

**STATE OF NEW JERSEY  
DEPARTMENT OF EDUCATION**

In the Matter of Tenure Charges Against  
Jason Whalen

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**Board of Education**

**Of the township of North Bergen,**

Petitioner

- and -

**Jason Whalen,**

Respondent

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**Docket #:29-2/24**

**Opinion and Award**

Before: Deborah M. Gaines, Arbitrator

**APPEARANCES:**

**FOR THE PETITIONER:**

Weiner Law Group LLP By:  
Margaret Miller, Esq.

**FOR THE RESPONDENT:**

Oxfeld Cohen, P.C. By: Gail  
Oxfeld Kanef, Esq.

Pursuant to NJSA 18A:6-16, as amended by P.L. 2012, c.26 and P.L. 2015, c. 109("TEACHNJ"), the tenure charges brought by the Township of North Bergen/Commissioner of Education ("the Board", "District" or "Petitioner") against Jason Whalen ("Whalen" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and Decision on

February 21, 2024. I conducted a hearing at the Board's Offices in North Bergen, New Jersey on August 26 and 27, 2024.

The parties had full and fair opportunity to examine and cross-examine witnesses, introduce documentary evidence and make argument in support of their respective positions. The parties' submitted written closing statements on October 1, 2024, whereupon the record was closed. The evidence adduced and the positions and arguments set forth in the parties' post-hearing briefs have been carefully considered in the issuance of this Opinion and Award, whether specifically referenced or not.

#### **ISSUES PRESENTED**

The parties stipulated to the following issues for arbitral determination:

Is there just cause to discipline Respondent, Jason Whaley?  
If so, what shall be the remedy?

#### **THE CHARGES**

Respondent was served sworn tenure charges on December 21, 2023, which included three counts of unbecoming conduct and other just cause. Respondent is charged with possessing and using marijuana at school, smoking within the school building and failing to properly follow the protocol in securing the school.

## **BACKGROUND**

Respondent began employment in the District's custodial department as an intern in 2010. He was appointed to a fulltime custodial position in 2012. His duties included cleaning the school and securing it after the custodial staff leaves for the day.

Assistant Superintendent of Facilities Thaddeus (Ted) Goscinski testified Respondent was most recently assigned to the McKinley School, where he worked the 3pm to 11:30 pm shift. According to Goscinski, three custodians worked the evening shift. Each was assigned to clean one floor. Respondent was responsible for the basement.

Goscinski testified Respondent had numerous performance issues. He noted Respondent received repeated written warnings and letters to file since 2014. The letters to file were all included as part of the record. [See, Board Exhibits 1-43]. They include instances of failing to perform his assigned duties, time and attendance, smoking, sleeping on the job, failing to secure the building, leaving early, and failing to properly clock out. [Id.]

Goscinski testified the issues in this began on September 19, 2023, when the District had its back to School night. According to Goscinski, he communicated his expectations to the staff in advance of the event for what they needed to do before

the event. In addition, he testified he added staff for the evening to ensure all the work would be completed.

Goscinski testified a number of issues arose with Respondent's performance that evening. First, he testified Respondent failed to clean his assigned area as directed. [Respondent Exhibit 54] Goscinski testified he observed the area himself and noted Respondent did not clean the bathroom's urinals and floors. He testified he asked Respondent why he failed to get the work done, but Respondent did not respond.

Goscinski testified he also issued a disciplinary memo to Respondent for leaving the building without permission and tripping the security camera when he left for the evening.

