called to notify Petitioner she was taking a sick day within the time authorized by the labor agreement between her

collective bargaining agent and Petitioner, a point that Petitioner does not challenge. She denies that Petitioner's agent, Ms. Pongratz, ever asked her for a doctor's certification for the absence. Furthermore, Respondent points out that nothing in New Jersey school law, which addresses paid sick leave for public school teachers, prohibits use of such leave for medical appointments, and no policy proffered by Petitioner states or implies that use of paid sick time for a medical appointment is prohibited.

As for the charge that Respondent transported TW in her private car to have breakfast and go shopping, Respondent says there is no rule prohibiting such actions and that Petitioner's use of an "unbecoming conduct" claim is a desperate measure to support tenure removal. In Respondent's eyes, Petitioner has dragged her actions with TW under the "unbecoming conduct" standard only because Petitioner has no other ground on which to criticize her behavior. Last, Respondent rejects the claim that she left her classroom unattended. She says she not only asked but had another teacher oversee the class while Respondent used the restroom on an emergency basis after Respondent had tried to reach her aide, school security, and the school office. Respondent says that Mr. Bizzell, who testified for Petitioner as to this charge, conceded that he never asked the teacher named by Respondent whether she was asked or in fact did watch Respondent's class during the few minutes Respondent was gone. Instead, Mr. Bizzell said he watched a recording taken from the cameras that cover Respondent's room and did not see another faculty member there at the time. But Respondent replies the cameras could not see the passageway between her classroom and that of the teacher whose assistance she secured. From this space, Respondent insisted, both rooms could be observed simultaneously. Mr. Bizzell's admitted failure to question the other teacher[15] makes Petitioner's accusation dismissible on the ground Petitioner failed to do a thorough and efficient investigation.

At the end of the day, Respondent argues, the only valid charge against her is the one referring to administration of medication to students. Given Respondent's avowed motive for doing so, the parental permission secured in both cases, and the fact the medication was over-the-counter Advil, this should not support removal of her tenure, Respondent argues. Further, Respondent underscores her admission the act was an error and that she would not repeat it. Based on that, Respondent says there is insufficient ground to support her removal after 19 years

[15] As noted above, Mr. Bizzell testified the teacher in question refused to speak to him about the matter.

of service to Petitioner and in the middle of her teaching career which, should removal be permitted, would likely end.

Opinion:

In New Jersey tenure removal cases, the employing district must show that removal of a tenured staff member is justified on some grounds. Often those grounds go to teaching ineffectiveness, but in this case they do not. As explained above, I have previously ruled that Respondent's teaching effectiveness as measured by evaluations in the school years prior to 2019-2020 are not the subject of the charges against her here and, since she did not claim teaching effectiveness, they are inadmissible. Rather, the charges here all revolve around her conduct which Petitioner contends is "unbecoming" within in the meaning of NJSA 18A6-10[16]. Thus, my decision here is based on my judgment of that conduct, both in and out of school.

Petitioner's charges relating to that conduct fall into four categories.

The first I consider is that she wrongfully engaged in text messaging with students. The fact of the messaging cannot be disputed. The relevant issue is whether those communications violated a District policy or rose to unbecoming conduct generally.

The policy, known as 4119.26, was apparently adopted in response to a legislative enactment, codified at NJSA 18A: 36-40, requiring local school districts in New Jersey to set rules on communication between staff members and students, including text messages. However, neither the legislation nor the policy adopted by Petitioner in response absolutely prohibits electronic communications between staff and students. Moreover, the record convinces me that Respondent received no substantive guidance on the communications policy from Petitioner, nor does the record show that Petitioner ever expressly precluded texting between staff and students. Indeed, Petitioner's case in this aspect was undermined by Ms. Sousa's acknowledgement there are of "thousands" of Petitioner policies—meant by Ms. Sousa as an

[16] Unbecoming conduct is that which has a tendency to destroy public confidence in the operation of public services and need not violate a specific rule. *Karins v. City of Atlantic City, 152 NJ___ 1998; Hartman v. Police Dep't of Ridgewood, 258 NJ Super 22 (1955).*

hyperbole to be sure—and the commonsense observation that no employee can be expected to know all of them or their interpretation, especially policies on which no training was provided.

