NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Michele Schwab:

WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, NEW JERSEY

"Petitioner,"

- and -

MICHELE SCHWAB

"Respondent."

Agency Docket No. 125-5/16

OPINION AND AWARD

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Ari D. Schneider, Esq.
Busch Law Group, LLC

For the Respondent:
Edward A. Cridge, Esq.
Mellk O'Neill

This arbitration proceeding arises under the terms of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1. It concerns tenure charges filed by the Woodbridge Township Board of Education [the "Petitioner" or "Board"] with the Commissioner of Education on April 29, 2016 seeking the removal of Michele Schwab [the "Respondent" or "Schwab"] from her tenured position as an elementary school teacher. The Petitioner alleges that the Respondent engaged in Unbecoming Conduct and/or Other Just Cause through (1) Theft/Shoplifting (two counts); (2) Failure to Report Arrest; (3) Violations of District Policies; and (4) Pattern of Unbecoming Conduct, Insubordination and/or Other Just Cause over Protracted Period of Time. On May 13, 2016, Respondent filed an Answer seeking dismissal of the tenure charges and her reinstatement with all lawful back pay. The relevant statutory reference for review of tenure dismissal charges is set forth in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10 et seq. Petitioner has the burden to prove, by a preponderance of the evidence, that the tenure charges, including the disciplinary penalty of removal sought, should be sustained. Pursuant to N.J.S.A. 18A:6-16, as amended by PL 2012, Chapter 26, and P.L. 2015, Chapter 109, this controversy and dispute is subject to arbitration and was assigned to this arbitrator on May 26, 2016.

Informal pre-hearing conference calls to discuss hearing procedures including the offering of expert witnesses were held on May 24 and July 25, 2016. Arbitration hearings were conducted on August 20, September 7 and

October 4, 2016. During the course of the arbitration hearings, the parties argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony, in order received, was offered by six witnesses: Glen Geraghty, Asset Protection Manager at Sears, Judith Martino, Principal at Robert Mascenik Elementary School 26, Robert Zega, Ed.D., Superintendent of Schools, Respondent Michele Schwab, Avram Mack, MD and Eric Goldsmith, MD, each an expert witness in psychiatry. Post-hearing briefs were filed by the Petitioner and the Respondent on November 20, 2016. An extension of time to issue an award until January 5, 2017 was granted by the Director of Controversies and Disputes, Department of Education.

BACKGROUND

Michele Schwab was hired by the Woodbridge Township Board of Education in September 2001. She worked as a fourth grade teacher throughout her employment. She was last employed at the Robert Mascenik Elementary School 26. Her Principal was Judith Martino. While employed, her teaching performance was highly satisfactory. Many of her evaluations were submitted into the record and support this conclusion. Petitioner does not contend otherwise. Her more recent evaluations under the TEACHNJ Act scored her as a "Highly Effective Teacher." In addition to her evaluations, she received several commendations, including serving as a recipient of the Governor's Educator of the Year Program.

The events that the Petitioner states gave rise to the filing of tenure charges seeking her removal began on February 7, 2015. On this day, Respondent went to the Woodbridge Center Mall. While there, she entered Sears. Loss Prevention Agents observed Respondent placing a New York Jets hat and hooded sweatshirt from the sales floor into her purse. She was seen entering a fitting room and then exiting the store without paying for the merchandise. After exiting the store, a Loss Prevention Agent stopped her and requested that she return to the store to discuss her possession of merchandise that the store believed she had taken and concealed without making payment. Respondent voluntarily cooperated with this process which included a meeting with store security representatives immediately after the incident to discuss her actions. Glen Geraghty, Asset Protection Manager, detailed the events that occurred during the meeting. When confronted with what had been observed on video at the meeting, Respondent admitted in writing to having engaged in the removal of store merchandise without payment. She acknowledged at this arbitration hearing that she took the items without paying for them. The items taken included pliers that were later used to clip sensors off the items, a New York Jets hat and two New York Jets sweatshirts. One of the sweatshirts remained on the floor and was damaged by the pliers. Sears Asset Protection Manager Glen Geraghty testified that the value of the property was $229.98 and that the store never received payment from Respondent. During the meeting, the store referred the matter to the Woodbridge Township Police Department. An Incident Report was prepared, the Respondent was arrested and a Complaint

was filed in the Woodbridge Township Municipal Court. The Complaint was eventually dismissed in May when the Sears apprehending agent, no longer employed by Sears, did not appear in court to testify against the Respondent.

