

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against
Donna DeMarco

WAYNE BOARD OF EDUCATION,
-PASSAIC COUNTY

320-12/16

Petitioner

Opinion
and
Award

- and -

DONNA DEMARCO

Respondent

Before: Deborah M. Gaines, Arbitrator

APPEARANCES:

FOR THE PETITIONER:

FOR THE RESPONDENT:
SPRINGSTEAD & MAURICE, ESQS.

Pursuant to NJSA 18A:6-16, as amended by P.L. 2012, c.26 and P.L. 2015, c. 109("TEACHNJ"), the tenure charges brought by the Wayne Board of Education ("the District" or "Petitioner") against Donna DeMarco ("DeMarco" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and Decision on January 13, 2016. I conducted hearings at the District's Offices in Wayne New Jersey, New Jersey on March 3, May 10, June 5, July 27 and August 24, 2017. The parties

received extension of time to conduct and complete the hearings based upon the need for records from the state and scheduling issues.

At the hearing, the parties had full and fair opportunity to examine and cross-examine witnesses, introduce documentary evidence and make argument in support of their respective positions. The hearings were transcribed. The parties submitted written closing statements whereupon the record was closed.

THE CHARGES

Respondent is charged with Conduct Unbecoming and Other Just Cause as described in 53 paragraphs in the Board's Statement of Tenure Charges.¹ The substance of these charges alleges: 1) Respondent improperly confined at least one student to a bathroom as a means of punishment and/or behavioral control; 2) Respondent referred to her students as "little assholes" and/or "little douchebags" to other faculty; and 3) Respondent's actions caused publicity that brought the District into disrepute. The undersigned has summarized the charges as they were not written in the form of charges with

¹ The paragraphs are not actual specifications, but rather recount all the steps the District took in bringing charges against Respondent.

specifications. The charges are attached to the decision as Attachment "A".

BACKGROUND

Respondent is a tenured pre-school teacher who, most recently, was assigned to Packanack Elementary School. The instant case arises out of allegations of misconduct during the 2015-2016 school year at which time Respondent was responsible for a pre-school class comprised of approximately 16 students, half of whom were special education students or fell on the autism spectrum. Respondent was assisted in the classroom by two paraprofessionals, Kathy Frega and Margaret Hickey.

Respondent's classroom at Packanack was a very large space with an alcove in which a student bathroom was located. The bathroom contained only a toilet and metal shelves. The walls were tiled. The bathroom was a narrow space with a heavy door that opened inward. The sink was located outside the bathroom.

On June 7, 2016, Principal Roger Rogalin received an email from case worker Cynthia Carey requesting a meeting to discuss an issue of concern. Carey told Rogalin that teacher Michelle Littman reported to her that Respondent bragged in the teachers' room she locks students in the bathroom to calm them down. At the direction of the Superintendent, Rogalin began an investigation into the allegation. He conducted interviews on

June 8 and 10, 2017 and again June 22, 2016. These interviews were summarized in a memorandum [Employer Exhibits 1 and 2.]

According to Rogalin, Respondent denied confining students to a bathroom, and the information received during the interviews from Littman was that Respondent held the door closed until she felt the student was ready to come out. Occupational therapist Ali Leszkowicz reported that Paraprofessional Hickey commented to her one day when she asked why a student was upset, "wouldn't you be upset if you were locked in the bathroom?"

Rogalin testified Carey initially called the Division of Child Protection and Permanency (DCPP), Institutional Abuse Investigation Unit (IAIU), but was told the situation did not warrant an investigation. However, on June 22, 2013, paraprofessional Frega acknowledged Respondent had placed a student in the bathroom a few times over the course of the school year when the children were out of control.

Based on the more specific information, the school re-contacted IAIU. Senior Investigator Irek Taflinski testified he was assigned to investigate. He stated his investigation included a site inspection, as well as interviews with related staff and the students and parents.

Taflinski testified he determined the case of abuse was unfounded, which he noted is a term of art. However, he testified the finding did not mean the student was not placed in

harm. Although Respondent denied placing RG in the bathroom, he determined the Respondent placed RG in the bathroom when he was upset. He found this to be potentially harmful because the child could have put himself "in danger and hurt himself." [Transcript II, p. 145] He believed this was a form of punishment and violated the school's disciplinary code.

