

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

**IN THE MATTER OF THE ARBITRATION
OF THE TENURE CHARGE**

DOE DOCKET NO.267-9/16

between

GREATER EGG HARBOR BOARD OF EDUCATION,

OPINION

Petitioner

AND

-and-

AWARD

PATRICK LYNCH,

Respondent

BEFORE: SUSAN WOOD OSBORN, ARBITRATOR

DATE OF HEARING: December 1, 2016

DATE OF AWARD: January 10, 2017

APPEARANCES:

For the Petitioner:

Law Offices of Louis Greco
(Louis Greco, of counsel)

For the Respondent:

Ned Rogovoy, attorney

Witnesses:

John Keenan, District Superintendent of Schools
Patrick Lynch, District Science Teacher/Respondent

BACKGROUND OF THE CASE

On September 27, 2016, the Greater Egg Harbor Regional High School District (“Board” or “District”) served High School Teacher Patrick Lynch (“Lynch” or “Respondent”) with tenure charges. Lynch is charged with engaging in unbecoming conduct in the work place by having consumed intoxicating beverages and testing legal intoxication on a blood-alcohol screening test. On September 30, the Commissioner of Education certified the tenure charges and on October 11, the Respondent filed an Answer with the Department of Education admitting to the consumption of alcohol in the work place during school hours and admitting to legal intoxication pursuant to a blood-alcohol screening test. The Respondent also proffered affirmative and mitigating defenses concerning his rehabilitation.

Pursuant to N.J.A.C. 6A:11-6.3, I was appointed on October 24, 2016 as the arbitrator to hear and decide the tenure charges filed by the Board against Lynch. An arbitration hearing was conducted on December 1, 2016, at which time the parties each presented witnesses and documentary evidence. The parties summarized their respective cases orally on the record and waived post-hearing briefs. N.J.A.C. 6A:11-6.3 provides that the decision in this matter shall be issued within forty-five days of the beginning of the hearing, and that the decision shall be final and binding.

On June 21, 2016, the Respondent's attorney wrote to the Board asking that the proposed tenure charges against Lynch be placed on hold pending his completion of an in-patient addiction recovery program. The Board agreed and held the charges in abeyance. On September 20, 2016, after completing the program, Respondent asked to be returned to work under a Last Chance Agreement (email dated September 20, 2016 from N. Rogovoy).

The Board denied the request and, on September 27, 2016, formally issued the above referenced Tenure Charges, and related documentation, referring them to Commissioner of Education David Hespe, on that date. On October 11, 2016, the Respondent filed an Answer to the Charges, admitting he consumed alcohol during school hours in the workplace and that he had been tested and discovered to have a blood alcohol content of .111% on May 26, 2016, while on duty in the workplace. He left the proofs of signs and symptoms of intoxication to the Board to prove.

STATUTORY AND REGULATORY CONSIDERATIONS

N.J.S.A. 18A:6-10: Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the

deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

* * *

18A:6-16 Proceedings before commissioner; written response; determination

* * *

... If, however, [the Commissioner of Education] shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, . .

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict

between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S.A. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10.

STATEMENT OF CHARGES

On September 27, 2016, the Board brought the following charges against

Patrick Lynch:

CHARGE 1:

1. That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, while on school premises in his assigned workplace and during school hours and in the presence of students, was in a state of intoxication due to consumption of alcohol, all of the same constituting conduct unbecoming in the workplace.
2. That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, did manifest in the workplace and during school hours and in the presence of students, obvious signs and symptoms of having consumed intoxicating beverages, all of the same constituting conduct unbecoming in the workplace.

3. That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education did, during school hours and at a time when he was responsible to be on duty in the workplace submitted to a blood alcohol screening test which yielded a result .111% blood alcohol content, all of the same constituting legal intoxication and unbecoming conduct.

* * * *

FINDINGS OF FACT

In May 2016, Patrick Lynch was a science teacher at the Oakcrest High School of the Board. The Board hired Lynch in about 2002 and he was tenured. Before May 2011, he had no performance issues and no medical or addiction issues. Lynch admitted that he began drinking in 1998 (P-4).

In 2011, after an incident where another staff member reported him, the Board required that Lynch (or Lynch volunteered) obtain treatment for alcohol addiction (P-4). In June 2011, he entered a 45-day inpatient addiction recovery program, but suffered a relapse about one month after completing it. He was readmitted for an additional 60 days (P-7, P-8). It appears he relapsed again later in 2011, but recovered and remained sober from January 2012. Lynch was apparently on a leave of absence and did not work at all during the 2011-2012 school year (P-4). Before permitting him to return to work, the Board required that Lynch be evaluated by its psychiatrist. On May 18, 2012, Lynch was evaluated by Dr. Gary

Michael Glass (P-4). Lynch testified the content of Glass' report was entirely accurate.