The Board became aware of Respondent's arrest on March 3, 2015 when Superintendent of Schools Dr. Robert Zega received a letter from Respondent's counsel at that time. Dr. Zega was unaware of Respondent's arrest until he received this letter.[1] The letter stated [P. Ex. C]:

> I represent Michele Schwab in the above captioned matter. She asked me to contact you regarding her inadvertence in not notifying you of this matter. Because of her obvious lack of familiarity with this type of matter, she assumed that as a matter of course I would contact your office regarding her alleged involvement. Having not done so, I ask that you overlook this omission as I should have fully explained the process to her. Please note that we are confident that this matter will be resolved in manner which will be satisfactory to all parties.

Following Dr. Zega's receipt of the letter, he arranged a meeting with the District's Director of Personnel, Joanne Shafer, Ms. Schwab and Union Representative Brian Geoffrey on March 4, 2015. Respondent testified that she was called out of the classroom to attend the meeting. Principal Martino was asked to have Respondent's class covered. According to Dr. Zega, at the

[1] Judith L. Martino, Respondent's Principal at Robert Mascenik School #26, testified to receiving a phone call or a text message from a colleague indicating that Respondent forwarded a text message to the colleague indicating that she wished to harm herself at some point after the arrest. Principal Martino informed the District's Director of Security out of her concern for her welfare. The record does not show the precise date that this occurred, nor is there any evidence that Principal Martino notified Dr. Zega of this prior to his receipt of the March 3, 2015 letter from Respondent's attorney. Respondent testified that she told the colleague that "I wished I was dead" after the meeting with Dr. Zega, Director Shafer and Mr. Geoffrey at which time she was suspended. This testimony establishes that Dr. Zega could not have learned of the arrest prior to

meeting Ms. Schwab admitted that she was arrested for shoplifting, acknowledged that she had done so. According to Dr. Zega, she did not make any mention of any medications she was taking or mental health treatments she had been undergoing. Dr. Zega then suspended Ms. Schwab pending investigation of the shoplifting incident and for not reporting the incident within fourteen (14) days as required by District policy and law. He sent Respondent a letter after the meeting. It stated:

> As I discussed with you and your Association representative, Brian Geoffroy, today, certain allegations have been made against you regarding a serious matter. As a result and as I explained to you, you are hereby suspended with pay from your position as a teacher for the Woodbridge Township School District.
>
> I will recommend to the Woodbridge Township Board of Education at its next public meeting, scheduled for Thursday, March 19, 2015, that your suspension with pay be approved retroactively, effective today, March 4, 2015, and continue pending further action of the Board.

Respondent testified that she returned to her classroom after the meeting, picked up her belongings and went home. She testified that she was distraught and informed a colleague that she "wished I was dead." A substitute was assigned to cover Respondent's class during the period of her suspension. Dr. Zega's investigation confirmed the incident with Sears' Director of Security and he obtained a copy of the police incident report.

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the March 3, 2015 letter due to the fact that Principal Martino's knowledge of the colleague's statement to her occurred after the meeting at which Respondent was suspended.

Dr. Zega decided to lift the suspension and return Ms. Schwab to school in May of 2015 after he learned that the criminal charges against Respondent were dismissed due to the failure of the Sears' apprehending agent to appear in court to testify. He testified that he returned her to class because:

> We were hoping that this was a one-time incident, and we wanted to be compassionate to Ms. Schwab and return her to the classroom.

A similar type of incident to the February 7, 2015 event at Sears occurred on March 5, 2016. While Respondent was visiting a friend on Long Beach Island, she entered Song of the Sea, a store in Beach Haven, New Jersey. While in the store, she picked up a Shell Picture Frame off of a shelf valued at $60, placed it in her purse and left the store without paying for the item. The store owner was unaware of this act at the time. After later discovering that the item was missing, the owner viewed surveillance footage of the store that revealed the item's removal. The video was submitted into evidence. It showed Respondent removing the item from the shelf, concealing it and proceeding down an aisle. In an effort to identify the individual responsible, the owner first posted a picture of Respondent on Facebook. Shortly after, he posted the video footage of the incident on the public pages of Facebook. The post was viewed and reflected 47,000 "hits" including at least one of Respondent's fourth grade students. Principal Martino was informed by a teacher of the post and personally viewed it. Respondent was identified from the pictures and video and was arrested by the Beach Haven Police Department. She was served with a