According to Goscinski, the incident with the alarm was raised when he received a call from the security company. He testified he called Custodian Bolanos to find out what happened. He testified Bolanos told him that Respondent failed to appear at the exit door as expected and also did not respond to texts, calls or the intercom. Goscinski called Respondent and determined it was Respondent who tripped the alarm, and he sent Bolanos back to the school to re-secure the building. Goscinski testified he also received a report during the same evening from Bolanos about marijuana smoke in the building. Goscinski testified he advised Respondent that his-coworker Jonathan said Respondent was smoking

marijuana and Respondent replied, it was legal. Goscinski testified he issued a letter to Respondent regarding the smoking as well. [Board Exhibit 47]. Goscinski testified about a week later, on September 25<sup>th</sup>, he was called to the school again by Bolanos. Goscinski testified he came to the building around 7pm and discovered the basement area smelled like marijuana. He testified he saw Respondent trying to suppress the odor. He testified none of the other floors of the building smelled. Goscinski testified he confronted Respondent saying the whole building smelled of marijuana, to which Respondent said, it is legal now.

Goscinski testified he attended an investigatory meeting on October 2, 2023. He testified Respondent attended with his Union Representative Ed Stevens. Goscinski testified Respondent denied using marijuana. He testified the issue of smoking was also raised and he noted during the discussion that he has warned Respondent repeatedly about smoking in the building. Custodian Jonathan Bolanos testified that he worked with Respondent at McKinley. Bolanos testified he was responsible for cleaning the first floor of the school. Bolanos testified that on back-to-school night, he heard people complaining about smoke. He testified he heard statements to the effect that they smelled cigarette smoke or weed. Bolanos testified he smelled smoke in the gym closet. He testified he did not see anyone smoking. He

testified he also smelled marijuana that night. He testified that although he does not smoke marijuana, he is familiar with the smell. Respondent testified he called Goscinski to report the smell.

Bolanos testified he has previously smelled cigarette smoke in the basement. While he has never seen Respondent smoking, he has seen cigarettes on Respondent's desk as well.

Bolanos testified he was halfway home on the same night when Goscinski called him to return to the school. Bolanos testified the security alarm was tripped when Respondent left the building after the alarm had been set. He explained that the process for securing the building was for the staff to meet together at the end of shift in the exist area and for either he or Gladys to set the alarm. He noted that on this night, Respondent did not appear at the exit, nor did he answer Bolanos' texts, phone calls or the school's intercom. He testified Respondent also called him and said he had tripped the alarm.

Bolanos testified, on September 25<sup>th</sup>, he saw Respondent rolling a joint of marijuana when he went to get a dust mop from the basement. Bolanos testified the substance he saw in front of Grievant was greenish in color and looked like large cookie crumbs. Bolanos testified although he does not smoke pot, he generally knows what it looks and smells like. He testified it was not tobacco.

Vivian Whalen testified she has been a matron for 23 years in the district. Her primary duties are cleaning bathrooms. She testified she was assigned to work with Respondent on back-to-school night. She testified she discovered that Respondent had not put toilet paper in the bathroom, and she went to get some and saw Respondent in the boiler room. She asked him why he was there as it was parent's night. She testified she saw him spraying. According to Vivian Whalen, she smelled cigarette smoke in the basement.

Amy Tierney, who was a part time custodian at the time of the incidents, testified that she was working in the building on September 19, 2023. She testified she is a smoker and when she first began, she and Respondent smoked inside the building on occasion when the weather was bad. She testified after a couple of months, she stopped because there were multiple signs around the school prohibiting smoking on the premises.

Tierney testified she did not see Respondent smoking on back-to-school night. However, she noted she did see him with a cigarette in his hand. She testified she no longer has a very good recollection, but believes she encouraged him to go outside with her to smoke. But he did not.

Tierney testified she had seen him on another occasion smoking marijuana in the school. She testified she never said

anything as she did not want him to get in trouble. Tierney testified she worked with him on numerous occasions, and he was aware of the duties he was responsible for. She noted he had also left the building at times but had no specific recollections.

Superintendent Jack Solter testified that issues regarding Respondent's conduct were raised to him from Board Secretary Cabrera, who works the Facilities Department. He testified the issue of marijuana was raised to him from parents as well and he directed an investigation be conducted and determine a course of action.