Report of Dr. Glass (Board's Psychiatrist)

Glass found Lynch fit to return to work but expressed concern that Lynch was not fully committed to his sobriety. Glass recommended that Lynch participate in Alcoholics Anonymous ("A.A.") at least four times per week, immediately obtain a temporary sponsor and then a permanent sponsor within two months, receive counselling and obtain a complete physical/medical examination.

On June 12, 2012, then-superintendent Steven Ciccariello wrote to Lynch advising he could return to work in the 2012-2013 school year, adding: "In closing, I informed you that there would be no second chances in the future and the Board is prepared to file tenure charges against you should there be another incident." (P-4) Lynch returned to work and appears to have worked without incident from 2012 until October 2015.

Lynch initially testified that between the time he returned to work in September 2012 and the May, 2016 incident, there were no further incidents at work. However, on cross examination, he admitted on one particular day in 2015, after a night he was drinking, he was called to a meeting in the principal's office.

On October 12, 2015, an incident report (P-2, P-3) was created by Principal Joseph Carruth, describing a complaint by another staff member (Gatto) who

thought Lynch may have been drunk. Lynch was questioned, denied being drunk but admitted to having been drinking alcohol the night before. Carruth thought Lynch was not drunk and decided not to order his blood alcohol levels to be tested. The principal asked him if there was anything the district could do to help him with his problem. Lynch declined and said he did not need any help. Carruth returned him to class but reported the incident to Keenan (P-2, P-3). The incident report was placed in Lynch's personnel file.¹

On cross-examination, Lynch was referred to the "contingencies" set out in Dr. Glass' report for him to return to work in 2012. Lynch's testimony reveals he has not complied with the conditions:

Q: Do you attend AA meetings?

A: I have, yes.

Q: Do you attend now?

A: Umm, occasionally, yes.

May 26, 2016 Incident

On May 26, 2016, Superintendent John Keenan was out of his office at an awards ceremony. He received a call from Oakcrest High School Assistant Principal Michael Wilbraham, reporting that two employees had stated that Lynch smelled

¹ At the hearing, Respondent's attorney objected to admission of any documents in Lynch's personnel file, but I admitted them into evidence, including P-2 and P-3, because I found they were potentially relevant to the Board's decision-making in this matter. I find the documents are hearsay exceptions within the meaning of N.J.R.E. 803c (6) records of regularly conducted activity and/or (8) public records, reports and findings. Additionally, Lynch corroborated the contents of J-2 and J-3.

of alcohol and may be intoxicated. Keenan directed Wilbraham to remove Lynch from his classroom and investigate whether Lynch was intoxicated. Keenan also told Wilbraham that if he reasonably suspected Lynch had been drinking alcohol, he should immediately send him for a blood test. At 11:15 a.m., Wilbraham met with Lynch, Association President Stephanie Tarr, Association Representative Erin Chiappini, Supervisor Michele Mesghall and School Nurse Cindy Young (See, Statement of Evidence in Support of Tenure Charges). Wilbraham told Keenan that Lynch denied having been drinking that day but admitted he had been drinking heavily the night before. Lynch testified that during dinner with his parents the evening before, he learned that his mother had cancer and this news had gotten him upset and triggered his drinking.

After Lynch consulted privately with his Union representatives and Union attorney, he agreed to submit to blood alcohol testing. He then went to AtlanticCare Occupational Medicine (P-1), where he underwent alcohol testing, resulting in a blood alcohol reading of 0.111%. The lab test occurred at approximately 1:15 p. m., several hours after the initial report (P-1, pg. 2). Lynch acknowledged in testimony the legal minimum for intoxication is .02% and that on May 26, 2016, his reading was above the minimum.

Keenan received the lab report later that day. Keenan realized that Lynch's blood alcohol level constituted legal intoxication and placed him on paid

administrative leave pending further Board action (P-1). He reviewed Lynch's personnel file and learned of Lynch's prior history of treatment and relapses. Based on Lynch's intoxication at work on May 26, and his history, Keenan decided to recommend the Board bring tenure charges against Lynch.

On June 8, 2016, Keenan filed a Statement of Tenure Charges and a Statement of Evidence supporting the charges against Lynch with the Board. On June 21, 2016, Lynch filed a request for an unpaid leave of absence to enter a 60 to 90-day inpatient addiction treatment program. Through his attorney, he asked for a delay in the processing of the tenure charges. On June 27, 2016, the Board granted Lynch's request to hold the charges in abeyance pending his completion of the treatment program.