Rogalin testified the school placed Respondent on an administrative leave on June 8, 2016. He noted that at that time, the investigation also uncovered allegations Respondent had referred to students in a derogatory manner, using terms such as "little assholes", "little douchebags" and specifically referring to a student with a dirty diaper as "Stinky Pete."

Michelle Littman testified at the hearing and confirmed she reported to Carey a remark made by Respondent regarding her placing kids in the bathroom when they act out. She testified she heard Respondent make a similar statement earlier in the year, but assumed she must have been joking. When she heard it again, she found it disturbing and believed it was unethical. Littman confirmed she also hear Respondent refer to students as little assholes.

Occupational Therapist Ali Lescowicz, Speech Therapist Dana Tengi testified and confirmed the statements they provided to Principal Rogalin and State Investigator Taflinski.

Paraprofessional Kathy Frega also testified. She admitted Respondent had placed RG in the bathroom for 3-5 minutes at a time when he was very disruptive in the classroom.² Frega testified the child was approximately four years old and was often disruptive. She testified RG had thrown himself on the floor on one occasion in April or May 2016. She noted he was pushing his backpack into other students as well.

Frega testified RG consistently had behavioral issues. She noted they would normally ignore him, speak to him, call the principal or child study team if he was too disruptive. On this day, she testified, there was no response from the CST. She testified Respondent asked RG to stand up and moved him by the hand toward the bathroom. She testified the student was crying, but did not bang on the door of the bathroom. She noted Respondent left the bathroom area and went back to the other students. Frega testified RG came out of the bathroom and stopped crying. Frega testified she did not tell anyone and did not believe it was necessary.

Frega testified Respondent gave students pet names. She had heard Respondent call a student "Stinky Pete."

Superintendent Toback testified as to the impact of the Respondent's actions within the District. He confirmed he

² Frega initially denied the allegations when she was first interviewed by Rogalin.

oversaw the investigation and made the decision to place Respondent on administrative leave. He testified in late June numerous news outlets picked up the story after the investigation interviewed parents. He testified he received many calls and communications from outraged parents about Respondent.

As to the decision to terminate Respondent, he noted the investigation raised many concerns. He testified Respondent described her students as assholes and/or douchebags and locked students in bathrooms. Toback testified Respondent's conduct violated numerous District policies. He noted the District implemented a specific Behavior Management System entitled "Handle with Care" [Employer Exhibit 19] which prohibits confinement and requires reporting and review of such incidents.

Respondent, Donna DeMarco testified. She noted she has consistently received above average ratings. Respondent testified she helped develop the "Little Learners Program" in the District. It was the first inclusion classroom for students with IEPs and allowed the District the opportunity to educate these students with general education students.

Respondent testified she is familiar with the behavioral programs and techniques employed by the District. She noted safety is the primary concern. She testified some of the behavioral techniques she employs involve positive

reinforcement, such as giving students stars for behavior, small parties for the class, and other positive reinforcing behaviors. She noted there is a Child Study Team (CST) and a consulting behaviorist for support.

Respondent acknowledged using the bathroom as a de-escalation technique for two students during the 2015-2016 school year. She testified one student, KJ was in her class from September until January. She testified he was removed because he needed a more structured environment. She testified on one occasion, he got very agitated because other students were looking at him. She told him to relax and that he can use the bathroom and then wash his hands. Respondent testified the door was always kept open so that paraprofessional Kathy Frega could observe.

Respondent testified she also used the technique for student RG. She testified she recalled one day because RG was very distressed after transitioning from the cafeteria. She testified he was crying and throwing himself to the ground near the cubbies. She testified she initially used "I" statements with him and directed him to the bathroom, told him to use the bathroom and wash his hands after which she would then put lotion on his hands. Respondent testified she left the door open two to three inches so that Frega could watch him. She testified she then went back to the other students.

According to Respondent, she was never told not to use such a technique, although she acknowledged she never specifically discussed it with anyone.

Respondent acknowledged referring to her students on occasion as little assholes or douchebags. She testified she did so out of frustration to other staff members. She apologized for this behavior and testified upon reflection she realized it was wrong.

However, while she acknowledged calling a student Stinky Pete, she testified that is was not a derogatory term. Rather, she testified all her students were given nicknames derived from the movie Toy Story. She testified Stinky Pete is an old prospector in this movie. She did not believe any student took offense. Rather, they enjoyed the names.

