BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

between

The Rockaway Township Board of Education, Morris County, NJ,

Petitioner,

and

James Dunckley,

Respondent.

Agency Docket No: 291-9/15

OPINION & AWARD

Dr. Andrée Y. McKissick
Arbitrator

APPEARANCES:

For the Petitioner:
John G. Geppert, Jr., Esquire
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For the Respondent:
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On September 18, 2015, the Board found probable cause to allow Sworn Tenure Charges as well as Sworn Statement of Evidence in support thereof against Respondent James Dunckley to warrant his dismissal. Thus, the Board certified and filed the Charges with the Commissioner of Education. On August 31, 2015, Respondent Dunckley was suspended but with pay.(See P-31) That is, his salary increment for the upcoming year will be withheld. The Respondent answered the Charges on October 7, 2015.

Subsequently, the Commissioner submitted the Tenure Charges to this Arbitrator on October 19, 2015.

The Sworn Tenure Charges allege that Respondent Dunckley engaged in conduct unbecoming of a teacher, in violation of the Board Policy, as well as State Law, by his inappropriate conduct exhibited towards his special education students. This conduct included acts of inappropriate touching of certain young females repeatedly.

During the four (4)-day hearing from December 14 and 15, 2015 and January 5 and 6, 2016, the Board presented fifteen (15) witnesses over a three (3)-day period. The Respondent presented approximately eight (8) witnesses. However, Respondent Dunckley did not testify in his own defense. Both Parties were afforded full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. Subsequently, the Parties submitted Post-Hearing Briefs on February 5, 2016. An extension was granted to the Arbitrator for submission on July 6, 2016.

BACKGROUND INFORMATION COMMON TO ALL CHARGES

Respondent, James Dunckley, commenced employment with the Board in the 1976-77 school year. He subsequently obtained tenure in his position. He is certified as a teacher of the handicapped and an elementary school teacher. Since September 1, 1996, Respondent has been assigned as an instructor of students with multiple handicaps at the Copeland Middle School. Over the years, he has been responsible for the education and welfare of many students. As a member of the professional staff, Respondent was obliged, among other things, to ensure the implementation and enforcement of all Board of Education policies and generally to safeguard and promote the well-being of the students entrusted to his care.

Respondent has a history of inappropriate and unprofessional conduct towards others. By way of example, without limitation, in 2012, an affirmative action complaint was filed against him by Donna Friedberger, a teacher who alleged Respondent engaged in harassing, threatening and hostile behavior toward her. It was resolved by Respondent agreeing to act in a

professional manner, and to cease communicating with the teacher to ensure he would not retaliate against her. But, because of Respondent's additional and ongoing failure to conduct himself in an appropriately professional manner, the District is now compelled to file the instant charges.

The present charges are the result of recurring complaints, made by minor female children who are or were students of Respondent. Respondent touched them inappropriately and repeatedly, without their consent, despite requests not to do so, and otherwise treated them inappropriately, causing them substantial anxiety, discomfort and disruption.

As more fully set forth below, following an initial complaint which was first brought to the District's attention by parents of various female students, in or about December 2009, Respondent was admonished to cease and desist from engaging in the offensive behavior. Nonetheless, Respondent continued in his reprehensible course of conduct into the present, resulting in further complaints of a similar nature involving additional female students. The similarities between the past and present occurrences are troubling. In both cases, the affected female students reported that Mr. Dunckley's unwelcome advances made them feel anxious and uncomfortable. In both cases, the girls who were targets of Mr. Dunckley's unwanted attention and physical contact, experienced anxiety, discomfort and disruption. Both the prior and present misconduct by Respondent, as more fully described below, was unbecoming of a teaching professional, and violative of numerous Board Policies, of which Respondent knew or reasonably should have known.

SPECIFICATION OF CHARGES

CHARGE I

CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "TA"

The foregoing Background Information and the facts alleged therein, are incorporated by reference as if fully set forth herein. At all times relevant to the facts set forth below, TA, was a 13-year old girl and a student in Respondent's class at Copeland Middle School, located at 100 Lake Shore Drive, Rockaway Township, New Jersey.

Count 1

On a recurring basis since on or about December 2014, through April 10, 2015, during class and without TA's consent, Respondent more than once touched TA on her shoulders, on her leg above her knee, knee, back, and "in the area of [her] chest." Respondent also touched TA on her collarbone. Respondent's touching focused primarily on TA, and to a lesser extent upon a second female classmate, ALR (see Charge II, supra). When Respondent touched TA, it made her feel uncomfortable.

Count 2

Respondent called TA his "buddy," said she was "mature," and that TA was "different than other kids." Respondent's characterization of TA as "mature" and as his "buddy" were made to TA's mother in or about the beginning or middle of the 2014-2015 school year, during a telephone conversation about TA's grades and performance in class. This caused TA's mother to become concerned about exactly what Respondent's intention was by the use of the term "mature." TA's mother found Mr. Dunckley's statements to be very odd; she was taken aback by them and felt very uncomfortable with the conversation.