On these facts, I cannot find Respondent violated Petitioner's policy *per se*. Nevertheless, the question remains as to whether Petitioner's texting breached the standard of "conduct unbecoming."

The answer lies in the history and nature of the communications. Several observations are in order. First, in almost every instance the texting was initiated by students—not Respondent. Second, save for some of the texting between Respondent and TW, none of the subjects of the text messages were of an inappropriate nature. Third, none of the texts, including those involving TW, suggested a nefarious pupil-teacher relationship or hinted at untoward intentions of one toward the other.

Quite to the contrary, the TW texts and others seem born out a genuine concern for Respondent's students and their trust in her. In that regard, I am particularly struck that AB, a student with a challenging history, contacted Respondent about a vicious fight he had had earlier in the day with another student which resulted in the latter being beaten unconscious. AB was obviously prompted by a faith in Respondent's understanding and willingness to help him. Even more astonishing is Respondent's advice that AB take corrective measures and her revealing the texts, without prompting, to Piscataway High School Vice Principal Jonathan Bizzell. Recall that although Mr. Bizzell referred the AB texts to administrators, he had never remonstrated her for exchanging texts, just as he did not criticize her for earlier texts he knew she had exchanged with students, including TW.[17] Indeed, it is not clear that Mr. Bizzell referred the matter up the chain because of Respondent's having received and sent texts from her phone or because he was concerned about the fight.

In the light of this history, it is impossible to conclude that Respondent's tenure should be removed because she texted with students—or rather they with her—or because of the related charge that she allowed students to have her cell phone number.[18]

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[17] Mr. Bizzell had also taken no action against Respondent when she sent him pictures texted to her by student TW showing the student's abscessed tooth in October 2019. (NT 361-362).

[18] Petitioner maintained it had warned Respondent about cell phone use in school. None of those warnings addressed the issue of texting with students. As for staff allowing students to have their cell phone numbers without prior notice to administrators, see my comments above regarding Vice Principal Bizzell's earlier inaction

The next charge considered is that Respondent left her classroom unattended on May 9, 2019. Although the alleged conduct occurred prior to the 2019-2020 school year there is no reason it cannot be considered as part of Petitioner's tenure charges brought in December 2019, particularly as Petitioner has constantly averred Respondent's conduct shows a pattern of unrehabilitated non-compliance with Petitioner's policies.

In this charge, a key fact is disputed. Both parties agree Respondent left her room. However, Respondent claims she asked Ms. Artist, the teacher in an adjoining room which was connected to hers by a short passageway, to oversee the PS3 class during Petitioner's brief absence. Petitioner denies that, and Petitioner's security cameras in Respondent's room do not capture an image of any stand-in. Respondent argues that the cameras do not cover the passageway or the doorway in which she claims Ms. Artist was straddling Respondent's class area and her own. Miss Artist did not appear at hearing on Respondent's behalf.

Petitioner does not dispute that Respondent has a medical condition that forces unexpected lavatory usage on a sporadic basis. Respondent claims it was that condition that forced her from her class on the day in question and that she had unsuccessfully tried to contact the school office, security, and her classroom aide before leaving the room. Without further evidence, it is impossible for Petitioner to substantiate the charge Respondent abandoned her room without securing coverage as she claims. However, even assuming Ms. Artist was *not* in a position to watch her class, Petitioner's charge on this incident cannot sustain discipline, let alone revocation of tenure. It is axiomatic in arbitral law that where there is an excuse or justification for not following a rule (in this case attending one's class unless other coverage is secured) there can be no culpability. Respondent has testified credibly that she has a physical disorder that requires unanticipated trips to the bathroom, Respondent has not disproved that testimony, and I have no basis for doubting her claim that that is what prompted her exit from class on May 9, 2019. I cannot therefore hold her culpable for that action.

The next charge considered here is that Respondent gave students medication. Respondent does not deny the fact that she gave students AB and KP the over-the-counter drug Advil for pain in the fall of 2019 while school was in session and she was the "lead" teacher in the PS3 program. Her defense is two-fold: (1) she had parental approval to give the medications,

which were common, over-the-counter pain relievers; and, (2) she now recognizes the gravity of her offense, which she acknowledged was prohibited by District policy, and remorsefully vows not to repeat it.