Positions of the Parties

Position of the Board

The Board argues it has demonstrated just cause for discharge. It maintains the credible evidence proves Respondent confined at least two students to the bathroom as a form of discipline or punishment. It argues her conduct violates the Board's policies regarding restraint, corporal punishment, and professional conduct.

It contends Respondent's assertion that she used the bathroom as a de-escalation technique is belied by the evidence

in this case. It cites Cathy Frega's testimony that Respondent closed the door on students KW and RG when she placed them in the bathroom. The evidence showed the door stuck on the bathroom and was difficult to open. Moreover, it notes Respondent bragged about her actions to colleagues that she locked kids in the bathroom until they calmed down.

Moreover, it maintains Respondent's failure to report her placement of the student in the bathroom belies her contention. It notes the "Handle with Care" program requires reporting of such a technique, and given that she claims the student was acting out in such a disruptive way, it would have been incumbent upon her to do so.

The District notes its expert witness, DiCesare, testified credibly that his review of the interviews in this case that Respondent's conduct violated school policies on professional conduct, and Restraint. It notes he found her conduct to have posed a risk to the students involved. Likewise, it argues the IAUA investigation also found Respondent's actions placed the students in harm.

Likewise, the District argues Respondent's use of derogatory language toward students - such as little assholes and douchebags constitutes unprofessional conduct also subjecting her to discipline. It cites many cases in support of its position.

Finally, the District maintains Respondent's misconduct is a separate ground for discharge as it diminished the public trust of the school system. It cites the numerous news stories regarding Respondent and the outcry from parents in the District.

Position of Respondent

Respondent maintains the District has failed to demonstrate grounds for discharge. It maintains first, the IAIU report specifically provided abuse was "Not Established." It argues this report was investigative and not adjudicative. It notes other arbitrators have found such reports do not establish harm occurred.

Respondent argues the District prematurely concluded Respondent committed misconduct and, thereby pre-determined the outcome of the investigation. It notes Investigator Taflinski's testimony that he was told by Principal Rogolin advised the teacher was suspended and the Superintendent did not want her to return to school the following year.

Respondent argues the District was aware the door to the bathroom stuck and clearly did not believe it constituted a risk since it failed to repair it prior to the instant case. It further argues that any alleged danger posed by any of the clutter seen in pictures of the bathroom was also known to the District.

Respondent maintains her use of the bathroom as part of a de-escalation technique is an appropriate behavioral strategy. It cites its behavioral expert Dr. Spano, who testified that given there was no behavioral plan in place for the students, the decision to use the bathroom for a "time out" was an appropriate strategy.

Respondent maintains the record does not demonstrate the students were harmed in any way. Rather, it asserts, the record evidence demonstrates Respondent was an effective teacher and well-liked by parents.

Moreover, Respondent argues the administration was on notice that she used the bathroom on occasion as a de-escalation technique. She testified prior Vice Principal Cathy Gaynor was aware of an incident with student KJ, where she asked him if he wanted to use the bathroom to calm down. Respondent argues no member of the administration ever told her such a technique violated any policy.

Respondent admits using improper language toward students in the teacher staffroom as a means of venting. It notes Rogalin heard her on one occasion and did not reprimand her. However, Respondent acknowledges it was improper.

Respondent argues the evidence fails to establish she called a student "Stinky Pete" because he wore a dirty diaper. Rather, Respondent contends Stinky Pete was one of many

nicknames given to the students based on the characters in the animated movie, Toy Story.

Respondent contends Michelle Littman reported her out of animus because she was going to be transferred the following school year and believed Respondent should have been the teacher selected.

Respondent argues that, to the extent any misconduct is found, termination is too harsh a penalty. Respondent argues her long history of exemplary service must be considered. In addition to numerous prior arbitration decisions, Respondent maintains application of the Fulcomer standard also warrants a lesser penalty. Respondent notes the court in Fulcomer requires certain factors to be considered, such as the impact on the charged teachers career, the longevity of the teacher, the teachers record, prior disciplinary and the gravity of the offense. It maintains examination of these factors warrants a lesser penalty.