Count 3

When he touched her, Respondent typically asked TA if she was "OK." This made TA feel uncomfortable because there was no reason for Respondent to ask TA if she was OK.

Count 4

Despite repeatedly touching TA without her consent, Respondent throughout the 2014-2015 school year said, "I don't touch kids." On or about March 25, 2015, TA said to Respondent, "Don't touch me," whereupon Respondent "dropped whatever he was doing" and said he "didn't mean it like that." Respondent's overt and exaggerated pronouncement, in direct contravention of his actions was perplexing and made TA feel uncomfortable.

Count 5

TA informed Respondent, "I don't feel comfortable when you put your hand on me." Yet, two days later, Respondent touched TA's shoulder.

Count 6

Respondent's foregoing conduct eventually took its toll on TA. Her mother reports that, about a month or two before the 2014-2015 school year ended, TA began to "appear anxious, seemingly more quiet and began changing her dress wear for school in the way of being much more conservative." When TA's mother "confronted [TA] about this change in her, [TA], after initially saying nothing was wrong, told her mother that Mr. Dunckley had been touching her on several different occasions on her shoulder, arm and knee, and that this had made [TA] feel very uncomfortable with him and being in his class."

TA reported to her guidance counselor, Sonya Patel, that she "feels as if she is depressed" and was "feeling threatened/bothered by Mr. Dunckley."

On or about April 3, 2015, TA "broke down" at home and told her mom that she was feeling "too much pressure" and was "feeling a lot of anxiety." This caused TA's mother to notify the school, and caused the administration promptly to have TA moved to another class.

After she became aware of the incidents involving Respondent repeatedly and inappropriately touching TA without her consent despite TA

telling Respondent to stop, TA's mother, toward the end of the 2014-2015 school year, took TA to see a doctor due to her "anxious and changing behaviors." After being informed of the incident(s) in school with her teacher, the doctor informed TA's mother that the behavior change could most certainly be explained from her experiences with Mr. Dunckley.

The foregoing acts and omissions by James Dunckley, individually and cumulatively, constitute conduct unbecoming a teaching staff member and/or just cause warranting dismissal.

CHARGE II

CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "ALR"

The foregoing Background Information, Charge, Counts and the facts alleged therein, are incorporated by reference as if fully set forth herein. At all times relevant herein, ALR, was a 13-year old girl, and a student in Respondent's Science and American History classes at Copeland Middle School.

Count 1

On a recurring basis throughout the 2014-2015 school year, until he was placed on administrative suspension on April 10, 2015, during class and without ALR's consent, Respondent touched ALR on her arms, shoulders, knees and legs. For example, without limitation, Respondent would touch ALR's shoulders when she asked to go to the bathroom, asking her if she was okay. When Respondent touched ALR, it made her feel "uncomfortable and weird." ALR noticed that Respondent's inquiry sounded "sweeter than it should" leading her to believe that the touching was sexual in nature.

Count 2

Despite repeatedly touching ALR without her consent, Respondent also repeatedly pronounced: "I don't touch kids!" ALR found this to be "weird" because Respondent was, in fact, touching her and others. She concluded that Respondent was trying to "hide something." This also made ALR feel uncomfortable.

Count 3

When they watched movies in class, Respondent would sometimes sit "really close" to ALR and touch her shoulder. This caused ALR to "feel uncomfortable and weird."

Count 4

When Respondent was at his computer and ALR's back was toward him, ALR felt "like he is staring at [me]" such that, "every morning," ALR moved her desk so she could see Respondent.

Count 5

The foregoing conduct of Respondent caused ALR to consider "moving out of the class," despite the fact that ALR was "scared of being in a big class."

The foregoing acts and omissions by James Dunckley, as set forth in the above Counts, individually and cumulatively, constitute conduct unbecoming a teaching staff member and/or just cause warranting dismissal.

CHARGE III

CONDUCT UNBECOMING A TEACHING STAFF MEMBER, AND/OR OTHER JUST CAUSE FOR DISMISSAL RELATED TO RESPONDENT'S RECURRENT PATTERN OF MISCONDUCT

All of the foregoing Background Information, Charges, Counts, and the facts set forth therein are incorporated by reference as if fully set forth herein. It is well established that the Commissioner of Education and the Courts recognize that the totality of a pattern of conduct may constitute unbecoming conduct, even when the individual acts comprising it, standing alone, may not. See, e.g., Cowan v. Bernardsville Bd. of Educ., Tenure Hearing of Greg Young, and Tenure Hearing of Donald Dudley.

The course of misconduct set forth in the within Charges and Counts, jointly and severally, based on numerous and ongoing infractions over an extended period of time, notwithstanding Respondent's prior history, constitutes such a pattern of conduct unbecoming a teaching staff member. This pattern and course of unbecoming conduct during an extended period of time, and the emotional damage and disruption Respondent has caused to his students manifestly demonstrates his recalcitrance and general unfitness to continue to serve in a position of trust as a public school teaching staff member, warranting his immediate dismissal.