summons for shoplifting. During the court proceeding on May 2, 2016 and after having discussion with the prosecutor, Respondent made application to enter into the Conditional Dismissal Program pursuant to N.J.S.A. 2C:43-13.1 et. seq. The entry into the program required entering a guilty plea to the charges. Respondent's guilty plea is reflected in a transcript of the court proceeding. She was admitted into the program. The prosecutor requested, and Respondent did not object, to the inclusion of a No Trespass Order as part of the plea wherein she agreed to stay out of the store. The conditional dismissal included that Respondent be on probation for a one year period.

Principal Judy Martino testified that because of the public nature of the Song of the Sea incident, students at the Robert Mascenik Elementary School were upset. She testified to receiving eight calls from parents expressing concern over the incident. She also noted that many teachers have students who attended school in the District. She testified that the entire two fourth grade classes became aware of the video. She assigned the school's guidance counselor to provide lessons to each fourth grade class regarding positive behavior to assist them in distinguishing between rumor and fact.

During the course of the arbitration hearings, a substantial volume of testimony and documentary evidence was received reflecting Respondent's mental health history dating back to the 1990s. There is no evidence that the District was aware of this history. During this time, she received counseling that

resulted in the prescription of several medications. As is evident, Respondent's mental health treatment began well prior to the February 7, 2015 and March 5, 2016 incidents described above and have continued up to the present. There is no suggestion that her mental health history affected her teaching performance in any way. Prescriptions of the medications and changes in those medications are reflected in the exhibits and in the testimony of the two psychiatrists who offered expert testimony. Respondent asserts that the mental health issues and the effects of changing medications were contributing and influencing factors in her conduct at Sears and Song of the Sea. According to Respondent's psychiatric expert, Dr. Avram Mack, the prescription changes were part of the factors that led to her "acting out" when faced with high stress. Dr. Mack opined that she could "do very well provided that she remains in some form of psychiatric treatment that combines medications and psychotherapy." Respondent testified that "I'm doing very well" and "I finally have a doctor who has me on the right medication regimen." These conclusions followed extensive testimony reflecting that Respondent underwent changes in her psychiatrists and medications over the prior years.

Petitioner does not dispute that the Respondent has suffered from mental health conditions, nor the documentary evidence reflecting her history of treatments. However, it contends that these conditions do not serve as a basis for mitigation of penalty. It cites the testimony of its psychiatric expert, Dr. Eric Goldsmith, who concluded that "it's my opinion to a reasonable degree of

psychiatric certainty there is no evidence of a psychiatric condition or psychological problem that would explain the theft incidents." Petitioner contends that relevant case law supports its position that a psychiatric condition does not warrant mitigation of the penalty of removal based upon the Respondent's conduct.

The positions of the parties are extensive and well articulated. Their main arguments will be summarized, including reference to the evidence concerning Respondent's psychiatric diagnosis, treatments and medications.

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Petitioner contends that it has proven that Respondent engaged in unbecoming conduct by committing two separate acts of theft and/or shoplifting, both of which involve conduct that is criminal in nature. While the incidents occurred outside of her normal duties as a teacher, nonetheless, Petitioner contends that Respondent created conditions under which the proper operations of the school were affected. In addition, Petitioner submits that Respondent violated Board Policy and law by failing to report her first arrest on February 7, 2015 to the Superintendent of Schools in timely fashion.

Petitioner submits that it has proven that Respondent committed conduct unbecoming as alleged in Charges I and III based upon Respondent's admissions that she engaged in conduct reflected in the two arrests for her actions on February 7, 2015 at the Woodbridge Mall and on March 5, 2016 at

Song of the Sea in Long Beach Island. Petitioner contends that Respondent's conduct was illegal, inappropriate and had harmful impacts on the school district and a breach of her trust as a teacher. The conduct was publicized on social media and became common knowledge to the students and parents of the District who became aware of the incident and by many who visually observed her theft on video on March 5, 2016. Her conduct, while off duty, is said to undermine Respondent's contention that she remains fit to be retained as an employee despite obvious concerns by the District, the public and parents over her continued presence in the school, her interaction with elementary school students and potential for future inappropriate or illegal conduct. Petitioner submits that Respondent engaged in conduct with disregard for New Jersey law and Board policy and that due to her unbecoming conduct she no longer can serve as a role model to guide the educational and social growth of students in the District.