The record establishes that there was parental approval in both cases, and there is no evidence that the medication she administered was other than Advil, although in AB's case the pill he took was one he had brought to school and never was physically examined by Respondent. Nevertheless, Respondent believed that it was, and I have neither evidence of her dissembling on the point nor evidence that the pill was not Advil. As for owning the offense as a grave fault, I have only Respondent's testimony as to her absorption of fault and regret[19]. That may be a thin reed on which to support a defense, but having observed Respondent's testimony on the point, I am willing to credit her.

That willingness, however, is not exculpation. Providing medication to students either actively or, in the case of AB, passively, is strictly limited by Petitioner's policy and for good reason. Drug interactions or allergies are grave dangers as are the possibilities that a given drug will exacerbate a condition rather than alleviate it. Teachers are almost universally unqualified to gauge such perils. Thus, even with parental consent, there is a serious threat when untrained individuals administer medications to pupils. If that were not enough, there must be recognized implicit prohibition against the possibility of teachers administering commonly obtained substances to make students more attentive or tractable. Ignoring such a standard surely shakes public confidence in teachers.

Given those threats, Respondent's blatant violation is so serious that it alone would support tenure removal for conduct unbecoming, and no post-offense remorse would be sufficient to deny Petitioner's action.

Yet there is more. Petitioner's fourth basis for removal is the combination of Respondent's communication with TW, her escorting of TW on a breakfast and shopping trip, and her use of a sick day to do so.

[19] When confronted with the fact she texted KP not to tell anyone she was giving her the medicine, Respondent testified that she merely did not want other students to start using her as a dispensary. I credit Respondent on that point.

I have already dismissed the email communications as a ground for dismissal, and I find no clear or inherent prohibition against having students in her personal vehicle. Consequently, she cannot suffer discipline on those accounts. Further, although Respondent's actions in taking sick leave was imprudent, thoughtless, and extremely unprofessional in its manner, I cannot affirm removal of tenure because of them. As a long-time teacher, she knew that finding substitutes is challenging generally and on a Friday—which is the weekday this incident occurred—even more difficult. Nevertheless, she was narrowly within her rights not to notify Petitioner until that morning of a medical appointment that she admitted was scheduled well in advance.

Respondent's difficulty in this incident is her condoning and abetting TW's absence from school, especially after defending many of her actions on a claim of concern for student attendance and classroom diligence. Further, Respondent's actions in taking TW to buy clothes strongly suggests favoritism toward TW over other students, many of whom it can be safely assumed were equally disadvantaged. Respondent's behavior in both aspects demonstrates an indifference to standards the public has a right to expect of teachers and affirms Petitioner's argument that she placed herself above the principles of her profession and treated standards of deportment as a catalog of nuisances to be disregarded as she saw fit.

Even more damaging to Respondent's case is that her action lends credence to Petitioner's claim that a lesser penalty based on the theory of progressive discipline would be wholly misplaced because Respondent is incorrigible. Petitioner's judgment is hard to reject given the blatant nature of Respondent's actions with TW. And it is hard to reject considering the leniency Petitioner showed at the close of the 2018-2019 school year when Superintendent Ranelli opted to forego a further increment withholding in an attempt to start anew with Respondent. That choice by the Superintendent was met only a few months later with Respondent's administration of medication to students which has long been forbidden under school law and Petitioner's clear policy, as well as the abetting of truancy, an act that is just as clearly wrong.

It is possible Respondent saw herself as a rogue heroine bucking the system for the sake of her pupils for whom she no doubt cared just as they appear to have cared for her. But actions such as the ones she took when she administered medication and favored TW cannot be tolerated

within a public school system which not only have public trust but also some centrality of control advanced by a set of reasonable rules and the standards of the teaching profession. Given Respondent's fault in these two instances and under the circumstances described above, I believe her continued employment by Petitioner would be detrimental to it and the public's confidence in its operation. There is cause for the removal of her tenure, and an Order will be issued accordingly.

Order:

Petitioner's charges are sufficient to remove Respondent's tenure and are affirmed to the extent set forth above. Respondent's appeal of those charges is denied. Respondent's tenure may be removed, and her dismissal is upheld.

10/26/20 — *Ralph H. Colflesh, Jr., Esq.*
Date — Ralph H. Colflesh, Jr., Esq.