ISSUES

1. **Whether or not James Dunckley engaged in acts or omissions constituting unbecoming conduct and/or other just cause, including: inappropriate touching of students?**

2. **If so, does the conduct warrant dismissal from his employment with the Board?**

PERTINENT PROVISIONS

THE CHARGES AND SPECIFICATIONS:

SPECIFICATIONS

In Particular:

District Policy 3281, *Inappropriate Staff Conduct*, provides, "Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district," and further that "School staff shall not engage in inappropriate conduct toward or with pupils ... [and] shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities." (P-23.)

District Policy 5751, *Sexual Harassment*, provides that the Board "will not tolerate sexual harassment of pupils by school employees," defined as "unwelcomed sexual advances ... or other verbal, nonverbal, or physical conduct of a sexual nature ... that is sufficiently severe, persistent, or pervasive to limit a pupil's ability to participate in or benefit from an educational program or activity, or to create a hostile or abusive educational environment." (P-24.)

District Regulation 5751, *Sexual Harassment of Pupils*, further provides, when "elementary or middle school (grades K-8) pupils are involved, welcomeness will not be an issue. Sexual conduct between a school employee and an elementary pupil will not be viewed as consensual;" and further provides, "In determining whether conduct is sufficiently severe, persistent, or pervasive, ... all relevant circumstances should be considered ... based on the totality of the circumstances;" and further provides, "Appropriate steps will be taken to end the harassment such as counseling, warning, and/or disciplinary action ... A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment." (P-25.)

District Policy 3211, *Code of Ethics*, requires the educator "to attain and maintain the highest possible degree of ethical conduct," and further provides that in "fulfillment of the obligation to the pupil, the educator ... [s]hall make reasonable effort to protect the pupil from conditions harmful to learning or to health and safety," and "[s]hall not intentionally expose the pupil to embarrassment or disparagement." (P-20.)

District Policy 3280, *Liability for Pupil Welfare*, provides that "[t]eaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct." (P-22.) District Regulation 3280, *Liability for Pupil Welfare*, further provides, "A teaching staff member must maintain a standard of care for supervision, control, and protection of pupils commensurate with the member's assigned duties and responsibilities." (P-23.)

District Policy 3150, *Discipline*, "directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct," and further states, "Violations of those statutes, rules, policies and regulations will be subject to discipline." (P-19.)

POSITIONS OF THE PARTIES

It is the position of the Respondent that Charge I and Charge II provide "plain notice" of what one is being charged. Thus, Charge I and Charge II are legitimate, the Respondent reasons, and not procedurally defective. However, Charge III lacks specificity and "plain notice" is absent. Therefore, Charge III, the Respondent asserts, functions as an umbrella charge and should be dismissed by this Arbitrator. Three assessments are set forth in West New York v. Bock, 38 NJ 500 (1962), the prevailing case law, the Respondent contends, which shall be analyzed by this Arbitrator in the Findings and Discussion along with other related case law such as: Buglovsky v. Randolph Board of Education case of Arbitrator Licata, Esq. (Docket No: 265-9-12), decided December 21, 2012.

In regards to Respondent Dunckley's 2009 incident, the Respondent asserts that he has no prior disciplinary record. Moreover, he has never had an increment withheld nor a letter of warning or a reprimand. The Respondent, again citing Bock, op. cit., asserts that "while prior disciplinary actions can serve as a basis for an increased penalty in a future case," "it cannot serve as a basis for future disciplinary charges." Based upon the above, the Respondent reasons that since Principal Allshouse did not impose discipline on Respondent Dunckley and that to consider this 2009 incident is against the concept of industrial double jeopardy. The Respondent explains that such a principle is derived from the basic elements of due process and fairness inherent in just cause, citing Arbitrator Biren's Award, In the Matter of John Carolomagno v. School District of Hillside (Agency No: 180-8-13, decided December 20, 2013). The Respondent reiterates that since the

Petitioner through Principal Allshouse testified that no action was imposed, as evidenced in his report, then the 2009 incident should not be viable for these reasons.

Focusing on Charges I and II regarding T.A. and A.L.R. with Respondent Dunckley, the Respondent challenges the credibility of these witnesses as well as the lack of corroboration of other students in the class, who were not fully investigated.

The Respondent points out that T.A. and A.L.R. are both very close friends who mirrored each other's testimony and operated as a clique. However, the Respondent contends that there was no corroboration of their version of events with other students in the classroom nor from other adults such as the classroom aide nor any administrator who visited Respondent Dunckley's classroom. Specifically, the Respondent notes that Principal Allshouse visited twice weekly with no advanced notification but did not see any of the alleged conduct testified to by T.A. or A.L.R.

The Respondent also asserts the inconsistencies of T.A.'s statements to the District's Investigator taken in August 2015 compared with her statements taken April 10, 2015, which occurred after the alleged conduct. For example, the Respondent notes that T.A.'s first response to the Investigator states that Respondent Dunckley "touches her" when she is "mad and upset." Then, T.A. says that he concurrently asked her if she "was okay." However, in the second interview with the Investigator, in contrast, she elaborates on the touching and its frequency. The Respondent also adds that T.A.'s response was as follows: "He would just say [']are you okay[?'] but there is no reason for him to ask me if I'm OK." When the second Investigator asked T.A. when Respondent Dunckley said this, T.A. responded as follows: "He would bump into me and say [']I'm sorry[,] I don't touch kids[,'] I just find it weird."