In respect to Charge II, Petitioner contends that it has proven that the Respondent violated Board Policy 4219.2 and N.J.A.C. 6A:9B-4.1(c) by not reporting her February 7, 2015 arrest to the Superintendent of Schools until March 3, 2015. The Policy states:

> DUTY TO REPORT ARREST
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> Any non-certificated employee who has been arrested and charged with an offense or crime in this State or any other State which would disqualify the employee from public school employment in accordance with N.J.S.A. 18A:6-7.1 et seq. or N.J.S.A. 18A:39-19.1 et seq. (as may be amended) must report his or her arrest and the

> nature of the charges to the superintendent as soon as possible. If the employee is absent from work and unable to report his or her arrest due to circumstances beyond the employee's control, then the employee shall report the arrest as soon as he or she returns to work. Thereafter, the employee may be suspended with or without pay in accordance with the law. Each such employee shall keep the Superintendent apprised of the status of the charges against him or her. Failure to report an arrest and charge in a timely manner and failure to keep the Superintendent apprised of the status of the charges may be the basis for disciplinary action.

Respondent's failure to report the arrest within fourteen (14) days is said to have deprived the Board of an opportunity to review her conduct in a timely manner and determine whether it should have suspended Respondent earlier pending further investigation. Moreover, the Board cites the testimony of Respondent's Principal Judith Martino that she provides Board Policy to all teachers at each annual opening day faculty meeting that includes the obligation of teachers to report arrests within fourteen (14) days. Thus, Petitioner submits that any attempt by the Respondent to defend her failure to provide notice to the Superintendent of Schools because of lack of knowledge to do so is without merit. Petitioner further notes that when Dr. Zega received the letter on March 3, the contents of the letter did not reveal, as required, that Respondent had been arrested, the date of the arrest and the charges that had been brought against her.

The Petitioner asserts, as alleged in Charge IV, that it has proven that Respondent violated Board Policy 4119.22/4219.22, Conduct and Dress by establishing that Respondent's conduct outside of school constituted

unbecoming conduct and affected the proper operation of the school. Petitioner cites relevant portions of this policy:

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

Petitioner points to the Song of the Sea Facebook post that clearly depicted Respondent engaging in illegal conduct and was widely viewed. Petitioner cites Principal Martino's testimony that she was aware that at least one of Respondent's fourth grade students viewed the surveillance footage and that the entire fourth grade had become aware of it. Principal Martino further testified that she received at least eight (8) phone calls from parents who had either heard about the arrest or heard about the Facebook video. According to Principal Martino, some parents expressed concern with how their children would cope in their classroom environment. The Board further contends, as set forth in Charge V, that when each individual act of unbecoming conduct is considered, the totality of Respondent's conduct is sufficient to require dismissal, even if any individual act of unbecoming conduct is not deemed to be egregious enough to require termination. It points out that each individual act was independent of one another

over the course of two school years thus reflecting a pattern of poor judgment and unlawful behavior.

Respondent seeks the dismissal of the tenure charges and her reinstatement to her classroom. Among Respondent's defenses to her conduct is that although she has suffered from serious, chronic mental health issues, her condition did not affect the quality of her job performance and that when she is returned to the classroom she would continue to perform in a highly effective manner. Her mental health issues, in conjunction with changes in her medications, are said to have been contributing factors to her conduct in the two instances that gave rise to the Petitioner's complaints underpinning the tenure charges. The testimony of Respondent, documentary medical evidence and the report and testimony of its psychiatric expert Dr. Avram Mack are asserted by Respondent to find that the penalty of removal in her instance is draconian and must be set aside in favor of her return to the classroom, especially in light of evidence that her current health status has stabilized.

Despite the burden placed on the Petitioner to establish just cause to support the tenure charges it filed against the Respondent, a review of the medical evidence and arguments presented by the Respondent as a defense to her conduct will first be undertaken before reviewing the response of the Petitioner who disputes that the Respondent's medical defenses can properly serve as mitigation to her conduct.