Solter testified he was advised that it was determined marijuana was present in the building and Respondent had violated the cigarette policy. Solter testified that his review showed Respondent had previously been reprimanded for a similar violation. He noted the parties' Agreement contains a provision that imposes a monetary fine for smoking. However, he testified he had no recollection of anyone being fined. Rather, individuals have been disciplined.

Solter acknowledged that marijuana smoking and certain types of possession are now generally legal in the state. He noted, however, it continues to be prohibited on school property.

Solter testified that as part of the investigation the special counsel for the Board of Education met with Respondent. He noted that it was his understanding that Respondent was



directed to take a reasonable suspicion drug test. Solter testified Respondent refused to submit to the test which, under the policy, is considered a positive test.

Solter testified in determining the appropriate penalty, he examined the Respondent's entire personnel file. He noted there was substantial documentation of prior disciplinary incidents. He noted Respondent's increment was withheld in June 2021. Testified he believed termination was appropriate because Respondent has a record of continually violating rules and has failed to improve.

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Respondent testified he has been working as a full-time custodian for 12 years in the District. He testified for the past three and half years, he has worked at the McKinley school where his schedule runs from 3pm to 11:30 pm. He testified that in addition to him, he works with two other custodians, Gladys and Jonathan. He noted, his work assignment was in the basement, Jonathan worked on the first floor and Gladys was assigned to the second floor.

According to Respondent, upon being hired, he advised Goscinski that he has a learning disability, which he described as being "slow." He testified that he told his supervisor, Sebastian Arnown and later Goscinski and Mike Boyce. He testified

he advised them he may need things to be repeated or to walk him through certain things.

Respondent testified no one ever offered him an accommodation or inquired if he needed assistance. Respondent testified Goscinski often yelled at him and called him retarded. He testified that he also belittled him and called him stupid.

Respondent testified that in 2014 he worked for Mike Boyce. He testified Boyce called him "spear chucker" and said he expected more from him. Respondent testified he did not complain at the time, but later when he was working security at Franklin, he reported the conduct. The complaint was investigated, and Boyce was later transferred and left the district. Respondent testified his relationship with Goscinski changed after the investigation. he noted the two were friends and Goscinski asked him why he had never said anything to him about the incident. He testified after the discrimination report was issued; Goscinski targeted him for every little thing.

Respondent acknowledged smoking. He testified he smokes Lucky Strike and Marlboro cigarettes as well as rolling his own tobacco. He initially testified he did not understand there was a no smoking policy, and no one had ever discussed it with him. He testified he generally smokes outside, but when questioned why, he said, it was for no reason.

Respondent acknowledged smoking inside the building at times. He testified he did not recall whether anyone had told him he was not allowed. He testified he continued to smoke inside the building and stated that many others did.

Respondent denied rolling marijuana at school or smoking it. He testified Amy was not accurate when she said he had done so on another occasion. He testified he thinks she lied because she was seeking a promotion.

Respondent testified he did not understand that his salary increment was withheld but acknowledged not getting a raise. He testified no one had explained to him why it was withheld. Respondent testified that he attended a meeting at some point in September 2023 with his Union Representative Stevens, as well as an attorney for the district. He testified he was accused of smoking pot in the building on back-to-school night. He testified he had not been sent home or tested. He testified he was asked to take a drug test, but Ed Stevens told him not to do so.

Respondent testified he does not believe he was given a "fair shake". He testified that he believes he was targeted after his complaints about Boyce. He testified that he has expressed a willingness to fix problems.

NJEA Edward Stevens testified that he was involved in the negotiations for the collective bargaining agreement. He noted

smoking fine is in the contract, which provides in Section 26 that any member smoking in the building will be subject to a \$100 fine. He noted it has been in the contract since 1998. Stevens testified he represented Respondent in an investigatory meeting on October 2, 2023. He testified there was an allegation of smoking marijuana on school grounds. He testified they asked Respondent to take a drug test. Stevens testified he told the Board it was not appropriate because it was well after the fact and would prove nothing. He testified he would advise Respondent not to take the test. He testified it never got to the point where Respondent was told directly to take a drug test.