Another inconsistency, the Respondent asserts, is the testimony of T.A. in comparison with another classmate, C.P. For example, during the second interview, T.A. mentions that C.P. "freaked out," when Respondent Dunckley "touched her shoulder." However, C.P. testified at the hearing that this was untrue and she was greatly troubled by the fact that she could have gotten Respondent Dunckley in trouble.

In regards to the lack of corroboration from teachers, the Respondent offers the testimony of the elementary teachers, S. Culleny-Peer and D. Marchese. Apparently, the Respondent asserts that both taught T.A. in the past, nonetheless T.A.'s comments to them regarding the allegations against Respondent Dunckley were divergent from her prior statements made to the District Investigators. In particular, the teachers testified that T.A. told them that Respondent Dunckley put his hand on her thigh, indicating a rubbing motion. The Respondent points out that this is a significant omission from T.A.'s earlier investigation with the Division of Youth and Family Service (DYFS) investigator, when she failed to mention this touching of the thigh incident.

Focusing now on the lack of credibility of A.L.R., the Respondent contends that A.L.R.'s response to her allegations against Respondent Dunckley that both T.A. and E.D. said that he was "weird" and he made them feel uncomfortable. In contrast, E.D. testified at the hearing, the Respondent asserts, and she denied these allegations. Thus, for all the foregoing, the Respondent strongly asserts that T.A. and A.L.R. lack credibility.

In regards to the lack of a thorough investigation of the School District, the Respondent points to the failure of the District to interview School Aide Ciampitte. She was Respondent Dunckley's aide during the school year at issue. Essentially, the Respondent asserts that she corroborated C.P.'s testimony, stating that "he does not touch

kids." Most importantly, the Respondent maintains that Aide Ciampitte never witnessed Respondent Dunckley inappropriately touching any student. This again, the Respondent contends, supports the synopsis of Principal Allshouse's version of events, when he made unannounced pop-ins on Respondent Dunckley while class was in session. In summary, the Respondent concludes that not one witness, student, principal or aide can corroborate the allegations of T.A. and A.L.R.

In response to the Petitioner's reliance on the Davis case, the Respondent rebuts that the Davis case differs from our case. In particular, the Respondent points out that there was independent corroboration that School Custodian Davis touched the student's hair. That is, it was done in front of the mother of the student. She noticed that her daughter was uncomfortable with the stroking and fondling of her hair. However, there is no similar corroboration of any student's testimony, the Respondent asserts. Besides, the Respondent notes that there was no factual dispute in the Davis case, as here.

In addition, the Respondent further asserts that the School Custodian Davis admitted to fondling the student's hair, but these factors are absent in our case with Respondent Dunckley. Based on the foregoing, the Respondent requests that the Arbitrator restore Respondent Dunckley to his prior position with full back pay because the charges are baseless and to expunge his record.

On the other hand, it is the position of the Petitioner that this is a tenure case concerning a special education teacher who chose not to appear as a witness in his own hearing. The Petitioner asserts that he is a danger to young girls and has recently touched two (2) thirteen (13)-year-old girls on numerous occasions. The Petitioner further asserts that Respondent Dunckley has touched other girls in the past. Specifically, the charges

reflect that he touched T.A. and A.L.R. on various body parts, including shoulder, thigh or leg above the knee, back, chest area, collarbone, arms, knees and legs, during the 2014-2015 school year, despite being told to stop by these young girls. Paradoxically, the Petitioner points out, Respondent Dunckley verbally exclaimed that he doesn't "touch kids," much to the confusion of the girls who he continues to touch. Thus, the Petitioner contends that T.A. and A.L.R. were made to feel uncomfortable and causing substantial anxiety, discomfort and disruptions by his conduct. Based on Respondent Dunckley's conduct, the Petitioner adds that one of the female students was transferred to another class. He was placed on administrative leave pending the outcome of the District's Investigation.

Most importantly, the Petitioner maintains that the conduct exhibited by Respondent Dunckley in 2014-2015 was not the first time he has acted inappropriately and in a disturbing manner toward minor female special education students placed in his care. That is, in 2009, two (2) girls and parents came forward and complained of the exact same conduct, forcing the administration to remove two (2) female students (J.W. and A.R.) from Respondent Dunckley's class. Thus, the Petitioner contends that he disrupted the continuity of the girls' education. At that juncture, the Petitioner points out, that Respondent Dunckley was warned and instructed to cease and desist from engaging in offensive behavior toward young girls. Based upon the conduct described, the Petitioner surmises that the Respondent is a real danger to young girls and should not be permitted to continue working with children and subjecting them to this behavior. The Petitioner asserts that three (3) cases, in particular, epitomizes this conclusion and their dismissal is required. They are as follows: In the Matter of Tenure Hearing of Marvis Davis, Agency Docket No: 22-1/4 (May 15, 2014, Arbitrator Symonette); In the Matter of Tenure Hearing McClelland (March 25, 1983, affidavit State Board, July 6, 1983 affidavit, A-152-83T2, app. Div. 1984;

and In the Matter of Grace Colon v. City of New York Department of Education, 2010 NY Slip Op 33211(U) (New York Supreme Court, 2010), Arbitrator Dr. McKissick.