Respondent described her history of mental health treatment. She testified that her OB/GYN initially prescribed Zoloft sometime in the early 1990s. She then engaged a counselor who she saw between 1995 through the 2014-2015 school year. In documents, the counselor described that Respondent was having mood swings and was suffering from depression. Respondent had been taking 75 mg of Zoloft on a daily basis. However, towards the end of 2014, Respondent testified that she felt this medication was no longer working for her. She also testified that she was upset and stressed with her finances. Because of this, she began to reduce her intake of Zoloft towards the end of 2014 for the purpose of "weaning" off the medication.[2] She sought the help of her counselor to make an appointment with a psychiatrist. She testified that she had difficulty finding a psychiatrist who would treat her in timely fashion. Because of this, her counselor suggested that Respondent see her personal physician. She then made an appointment with her personal physician who prescribed Lorazepam and Paxil medications.

According to Respondent, her mental health issues described above in conjunction with the changing medications contributed to the events that occurred on February 7, 2015 and March 5, 2016. She based her testimony on the opinion of psychiatric expert Avram Mack, who evaluated her mental health

[2] It is not clear whether this effort was her own or with the aid of her counselor or a physician.

status and her prior medical history for the purpose of his presentation at this hearing. Respondent does not deny the events that occurred at Sears on February 7, 2015 that led to her arrest for shoplifting. She described that she was "in a fog that day" and believes that having come off the prescription medication Lorazepam and being placed on Paxil contributed to her lack of clear thinking. Once arrested, she described herself as being distraught. She was taken to Raritan Bay Crisis Center where she underwent an evaluation. She then began to be treated by a new psychiatrist who she continued to see along with her long-term counselor. She later stopped seeing the counselor toward the end of July 2015. Her psychiatrist had prescribed new medications: Effexor, Remeron and Abilify. The dosage for Effexor at this time was 225 mgs. Respondent testified that she was not pleased with the treatment she was receiving from this psychiatrist. In February 2016, the psychiatrist reduced the Effexor dosage to 150 mgs. During this approximate time period, Respondent testified that she underwent additional stress when her son failed to pass a psychological examination to become a probation officer.

Respondent offered additional testimony concerning her mental condition at the time that the March 5, 2016 incident occurred in Beach Haven, New Jersey. Respondent removed a picture frame from a store, concealed the item and left the store without paying for the item. Video tape footage confirmed her actions, she was identified and, after being arrested, she admitted to her conduct and plead guilty as required by her entry into the conditional dismissal program.

In her testimony, Respondent indicated that she was undergoing increasing stress at the time because of her son's inability to secure the probation officer position. She also believed that the changes to the Effexor medication contributed to her conduct. She entered a treatment facility at Summit Oaks after her arrest. After completion of the treatment, Respondent received outpatient treatment at the High Focus Center in Cranford, New Jersey. The outpatient treatment consisted of five hours per day, five days a week. After completion of treatment she secured a new treating psychiatrist. Respondent testified that she is happy with her treatment, that she has been given a proper medication regimen and is doing very well.

Respondent offers expert the testimony of psychiatric expert Avram Mack, M.D. who described her condition as having been stabilized. He offered the opinion that Respondent's actions were influenced by her mental health conditions and the effects of changing medications. Dr. Mack identified Respondent as having "a depressive disorder not otherwise specified." He expressed the opinion that her conduct during the two events:

> "represented her 'acting out' in the context of the combination of mood problems, recent stressors, insufficient medication therapy, and possibly the agitating effects of psychiatric medications. It is my opinion that Ms. Schwab's prohibited acting out behavior was influenced by many vulnerabilities is not the same as asserting that she was "insane" or "not criminally responsible." It is to say, rather, that among the factors affecting her, the behaviors occurred in a manner that is a recognized health phenomenon. It is important to note that this state of mind has been recognized by her current psychotherapist and by the patient and remains an area that she recognizes needs to be prevented in the future."

Dr. Mack also opined that Respondent's exposure to various medications, changes in those medications as well as changes in dosages, influenced her behavior. He believed that she suffered from "discontinuation syndrome." That is, the likelihood that a reduction or termination of medications that can lead to a variety of symptoms. His observations on this point included Respondent's cessation of sertraline (Zoloft) in December 2014 as a contributing factor in the February 7, 2015 incident because she no longer had exposure to this medication that had previously provided her with stability.