From June 18, 2016 to September 9, 2016, Lynch was enrolled in a treatment program at the Recovery Institute of South Florida. On September 9, 2016, the Institute's physician Dr. Emilio Mantero-Atienza, wrote that Lynch had successfully completed the program and was fit to return to work with no restrictions effective September 12, 2016. (R-1)

On September 26, 2016, the Board considered the tenure charges, statement of evidence and the response filed by Lynch's attorney and determined and voted that the charges were sufficient to warrant dismissal. Since that date, Lynch has been suspended without pay. On September 27, 2016, the Board forwarded the

certificate of determination and all supporting documentation (9 documents) to the Commissioner of Education.

POSITIONS OF THE PARTIES

The Board

The Board argues that the incidence of Lynch's intoxication on May 26, 2016, is not Lynch's first offense, and a review of his record shows he has a serious, ongoing problem. The Board opposes a last chance agreement, arguing it would only work to enable Lynch's condition and would ultimately be to the detriment of the safety and education of the students. It points out that high school students learn by example, and Lynch sets a bad example for students.

The Association

The Union acknowledges that Lynch came to work intoxicated. It asks that in lieu of termination, I return him to duty on the condition that he sign a "last chance agreement," in which any further intoxication over the legal limit of .02 would result in an immediate forfeiture of Lynch's teaching position. Lynch testified that he understood and will agree to these conditions.

ANALYSIS

In this matter, the Board has the burden of proving by a preponderance of the credible evidence that tenure charges are warranted under N.J.S.A. 18A:6-10, "Dismissal and reduction in compensation of persons under tenure in public school

system,” providing no person under tenure shall be dismissed “. . .except for inefficiency, incapacity, unbecoming conduct or other just cause.” The Board must also demonstrate that dismissal is the appropriate penalty.

The Board argues that Lynch should not be returned to a professional position given his history of relapses wherein he has been intoxicated while supervising and teaching students. The Association argues Lynch has a long history of satisfactory performance, struggles with a recognized disability and has attempted to recover from addiction. It asserts he should be given another final chance to retain his position.

Lynch testified he had not possessed nor drunk alcohol during school hours or in the workplace, however, in his formal Answer, dated October 11, 2016, he admits he consumed alcohol during school hours in the workplace. Moreover, the blood alcohol test administered at 1:15 p.m. -- several hours after the school day began -- showed a high blood alcohol content level of .111%, considerably beyond the legal intoxication level of .02%. The Board did not conduct a search of Lynch’s classroom at the time it met with him on May 26, 2016, but given the above facts, I infer Lynch could have been drinking alcohol on the job or just before the workday began. The evidence presented at the hearing including the lab report and the testimony of both Keenan and Lynch, proves Lynch was intoxicated during school hours, at the workplace and in the presence of students. This shows very bad

judgment and lack of self-control on Lynch's part. This behavior constitutes unbecoming conduct warranting dismissal. Therefore, based on the above, I find the Board proved paragraphs 1 and 3 of the Charge.

However, paragraph 2 alleges that on May 26, 2016, Lynch manifested "obvious signs and symptoms" of being intoxicated. In this record, only hearsay evidence supports this assertion. No one who actually saw and interacted with Lynch on that day testified at the hearing. Some direct evidence is required for me to find Lynch appeared or was acting intoxicated. Those individuals who the record indicates encountered Lynch - the coworkers, Wilbraham, his Association representatives, and the school nurse - did not testify. I decline to make this finding absent some direct, non-hearsay evidence. Based on this record, I find the Board has not proven this allegation.

A Board is entitled to expect its teachers to model appropriate and responsible conduct to students, especially teenagers, including, at the appropriate age, moderate consumption of alcoholic beverages, abstention from alcohol and avoidance of intoxication during worktime and at the workplace. Teachers are required to have an "unusually high degree of self-restraint and controlled behavior." (Tenure of Sammons, 1972 S.L.D. 302, 321). Further, a Board is entitled to require teachers to maintain order and safe conditions for students; intoxication likely renders a teacher incapable of fulfilling this role.

I infer from Lynch's records and testimony that he was likely intoxicated in the workplace in the presence of students in both 2011 and 2015. Superintendent Ciccariello's June 2012 letter and Principal Carruth's October 2015 incident report refer to "incidents". His records indicate he was off duty from May 2011 until September 2012, receiving treatment for alcohol addiction. He took appropriate steps in both 2011 and 2016 and from fall, 2012 until late 2015, he maintained his sobriety at the workplace.