In the Davis case, the Arbitrator sustained a dismissal of a school custodian when he touched the hair of female students, making them feel "weird" and uncomfortable. This was the holding, despite a Department of Children and Family (DCF) finding that sexual abuse was unsubstantiated. In the McClelland, this case was upheld of a dismissal of a tenured fifth grade teacher who engaged in improper touching with five (5) female students. In the Colon arbitration, the Arbitrator found that the special education teacher engaged in conduct unbecoming, which included ongoing physical and verbal abuse of students and faculty members. Here, dismissal was the appropriate remedy notwithstanding the teacher's unblemished record. In sum, the Petitioner urges the Arbitrator that given the Respondent's prior history as well as the recent events in 2014-2015 that there is no alternative except dismissal.

Focusing upon Charges I and II, T.A. testified to the unwanted touching and this was corroborated by A.L.R. More significantly, such actions were testified to by N.A., a classmate, and former elementary school teachers, Culleny-Peer and Marchese. Both teachers taught T.A. in the past. All support the allegations of T.A. and A.L.R. as does Dr. Greg McGann, the superintendent, and Dr. Dempsey, the school psychologist. In particular, Dr. Dempsey concluded from his analysis that T.A. and A.L.R. were greatly damaged by this traumatic experience with Respondent Dunckley who sexualized this relationship with these young pre-adolescent females.

Regarding the Petitioner's request for an adverse inference, the Petitioner points out that this is not a criminal proceeding and that no constitutional rights are at issue.

Instead, Respondent Dunckley is the only person with personal knowledge of what occurred besides the girls themselves. Nonetheless, he has chosen not to offer any material facts or to contradict the factual testimony of the victims, T.A. and A.L.R. Here, the Petitioner adds that no witnesses were presented by the Respondent to contradict the analysis and conclusions of Dr. Dempsey, the school psychologist.

Moreover, the Petitioner notes that in State v. Clawans, 38 NJ 162, 170-171 (1962), New Jersey's highest court established the appropriateness of such inferences. That case held that the failure of a party to testify raises a "natural inference" that the "party fears exposure of unfavorable" facts would be presented against him.

Looking at the totality of evidence and egregious conduct of Respondent Dunckley, the Petitioner concludes that he has failed to satisfy the standards of the teaching profession. That is, the Petitioner adds that Respondent Dunckley has blatantly breached his fiduciary duty and wreaked havoc on lives of the young female students involved. Thus, the Petitioner reasons that Respondent Dunckley deserves no additional chances as he was forewarned in 2009, yet repeated the same behavior with other young female students. Based on the foregoing, the Petitioner requests that Respondent Dunckley be dismissed.

FINDINGS AND DISCUSSION

The appropriate evidentiary standard that applies to making findings of fact requires the Petitioner to prove its case by a preponderance of credible evidence. That is, it is more probable than not that the Respondent engaged in conduct set forth in the charges. In accordance with these requirements and consistent to the above evidentiary standard, the following Findings of Fact and Conclusions are so delineated.

CHARGE I

CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "TA"

P-3 reflects T.A.'s handwritten comments regarding the substance of this charge, when she answers questions from Investigator J. R. Keney on August 19, 2015. She writes that she is a student of Respondent Dunckley during the school year 2014-2015 and that he made her feel uncomfortable. Specifically, she writes that he "touched my leg above the knee," her "shoulder and back." He also touched her "chest." She also adds "his actions were different than his words." P-3 at p. 3 also mentions that T.A.'s friend, A.L.R., was moved from his class. P-4 is also a handwritten statement written by A.L.R. It is also reflective of questions asked of A.L.R. by Investigator J. R. Keney on August 22, 2015. In that statement, A.L.R. also writes that Respondent Dunckley's actions made her feel "uncomfortable." She also writes that Respondent Dunckley sat next to her "during videos" and that he would "touch my shoulders." P-6 reflects that events written in a memo from Social Worker P. Dafgek, dated April 9, 2015 concerning a call from T.A.'s mother.

This memo was directed to Principal Allshouse where the social worker Dafgek reveals the substance of T.A.'s mother's call regarding Respondent Dunckley's touching T.A. as well as other students: "A.L.R., C.P. and E.D." In this memo, T.A.'s mother states that she contacted Respondent Dunckley who stated that T.A. was "different than other kids, more mature and is a buddy." T.A.'s mother reported that the teacher was more "sexual" with her daughter, T.A., as well as A.L.R., because they were "more developed" than other girls in the class (see P-6 at 2).