Dr. Mack identified Respondent as being caught in a "constellation" that influenced her actions such as having a disordered mood, as suffering from real time stressors, as having poor coping skills and being affected by a fluctuation in medications. He described her actions as a form of maladaptive coping as influenced by her psychiatric issues. He explained that the effects of maladaptive coping on her behavior did not require Respondent to be in the throes of a major depressive episode or to be disabled during the time of her actions. Dr. Mack offered his opinion on Respondent's prognosis:

> I think that Ms. Schwab can do very well provided that she remains in some form of psychiatric treatment that combines medications and psychotherapy.

Respondent also urges that her psychiatric expert's opinions were more credible than Petitioner's psychiatric expert, Eric Goldsmith, M.D. Respondent, citing to record testimony, explains the basis for this conclusion:

> Dr. Goldsmith diagnosed Ms. Schwab with a major depressive disorder, and concluded that: "[Ms. Schwab's] state of mind during the shoplifting episodes appears most consistent with her usual and typical inter-episode depression and not an outcome from an acute major depressive episode" **(P-X, p.16).** Dr. Goldsmith found that Ms. Schwab has long-standing difficulties in coping with stress, and that is irrespective of whether or not she was in the middle of a major depressive disorder. **Goldsmith:T:43:7-11.** Despite this diagnosis, Dr. Goldsmith concluded that there was no connection between Ms. Schwab's mental health conditions and her behavior. **Goldsmith:T:22:14-17**.
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> Dr. Goldsmith's determination in this regard is unsound, for several reasons. First, Dr. Goldstein acknowledged that the psychological issues experienced by Ms. Schwab could have an affect on a person's behavior. Specifically, he acknowledged that depressed mood, anger, loneliness and feelings of inadequacy—symptoms he attributed to Ms. Schwab—can all affect behavior. **Goldsmith:T:54:20-56:3**.
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> Second, Dr. Goldstein acknowledged that a person might suffer, discontinuation symptoms as the result of a reduction in a Zoloft or Effexor prescription. **Goldsmith:T:33:2-16**. As the result of discontinuation syndrome, a person may experience a change in mood. A person who suffers from depression can experience an increase in depression. A person who suffers from anxiety can suffer an increased in anxiety during a discontinuation syndrome. He also testified that Effexor is a short acting medication, and that was one of the reasons that it is associated with discontinuation symptoms. **Goldsmith:T:53:20-24**. Despite all of these factors, Dr. Goldsmith believed that it was just a "coincidence" that Ms. Schwab, an otherwise upstanding person and superlative teacher, had engaged in her 2 instances of aberrant behavior both shortly after discontinuing those medications. **Goldsmith:T:54:1-13**.
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> Third, Dr. Goldsmith's conclusions were based on a number of incorrect assumptions. Dr. Goldsmith opined that:

> There is no evidence documented in the medical records of Christine Milne or Carmencita Lanez, M.D. of discontinuation symptoms or adverse side effects from the prescribed psychotropic medications that could account for a change in the mental status proximal to the two incidents of shoplifting. There is no documentation in the medical records of severe anxiety, mood changes, psychotic symptoms or dissociation related to the prescribed medications.

Exhibit P-X, p. 15. He also opined that "[in the months leading up to the second shoplifting event, Ms. Schwab was in good spirits." **Exhibit P-X, p.16.** Dr. Goldsmith's opinion that Ms. Schwab did not suffer from a discontinuation syndrome in connection with the reduction of her Zoloft and Effexor prescriptions was based upon the records of Ms. Milne and Dr. Lanez. **Goldsmith:T:44:25-48:2**. Since Ms. Schwab stopped seeing Ms. Milne in July 2015, however, Ms. Mime's records obviously would not document Ms. Schwab's mood at that time. Dr. Goldsmith overlooked the fact that Ms. Milne did, in fact, document mood swings during the time that Ms. Schwab was weaning off of Zoloft. **Goldsmith:T:44:25-48:2.** Likewise, Ms. Schwab did not see Dr. Lanez between the date in February 2016 when her Effexor was reduced, and March 5, 2016, when she took the picture frame in Beach Haven. This explains why her records did not document Ms. Schwab's mood changes during that crucial time period. Under cross examination, Dr. Goldsmith also admitted that Ms. Schwab did not tell him that she was in good spirits during February 2016, despite the fact that he relied on this assumption, in reaching the conclusions set forth in his report. **Goldsmith:T:59:11-60:8**. For all these reasons, Dr. Goldsmith's critical conclusions about Ms. Schwab's mindset during the relevant time periods are unsound.