### **Positions of the Parties**

#### **Position of the District**

On this record, the Board argues: (a) it has met its burden of establishing just cause for termination by a preponderance of the evidence under the statute; (b) all school employees, including custodians, must conduct themselves in a "manner which will reflect dependability and inspire confidence" and conduct himself in a manner that in no way condones or encourages the use of drugs"; (c) the uncontroverted testimony and documentary evidence shows Respondent has a history of "flagrantly disregarding the Board's Policies and practices, including violating the District's rules against smoking; (d) Respondent's refusal to undergo reasonable suspicion testing is also grounds

for termination; (g) Respondent's protracted disciplinary record including failure to perform duties and meet the expectations of his job is further grounds to sustain discharge; (h) the testimony of Groscinski, Vivian Whalen, Bolanos and Tierney was more credible than the self-serving statements offered by Respondent; (i) the District's witnesses established Respondent consistently smokes on the premises and was caught smoking on September 19 and 24, 2023; (j) the record evidence shows Respondent was repeatedly provided verbal and written warnings regarding smoking; (k) Respondent's contention that he did not know the rules is simply not credible; (l) in addition to smoking on the premises, Respondent failed to ensure that his areas were cleaned, as established by Goscinski who inspected the area; (m) the record evidence establishes Respondent tripped the alarm and failed to notify his supervisor and respond to repeated attempts to contact him prior to setting the alarm; (n) Bolanos testified credibly that he saw Respondent rolling a marijuana cigarette on September 24, 2023 and smelled marijuana in the basement; (o) Respondent did not deny smoking, but rather told Goscinski that it was legal; (p) the District witnesses established that during the investigatory meeting, Respondent was directed to undergo a reasonable suspicion drug test and failed to comply; (q) Respondent's testimony that he never smoked marijuana, any concern about being tested was misplaced; (r) Respondent's conduct between

September 19 and 25 alone is cause for termination, but given the documented warnings, reprimands and prior increment withholding, the termination should be upheld; (s) there are no mitigating factors to reduce the penalty sought by the District; (t) the harassment cited by Respondent by Mr. Boyce is not relevant to this proceeding, as Mr. Boyce was transferred five years earlier; (u) Respondent has not contested any of the letters, reprimands and memos documenting that he claims is retaliation; (v) the evidence shows Respondent was fully aware his conduct was not acceptable and he refused to alter his conduct and expressed no remorse; and his past record of smoking, failing to perform his duties and excessive absenteeism cannot be ignored and, in fact, demonstrate the likelihood that he would continue to disregard the reasonable rules of the Board.

#### Position of the Respondent

Respondent, on the other hand, asserts: (a) the District has failed to establish just cause to terminate and therefore he should be reinstated with full back pay; (b) the District's claim that Respondent was smoking marijuana on its premises has not been established; (c) the District has not proven that Respondent was directed to and refused to take a drug test, nor has it proven that a positive test under the circumstances could lead to the conclusion he used marijuana on September 19<sup>th</sup> within the building;

(d) the record evidence shows Respondent's supervisor had it in for him and did not properly investigate the allegations against Respondent; (e) the investigation conducted by Goscinski concerning cigarette smoking was based on assumptions, such as finding a can of soda with cigarette butts in it, and assuming it belonged to Respondent; (f) the memorandum issued to Respondent on September 20<sup>th</sup> mentions only cigarette smoke and not marijuana; (g) no evidence of impairment was presented by any witness; (h) Goscinski's credibility is undermined by his clear belligerence under examination; (i) Goscinski's testimony belied a belief that any infraction was attributable to Respondent; (j) Goscinski did not conduct a proper investigation - as Amy Tierney was also a smoker but he never questioned her; (k) the rules regarding smoking were never clearly conveyed to employees; (l) termination is not appropriate penalty for smoking since the parties' Agreement provides only a fine for smoking and not termination; (m) the District has engaged in disparate treatment related to infractions related to smoking, as Tierney admitted smoking on the premises and has never been disciplined; (n) Respondent was not sent home either on September 19 or 25<sup>th</sup>, after allegedly smoking marijuana or ordered to take a drug test on those dates; nor was he issued a memorandum on September 19<sup>th</sup> although it is claimed he was smoking pot; (o) the District failed to properly investigate any of the allegations regarding marijuana and these