P-7 is a memo from Guidance Counselor Sonya Patel who recorded her conversation with T.A.'s mother, dated March 26 and March 27, 2015. She relates to the guidance counselor that T.A. now has anxiety attacks and she has flashbacks of earlier incidents in her life. In addition, T.A.'s mother repeats that T.A. said to Respondent Dunckley, "Don't touch me." However, he responded to T.A. by saying that "I don't touch kids." The memo continues that Respondent Dunckley has continued to touch her on the shoulder, collarbone, and back.

P-10 is a handwritten assessment of Dr. Dempsey, the school psychologist, relating that Respondent Dunckley exhibited "abusive behavior" towards "two female students," dated August 21, 2015. He continued to describe this behavior of Respondent Dunckley as "sexualizing the relationship" between these two female students, "imposing a traumatic and damaging experience upon them."

P-12 reflects an affidavit written by T.A.'s prior school teacher, S. Culleny-Peer, regarding her conversation with T.A. She further relayed the information conveyed by T.A., including that Respondent Dunckley put his hands "on my thigh," while saying "good

job." Again, T.A. relates to her school teacher, Culleny-Peer, that his touches made her feel uncomfortable.

P-13 reflects the affidavit dated September 8, 2015 of T.A.'s former teacher, D. Marchese, who she encountered while the teacher was performing "Bus Duty." Former Elementary Teacher Marchese conveyed that T.A. seemed to be "visibly upset and shaken" as she told her about the conduct of Respondent Dunckley as he "rubbed her thigh." Collectively these various allegations encompassed Charge I, Counts 1 through 6. Implicit through these corroborations are the words of T.A., A.L.R., plus the guidance counselor, the school psychologist, and 2 (two) former elementary teachers. All of this evidence was again consistent with their testimony before this Arbitrator at the hearing.

CHARGE II

CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "ALR"

P-4 comprises an interview with A.L.R. by Investigator Keney where A.L.R. explicitly writes that Respondent Dunckley "made her feel uncomfortable." She also writes that he sits close to her during movies in class and touches her shoulder. This was written in her own handwriting and signed by A.L.R. on August 22, 2015.

Even more striking events occurred on April 9, 2015. This was reflected in the written memo by the school guidance counselor, Patel (P-8). In detail, she recounts the events narrated by A.L.R. that Respondent Dunckley makes her feel "uncomfortable and weird." She further "believes it may be a little sexual in nature." Moreover, she explained

that the touching often occurs when the class watches a movie in class or while she is on the computer. Specifically, A.L.R. adds that she told Respondent Dunckley "to stop touching her." Nonetheless, she reports that it continues to occur. Lastly, she related to School Counselor Patel that "they [the students] feel like he is staring at them." Thus, "they move their desk and seats so they can see him." Based on the foregoing, these collective recollections are consistent with their testimonies at the arbitration hearing. Accordingly, such specific details comport with Charge II, Counts 1 through 5.

CHARGE III

CONDUCT UNBECOMING A TEACHING STAFF MEMBER, AND/OR OTHER JUST CAUSE FOR DISMISSAL RELATEDTO RESPONDENT'S RECURRENT PATTERN OF MISCONDUCT

Charge III focuses upon Background Information of Charge I and II as set forth by Dr. McGann, the superintendent. Thus, he draws a nexus between prior behavior of Respondent Dunckley and these current charges. In particular, he focuses on the similarity of Respondent Dunckley's conduct in the school year 2009-2010 involving two (2), then-minor female students, J.W. and A.R. During a series of incidents, it was alleged that Respondent Dunckley inappropriately touched their hair; stroked their shoulders, arms and back. Although both girls asked the Respondent to stop, the record reflects that it continued. As a consequence, A.R. was removed from his class. The school psychologist, Dr. Dempsey, wrote of these incidents in P-11. His analysis of these incidents was that this consisted of the "same pattern of abusive behavior" that was displayed by Respondent Dunckley with said students. Moreover, Dr. Dempsey in P-11 concluded that Respondent Dunckley displayed a "persistent and ongoing pattern of hostile bullying behavior towards

children ...." In sum, Dr. Dempsey states that there was "compelling evidence" to suggest that he was "sexualizing the student-teacher relationship."

In P-15, Director Swierc states that Respondent Dunckley was to be "counseled about appropriate parent-teacher interaction." This was referring to the series of 2009 incidents regarding J.W. and A.R.

P-16 reflects Principal Allshouse's recollection of events of 2009-2010 involved the same students. At that juncture, Principal Allshouse "removed the two students from Mr. Dunckley's classes to eliminate the possibility of future issues." This memo was dated January 8, 2010. Notwithstanding being counseled and warned, the present charges of 2014-2015 constitutes a continuing pattern of conduct unbecoming a staff member. As such, the conduct exhibited by Respondent Dunckley was emotionally damaging to the students who were inappropriately touched by him.