Finally, though Dr. Goldsmith also opined that there was "no evidence" that Ms. Schwab needed a "more aggressive psychopharmacologic intervention" before her arrest in Beach Haven, he acknowledged that when she was admitted to Summit Oaks, her Effexor level was restored to the 225mg level that it had been at before it was reduced by Dr. Lanez. **Goldsmith:T:60:9-61:5.**

Petitioner disagrees with Respondent's psychiatric expert. It urges that the findings and opinions of Respondent's expert witness of Avram Mack, M.D.

be dismissed in favor of its own expert witness, Eric Goldsmith, M.D. Petitioner contends that Dr. Mack was unable to make an individual diagnosis of the Respondent, did not perform a clinical inventory of the Respondent, had never performed as a qualified expert in the past to opine whether illegal conduct was the result of a reduction in medication or a psychiatric condition, that he erred in concluding that Respondent had a "history" of acting out when faced with high stress based on his acknowledgement that the history he referred to was limited to a single reference to suicidal thoughts Respondent had in 2008, that his attempt to link Respondent's behavior to Respondent's medications was speculative without a reasonable degree of medical certainty, that Respondent continues to have the same stressors in her life that existed at the time she committed the two acts of shoplifting, and that Dr. Mack acknowledged that future "acting out" could reoccur and potentially result in conduct more severe than shoplifting including potentially violent behavior.

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation ... 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 ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The burden is on the District to establish that it met this standard. My review of the evidence requires a finding as to whether Respondent engaged in the conduct she is charged with; if so, whether disciplinary action was warranted;

if so, whether the penalty of removal was consistent with the nature of the conduct; and, if so, whether there were mitigating circumstances requiring a lesser penalty than removal.

Respondent does not dispute that she engaged in inappropriate conduct on two occasions, one on February 7, 2015 and the other on March 5, 2016. On both occasions, she was arrested for shoplifting. In both instances, Respondent admitted to the conduct that gave rise to both arrests. The first charge was dismissed when the Sears apprehending agent did not appear in court as a prosecution witness. The second charge was resolved by way of the conditional dismissal program. N.J.S.A. 2C:43-13.1 et. seq. The Respondent entered a guilty plea as a prerequisite to enter the program and remains on probation. Based upon the testimony, the exhibits and Respondent's admissions during this arbitration hearing in these two cases, Petitioner has established that the Respondent engaged in the conduct it has alleged. Petitioner has also established that the conduct of Respondent rose to the level of conduct unbecoming a teacher and conduct that authorized discipline under its disciplinary policy. The conduct was outside of normal duties but had adverse impact on students and affected the proper operation of the schools. Upon learning of her arrest on March 3, 2015, Dr. Zega met with Respondent, confirmed her arrest, received her acknowledgement of her conduct and suspended her pending further investigation. This required the use of a substitute teacher in the fourth grade classroom until Dr. Zega reinstated her to

her class sometime in May. Respondent's arrest and acknowledgment of her conduct, even without a criminal conviction, is sufficient basis to find a violation of her job description that requires a teacher to "behave in accordance with the law and exhibit high standards of professional ethical behavior." Any doubt as to this conclusion is resolved by Respondent's second act of removing a store's item by concealment and without payment only one year later. At that time, she was arrested, entered into a guilty plea of the charges against her, is barred from entering the store and remains on a one year probation. Her arrest prompted events that caused the District to cover her class for the remainder of the semester and to counsel all of the fourth grade students who became aware of Respondent's arrest due mainly to the publicity surrounding the store's posting of the surveillance tape. The extent to which the video was observed cannot be determined, but the record clearly supports the conclusion that it was either seen or its contents described by faculty, parents and students who became aware that a District teacher had committed an unlawful act of dishonesty.

Respondent also failed to inform the Superintendent of Schools of her February 7, 2015 arrest until March 3, 2015. This arrest violated District policy and N.J.A.C. 6A:9B-4.1(c) when she, through counsel, did not report her arrest in a timely fashion. Moreover, the letter of notice sent by prior counsel, did not, as required by law, that there had been an arrest or the charges that had been lodged against Respondent. While an argument could be made that the inclusion of this violation in the tenure charges was not timely given the lapse of

one year, I do not find Petitioner to have waived its ability to file this charge given Respondent's repetition of conduct that led to her second arrest.