assertions should be rejected; (p) the allegation that Respondent refused a test is not supported by the record evidence as there could have been no reasonable suspicion when testing was raised one week after the incident and the presence of marijuana; (q) the record evidence fails to establish Respondent failed to secure the building, as there was no evidence Respondent failed to lock the building and even if there was an infraction, it is not a terminable offense; (r) termination cannot be upheld given the failure to establish any of the underlying charges;

#### Decision

After carefully considering the entire record before me, including my assessment of the credibility of witnesses and the probative value of evidence, I find the Board has proven just cause to discipline Respondent and, under the circumstances, the appropriate penalty in this case is discharge from employment. My reasons follow.

Respondent is charged with three counts of Conduct Unbecoming. I find the credible record evidence establishes Respondent guilty of Count One, which deals with smoking in the school building. Smoking is prohibited in school buildings by statute. N.J.S.A. 26:3D-58 The record evidence shows Respondent was clearly on notice regarding the prohibition. Custodian Amy Tierney testified there are multiple signs posted within the school advising smoking is forbidden. Finally, Respondent was



specifically warned on May 2, 2022, that smoking was not permitted. He was issued a memorandum which read:

Re: Smoking in Building

This memo is to inform you that you left a bottle of cigarette bottoms in the boiler room. As you know, there is no smoking on school property. There no smoking in school building you must exit the building to smoke.  
[Board Exhibit 40]

While no one specifically witnessed Respondent smoking on back-to-school night, the circumstantial evidence is sufficient to meet the burden of proof in this case. I credit Custodian Bolanos he heard complaints from parents on back-to-school night regarding cigarette smoke in the building and, in fact, smelled it. I credit Vivian Whalen's testimony that she saw Grievant with a cigarette in his hand that night and Groscinski's testimony that he smelled the smoke from the basement. Groscinski testified he, in fact, saw Grievant spraying in the area to mitigate the smell.

Given the smoke from the area he is responsible for, the fact that he was seen with a cigarette in his hand, I find the evidence sufficient to establish Respondent guilty of Count One. Moreover, Respondent has acknowledged he has smoked in the building on previous occasions.

Count two deals with the most serious allegation. Respondent is charged with possessing and smoking marijuana in the school

building on September 25<sup>th</sup>. New Jersey law prohibits smoking marijuana on school premises. Contrary to Respondent's assertion, I do not find he was insufficiently placed on notice of the rule. Moreover, Respondent acknowledged Groscinski also accused him of using marijuana September 19<sup>th</sup>. Thus, he was on actual notice that such conduct was impermissible.

While no one directly observed Respondent smoking, I find the credible record evidence sufficient to establish Respondent guilty of the charge. First, I credit Bolanos' testimony that he saw marijuana on Respondent's desk, which is a violation as well. His description of the substance as greenish and having the texture of large cookie crumbs is consistent with marijuana. Moreover, Tierney, Groscinski and Vivian Whalen all testified they smelled marijuana coming from the basement of the school. Likewise, Respondent was observed trying to cover up the smell.

Respondent's contention the investigation was insufficient is not persuasive. Goscsinski specifically received a report from Bolanos, smelled marijuana concentrated in the basement and confronted Respondent about the smell, and Respondent's reply that it was legal was taken to be an admission by Goscinski. I find Goscinski's hearing the statement as an admission to be reasonable. Likewise, an investigatory meeting was held later at

which time Respondent had another opportunity to explain himself. Under these circumstances, I find the investigation sufficient to meet due process standards.<sup>1</sup>

I do not find Respondent's assertion that the Board's witnesses were not credible persuasive. First, I note none of the co-workers embellished their testimony. They testified only as to what they observed. Their descriptions made sense and had the ring of truth. Respondent, on the other hand, was not credible on many important points. He claimed initially he did not know smoking was not allowed, yet on May 2, 2022, he specifically received a written warning advising him such. Likewise, he claimed never to smoke marijuana, yet Tierney, with whom he was friendly testified reluctantly that she had seen him with marijuana on a prior occasion in the building.