In response to the Respondent's argument that Charge III does not provide "plain notice" or that the charge lacks specificity, this Arbitrator must disagree. To the contrary, the charge sets forth that it compasses the totality of conduct of Respondent Dunckley. It also specifically deals with a pattern of conduct, where background information provided by Dr. McGann regarding prior conduct can be considered in deliberating at the penalty stage. Accordingly, Charge III is viable and shall not be dismissed for the above reasons. Thus, West New York v. Bock, 38 NJ 500 (1962) was correctly applied to our case on this issue.

OMISSION TO TESTIFY AND ADMISSIONS

Since Respondent Dunckley chose not to testify in his own defense, it is necessary to more carefully analyze his responses to specific questions posed in the Answer. As to Charge I, Count 1, Respondent Dunckley "admits" that on "one occasion he touched T.A. on the leg when her leg was upon on a desk." He also "admits that he would praise students by touching them on the shoulder" or "to get the student to pay attention." However, he adds that "it was never sexual."

As to Charge I, Count 2, the Respondent Dunckley denies using the word "buddy." However, he "did state to the mother that T.A., as compared to other students age-wise, [T.A.] was more mature."

As to Charge I, Count 3 and Count 4, Respondent Dunckley denies these allegations "except on March 25, 2015, when T.A. was not paying attention, he did touch her arm." He also "admits" that "T.A." stated "at that time, 'Don't touch me'."

As to Charge I, Count 5 and Count 6, Respondent Dunckley denies because he was suspended on April 10th. Thus, he was not in school the last two (2) months of school.

As to Charge II, Count 1, Respondent Dunckley admits stating that "I don't touch kids." However, he denies Count 2, Count 3, Count 4, and Count 5 of Charge II. As to Charge III, Respondent Dunckley also denies these allegations in full.

At variance to Respondent Dunckley's responses above, A.L.R. tells the New Jersey Department of Children and Families, dated May 16, 2013 (D-3 at 11), the following: "He touched her [shoulder and leg]" "maybe more than 10 times, like twice a

week ...." When asked by Investigator Nuñez, whether A.L.R. saw him touch anyone else in the class. A.L.R. responded, Yes, "My friend, T.A." She then responds that "he does the same thing to me but sometimes he touches her thigh." When further questioned as to when this occurred, A.L.R. responded as follows: "It was when we had our feet up on the desk and he touched her [T.A.'s] thigh and asked her if she was OK." It is important to note that D-3, a composite of several persons who were investigated, also corroborates T.A. and A.L.R.'s version of events by the school guidance counselor Patel as well as the social worker Dafgek. As noted earlier and again in D-3, the school psychologist makes negative assessments concerning the Respondent Dunckley's chronic misbehavior and he validates the testimony of A.L.R. and T.A.

In response to the Respondent's argument that T.A. and A.L.R. are not credible witnesses, this Arbitrator must disagree based upon the specific questions answered and corroborated by the school guidance counselor, social worker, school psychologist, as well as other elementary teachers. Although the Respondent rightly points out that they are close friends, this Arbitrator does not find that the allegations of A.L.R. and T.A. were untrue.

In regards to the Respondent's witnesses, Classroom Aide Ciampitti and Aide Bartholomew, the record reflects that neither were employed in Spring of 2015, the timing of these events. Since they were not physically present, both were unable to offer viable evidence to counter the Petitioner's witnesses. As to the Respondent's student witness, C.P., she testified favorably but seemed emotionally intimidated by Respondent Dunckley; afraid to offend him. Thus, her testimony also was not viable to his case. Although Principal Allshouse stopped by twice a week to observe, the exact timing of this

misconduct did not occur during these exact intervals. Thus, his testimony does not rebut these occurrences of the misconduct.

In response to the Respondent's argument that to consider the 2009 incident, when Principal Allshouse did not impose a formal charge, constitutes a breach of industrial double jeopardy, this Arbitrator must again disagree. That is, Charge III specifically states "Respondent's recurrent pattern of misconduct." Thus, Dr. McGann had a right to set forth the analysis of prior misconduct exhibited in the 2009 incident. Respondent Dunckley was counseled and warned not to engage in similar misconduct of inappropriate touching (see P-31). Nonetheless, this misconduct continued and escalated and eventually culminates in his behavior with A.L.R. and T.A. in the 2014-2015 school year. It is also important to note that the withholding of one's salary increment and concurrently filing tenure charges is a part of the broad, continuing spectrum of progressive disciplinary actions since such actions do not impose separate penalties, thus industrial double jeopardy will again not apply. Here, Superintendent McGann in P-31 specifically noted the following:

> The Rockaway Board of Education voted on August 31, 2015 to withhold your employment and salary increment for the upcoming year. Therefore, your salary will be frozen during the 2015-2016 school year and will not be reinstated unless action by the Board to do so is taken in the future. Additionally, the Board is determined to continue your present suspension with pay pending further investigation and possible disciplinary action.

Accordingly, this is one transactional act, but divided into two (2) parts, as noted above. Thus, In the Matter of John Carolmagro v. School District of Hillside, supra is not applicable. In concurrence with the analysis of this Arbitrator regarding industrial double jeopardy, see Arbitrator De Treux's input on this topic, In the Matter of the Tenure Hearing

of Richard Graffanino River Dell Regional School District, Bergen County, New Jersey, Agency Docket No: 233-9/13 at 25-26, January 31, 2014.