Based upon the above, Petitioner has met its burden to establish that the Respondent engaged in the conduct alleged and that it had just cause to discipline Respondent. The next issue to be decided is whether Petitioner has established that Respondent's conduct warranted dismissal from her tenured position. Respondent urges that even if it is found that Petitioner has established a basis for disciplinary action, the penalty of removal is not warranted in this instance for many reasons. They include 1) the District's failure to impose progressive discipline; 2) the Respondent was subject to double jeopardy; 3) that other removal cases in the State of New Jersey in the past have not been sustained even where significant misconduct has been proven; 4) that removal from tenure has not been sustained in certain cases even where a teacher has engaged in conduct unrelated to employment; 5) that the opinion of Respondent's psychiatric expert has established that her behavior was influenced by her exposure to changing medications and stressors leading to her "acting out" in the two instances, that Respondent "can do very well provided that she remains in some form of psychiatric treatment that combines medication and therapy"; and 6) that her past performance and recognition as a highly effective teacher remains unaltered despite her mental health conditions and that she will continue to be a highly effective teacher if given the opportunity to return to her class.

Notwithstanding the forceful presentations by Respondent, I conclude that Petitioner has met its burden to establish just cause for the penalty of removal. The proven conduct of Respondent was serious. It led to her arrest and criminal charges in two instances. The conduct is not in dispute. It reflected two instances of dishonesty by a fourth grade public teacher. The public visual evidence of her second act committed on March 5, 2016 depicted a clear image of her breach of trust as a public school elementary teacher. This repeated act of dishonesty within a thirteen (13) month period allowed the District to exercise its discretion to remove Respondent from her tenured position. District policy provides for the penalty of dismissal "when appropriate." This requires the District to exercise its judgment in accordance with just cause principles. A penalty short of removal was within the discretion of the District but I cannot find that it abused its discretion by not doing so.

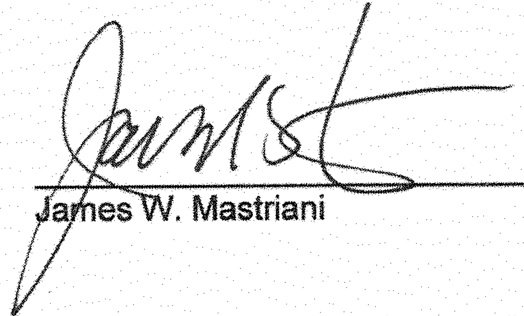
The proven repetitive conduct did not require a penalty short of removal. Although the District did not impose discipline after her arrest at Sears, its failure to do so did not waive its ability to consider her admitted conduct in that instance after a repetition of conduct that she acknowledged to be unlawful. To the extent that it is suggested that the District's reinstatement of Respondent for the first offense created a condition for Respondent to assume that a second similar offense would not be considered egregious, such inference is without merit given the unlawful nature of her conduct. Both parties have submitted a volume of

arbitration cases in support of their respective positions. Prior decisions on either side of the proposition must give way to the facts of the case at hand. None reflect repetitive acts of dishonesty within a thirteen month period. I also conclude that the evidence concerning Respondent's mental health history cannot serve to mitigate against the District's decision to impose the penalty of removal. Respondent's expert, despite acknowledging Respondent's progress in her medical condition, acknowledged that his judgment did not reflect that Respondent's conduct was not unintentional nor that the stressors in her life that gave rise to her "acting out" were no longer present.

Based upon all of the above, I enter the following Award.

AWARD

The Woodbridge Township Board of Education had just cause to dismiss Michele Schwab from employment.

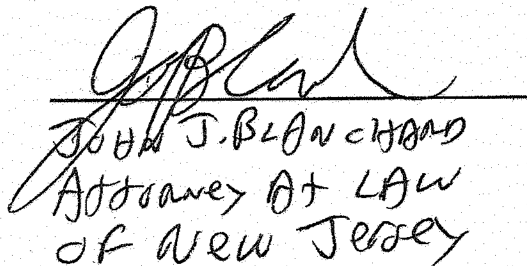


Dated: January 5, 2017
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 5th day of January, 2017, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.



John J. Blanchard
Attorney At Law
of New Jersey