Finally, the record evidence establishes Respondent failed to properly perform his duties in connection with securing the building on September 19<sup>th</sup> as well. The credible record evidence establishes the procedure for the staff closing the building at 11:30 pm is for anyone working to gather at the exist when the

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<sup>1</sup> Given my findings, I do not find it necessary to consider the District's assertions regarding whether Respondent was ordered to take a reasonable suspicion drug test or what implication his not taking the test should have on the charges.

alarm is set and to leave the building together. I credit Bolanos that Respondent not only failed to meet at the exit but, more importantly, failed to respond to his texts, calls on the cell phone and intercom. In addition, Grievant left afterward and tripped the alarm at 11:40 pm, after the shift ended. He clearly should have known that he was the last person leaving and the alarm would have been on. His failure to attempt to avoid this, meant the alarm was signaled and the potential of police arriving. I find this constitutes conduct unbecoming.

Having found Respondent guilty of conduct unbecoming and other just cause, I turn to the issue of penalty. Respondent's misconduct is serious. Possessing and using marijuana in the school building is explicitly prohibited and at odds with the school's mission. Respondent's actions in this case demonstrate a disregard for the rules that he certainly was on notice of and should have understood. The issue with smoking was compounded by the fact Respondent did so at back-to-school night - a time when parents were present in the school and observing the school environment that is provided to their children.

I find termination to be the appropriate penalty in this case based on Respondent's overall record. Respondent had 43 uncontested disciplinary letters in his file. They included warnings for failing to perform his duties, attendance, smoking, failing to secure the building, failing to properly punch out

among other things. None of the issues raised in the letters appear "nitpicky". Moreover, they are uncontested. To the extent Respondent claims they are retaliatory, there is no credible record evidence to support his allegation.

I do not find any mitigating circumstances sufficient to reduce the penalty in this case. Respondent has not demonstrated any remorse or reflection that indicates any further corrective action would be effective. Respondent continually claimed to not be aware of the rules, which I found not credible and reflects a lack of responsibility. Moreover, even when he acknowledged knowing the rules, he testified he willingly broke the rule regarding smoking.

Respondent's argument that Goscinski retaliated against him for filing a complaint against Boyce is not supported by the record evidence. The record evidence shows the District investigated and substantiated the complaint made by Respondent against Mike Boyce. [Respondent Exhibit 2]. In conjunction with Respondent's input, Boyce was transferred, and the District ensured no further contact between the two. [Id]. Respondent's contention that Goscinski retaliated against him is based on (1) Respondent's contention that after Boyce was transferred, Goscinski asked him why he did not report the issue to him; and (2) that only after the findings did the number of memoranda increase.

Even assuming Goscinski made that statement, it is not necessarily evidence of retaliatory intent. It could certainly be seen as an inquiry of concern. More importantly, there is no evidence Respondent ever complained or attempted to refute the memoranda at issue. Examination of the memos shows they all deal with discreet instances of misconduct and certainly within the realm of issues that go beyond "nitpicking" as Respondent claims. They deal with major issues of performance such as completing work assignments, regular attendance and smoking.

Under these circumstances, I find no reason to disturb the Board's judgment regarding penalty in this matter. As a result, I make the following

**AWARD**

The Board has demonstrated just cause for discipline and the appropriate penalty is termination from service.

*Deborah Gaines*

Dated: November 7, 2024 \_\_\_\_\_

Deborah Gaines, Arbitrator

Affirmation State of New  
York } County of New York  
} ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: November 7, 2024

*Deborah Gaines*

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