In response to the Petitioner's request for the utilization of an adverse inference, this Arbitrator must agree. Since Respondent Dunckley chose not to testify, it is fair to make a legitimate inference that he likely fears exposure to adverse facts which would be unfavorable to his case. This natural inference is clearly supported by In the State v. Clawans, 28 NJ 162 at 170-171(1962), New Jersey's highest court. Although Clawans is a criminal case, this principle is equally applicable to civil cases, as here.

PREVAILING CASE LAW REGARDING CHARGE I, CHARGE II, AND CHARGE III AND THE APPROPRIATE PENALTY

A case directly on point is: In the Matter of the Tenure of Marvin Davis and the School District of Asbury Park, Monmouth County, New Jersey, op. cit., Arbitrator Symonette, Esq., May 15, 2014. In that case, a school custodian was charged with conduct unbecoming a staff member when he continued to touch the hair of several young female students against their will. The custodian made this admission by way of an investigation on June 13, 2013 during an interview. This was the basis of Specification 6, the Admission. However, in the Answer, the custodian denied the charges. That is, he claimed that he did not engage conduct unbecoming and that he did not engage in inappropriate physical contact with young female students.

Two (2) students corroborated the testimony of J.R. Also, J.R.'s mother witnessed the incident which she reported to the District. The Arbitrator in that case dismissed Davis,

the school custodian, although he was remorseful and promised not to engage in such behavior again. It is important to note that there was at least one (1) prior incident of this recurrent misconduct before this current case came to fruition of the respondent custodian's proclivity to engage in inappropriate touching, when the students told him to stop.

Comparing the Davis case to our current case with Respondent Dunckley, both cases dealt with inappropriate touching of young girls who described such misconduct as acts which made them feel "uncomfortable" and "weird." Both respondents had engaged in prior misconduct, involving the same acts of repeated inappropriate touching of female students. Both respondents were warned before tenure charges were brought by their Districts. Clearly, the admission of the respondent custodian differs from our case with Respondent Dunckley. However, Respondent Dunckley made some limited admissions in his responses to the Answer, as noted earlier. Both respondents were asked to stop their behavior towards these young girls, but such misconduct continued. In the Davis case, supra, the respondent testified in his own defense and expressed regret and remorse. With our case, Respondent Dunckley chose not to testify nor did he rebut the findings of the school psychologist, Dr. Dempsey, on the traumatic harm that his misconduct caused the students, T.A. and A.L.R.

In regards to the appropriate penalty, it is helpful to analyze In the Matter of Colon v. New York Department of Education, Docket Number: 118161/2009, decided upon by this Arbitrator. In that case, Respondent Colon, a special education teacher, was charged with verbal and corporal abuse of her students. She was a long-term employee who was charged with a total of eighteen (18) Specifications of misconduct. This Arbitrator upheld Specifications 1, 2, 4, 6, 7, 9, 10, 11, 13, 14, 15, 16, and 17, but Specifications 3, 5, 8, 12,

and 18 were dismissed. This Arbitrator discharged Respondent Colon due to the severity and the egregiousness of the collective charges, notwithstanding her unblemished record.

Comparing the Colon's holding to our case, both dealt with the physical touching and abuse of special education students from a teacher on multiple occasions. Although Respondent Dunckley was not formally charged in the 2009 incident, the record reflects that he was counseled and warned of this continuing misconduct. Moreover, it is important to note that prior misconduct can be considered at the penalty stage, as here. Due to the egregious nature of these collective acts of 2009 and culminating in the misconduct of 2014-2015, the penalty of dismissal is not excessive. As the appellate court held in the Colon case, supra, "the penalty of termination is not shocking to the conscience." This Arbitrator, in particular, credits the graphic testimony of Dr. Dempsey, the school psychologist, in his analysis of the continuing harm upon T.A. and A.L.R. in reaching the conclusion of dismissal.

Lastly, the case also akin to the Davis and Colon cases is: In the Matter of the Tenure Hearing of George McClelland, School District Washington Township, Mercer County, New Jersey, No. Edu: 5284-82: Agency No: 130-4/82A, ALJ Erickson, February 10, 1983. Respondent McClelland was charged with inappropriate behavior with minor female students, which included: reciprocal hugging, touching and caressing of these students. All of these allegations were corroborated by school personnel and students. Although Respondent McClelland testified and denied these allegations, the evidence was substantially against him. Finally, it was the Commissioner of Education, on March 25, 1983, who dismissed him. As with the other respondents in Davis and here, Respondent

McClelland had been warned to cease such misconduct. Accordingly, the penalty of removal was appropriate.

AWARD

Respondent Dunckley is hereby terminated with just cause due to the substantial, credible evidence presented against him. Charge I, Counts 1 through 6, is sustained. Charge II, Counts 1 through 5, is sustained. Charged III is also sustained for reasons set forth in the Award.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE OF AWARD: June 13, 2016

ARBITRATOR

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