Lynch was made aware of steps to take to avoid relapses five years ago. He has participated in inpatient recovery programs and been absent for lengthy periods. However, some of his attendance in such programs was not entirely voluntary. He did not initiate all of these recovery efforts, rather he undertook them at times when he risked losing his job. Dr. Glass noted his concerns about Lynch's commitment to sobriety; however, it appears that Lynch is not currently taking the steps Glass recommended or pursuing alternatives to achieve and maintain sobriety. As of the date of this hearing, Lynch has acknowledged he is only occasionally active in AA and there is no evidence he has a sponsor. Lynch did not assert that he has received counseling or is pursuing other steps to maintain his sobriety. He has complied only minimally with the recommended actions. Lynch's lack of adherence to the advice he received is an indication that were he returned to work, he would likely be unable to avoid future relapses. It appears likely the

Board will be forced to contend with similar conduct in the future. The Board should not be required to worry about Lynch's next occurrence of being intoxicated at work, with potentially more serious consequences to himself, the students and the entire education community. Under these circumstances, termination is the appropriate penalty. Were he returned to work, he would likely continue his pattern.

NJ Court Disability/Accommodation cases

Respondent argues Lynch suffers from a disability and should be accommodated with a last chance order, citing Matter of Jackson, 294 N.J. Super 233 (1996); Matter of Cahill, 245 N.J. Super. 397 (1991) and Clowes v. Terminix Intern., Inc., 109 N.J. 575 (1988). Clowes established that alcoholism is a handicap under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 *et seq.* Discrimination against an alcoholic employee is prohibited unless the employer reasonably believes that the person cannot perform the work in question because of the handicap.² In Jackson, the Appellate Division upheld a termination of a firefighter in an LAD case where the firefighter had been suspended for drug abuse,

² In Clowes the discharge was upheld because the complainant had not made a prima facie case that unlawful discrimination was the reason for his termination. Clowes' alcoholism was not known to the employer before it decided to terminate his employment for performance based reasons.

was given the opportunity to attend a drug rehabilitation program and returned to work under a last chance agreement. His return was contingent on abstaining from any use of illegal drugs or chemical substances on or off-duty. When, three years later, the firefighter tested positive for using an illegal drug, he was discharged. In reviewing the appeal, the court noted the LAD did not require a municipality to provide a second chance for rehabilitation. It reiterated an “employer is not required to assume or hope that the employee will limit drug use to off duty hours or that the effects of the drug use will be dissipated by the time the work day begins,” 294 N.J. Super. 236, citing Cahill at 245 N.J. Super. at 401.

In this case, even assuming the veracity of Lynch’s testimony that he had not been drinking on the job but only during off-duty hours the prior evening, clearly, the effects of his alcohol consumption had not dissipated even by six hours after the beginning of the school day. While he has no record of poor classroom performance issues, it nevertheless can be said that he cannot perform his teaching responsibilities to the best of his ability while under the influence of alcohol. When he chooses to drink heavily even during off hours, he places the trust that the public must have in the Board in serious jeopardy. It appears the Board gave him a last chance in 2011, subject to his compliance with certain conditions. The superintendent provided Lynch with a written warning putting him on notice that the Board would not tolerate any repeat incidents involving intoxication and was

advised that further incidents would lead to tenure charges. He has only minimally complied with the conditions putting him back to work in 2012 and his efforts at rehabilitation were pursued primarily while he was under threat of losing his position. Under these circumstances, I decline to order a last chance agreement.

The Board's decision to terminate Lynch is, therefore, upheld.

AWARD

The Board proved Charge 1, paragraph 1, as follows:

On or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, Oakcrest High School, while on school premises, during school hours and in the presence of students, was in a state of intoxication due to his consumption of alcohol, all of the same constituting conduct unbecoming in the workplace.

The Board proved Charge 1, paragraph 3 as follows:

On or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, Oakcrest High School, during school hours and at a time when he was responsible to be on duty in the workplace submitted to a blood alcohol screening test which yielded a result of .111% blood alcohol content, constituting legal intoxication and unbecoming conduct.

The Board failed to prove Charge 1, paragraph 2:

That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, while in the workplace and during school hours and in the presence of students, manifested obvious signs and symptoms of having consumed intoxicating beverages, constituting unbecoming conduct.

That charge is dismissed.

Patrick Lynch's tenure as a teacher with the Greater Egg Harbor Regional School District Trenton School District is revoked and he is terminated immediately.

Susan W Osborn

Susan Wood Osborn
Arbitrator

DATED: January 10, 2017
Trenton, New Jersey

State of New Jersey)
County of Mercer)

On this 10th day of January, 2017 before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Pamela Jean Sutton-Browning

PAMELA JEAN SUTTON-BROWNING
ID # 2424173
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires August 20, 2017