Decision

After carefully considering the entire record before me, including my assessment of witnesses' credibility and the probative value of evidence, I find the Board has met its burden under the statute to sustain the charges of Conduct Unbecoming and Other Just Cause for termination. My reasons follow.

The credible record evidence establishes Respondent improperly confined students in the bathroom during the 2015-2016 school year. Respondent acknowledged placing students KW and RG in the bathroom on separate occasions. While she asserts she did so to de-escalate their emotional and potentially dangerous behavior, the credible record evidence establishes her actions violated District policy and placed the students in potentially harmful situations.

District Policy 5561 specifically prohibits the use of restraint against a child for the purpose of punishment. Likewise, the school's corporal punishment policy also prohibits such conduct. All the school's policies provide that confinement can constitute such restraint. Based upon my own inspection of the classroom and bathroom at issue, I find the students were confined when placed in the bathroom.

The bathroom within Respondent's classroom is small and narrow. It has a large heavy door that opens inward close to the toiler. Moreover, the credible evidence establishes the door was prone to sticking at the time. Given that the students were four years old, and the heavy door had to be pulled, placement in the bathroom (even without a lock) constitutes confinement since the student could not easily leave the room.

More importantly, Respondent's testimony established she left the students unsupervised when placing them in the

bathroom. Regardless of whether the door was opened two inches or fully closed, as described by Frega, the students were unsupervised when inside. Frega was nowhere near the students and there is no evidence Respondent charged Frega with overseeing them. In fact, Frega testified the bathroom door was closed when RG was in the bathroom.

The potential for harm to the students was substantial. The students in question had behavioral issues according to Respondent and paraprofessional Frega. The record evidence shows they were emotionally distressed when put into the bathroom. The students could have hit their heads on the toilet, gotten their hands caught in the door or any number of foreseeable problems could have arisen with children of such a young age confined to that space.

To the extent that placement in the bathroom could ever be deemed an acceptable de-escalation technique, as described by Specialist Spano, I do not find those conditions to have existed in the instant matter. Spano described its use where the students were closely supervised, which was not the case here.

Moreover, Respondent's failure to report any of the incidents discredits her assertion that the students were placing others in a dangerous situation. The District's behavioral plan requires a teacher to report the situation to administration and if the technique is used more than once to

undergo a review. Respondent testified she reported issues to the Child Study Team, but never reported the use of the bathroom on any of these occasions.

In fact, Respondent told other teachers she locked kids in the bathroom until they behaved, which demonstrates this one occasion was not so unusual. I credit Littman's testimony that she heard Respondent mention this more than once.

That the misconduct had an impact is demonstrated by the fact that student RG remembered being put in the bathroom the following school year and reported it to his teacher in October 2016 at his new school.

As to the charges relating to derogatory language, Respondent admits to using inappropriate language to describe her students to other teachers. The evidence does not establish the language was used in front of students.

However, I find insufficient record evidence to find she called a student "Stinky Pete" because he was wearing a dirty diaper. I credit Respondent's explanation she gave students nicknames. Moreover, the record evidence does not indicate the student was offended.

Finally, while I find the negative publicity that resulted from the investigations impacted the school, I find the District has shared culpability in this matter. The news stories indicate that parents were upset because the school had not

informed them about the investigation and they did not learn until the state investigator called. It would appear had the District notified parents of an investigation involving their children, the response from parents may have been very different.

Having found Respondent guilty of misconduct, I turn to the issue of penalty. Respondent's improper confinement of special education students to a bathroom is serious misconduct. Foremost in a teacher's responsibility is the need to protect and safeguard their students. This is especially true of special education students who are particularly vulnerable. Respondent on more than one occasion placed the students in potentially harmful situation. The students were unsupervised, while emotionally distraught, in a tiny room with the potential to bump their head become more distraught.

Respondent had numerous alternatives to her course of action. Even if the CST had not responded immediately, she could have moved the child to a chair in another part of the classroom away from other students or gone to the administration for help. Her lack of judgement is a clear instance of unprofessional conduct.

While Respondent's derogatory language in the teacher's room alone would, most likely, not subject her to termination, under these circumstances, I find her conduct is demonstrative

of a lack of empathy for her students which contributes to the determination she should not be returned to the classroom.

In reaching this determination, I have considered Respondent's lack of a prior disciplinary history. However, given the severity of her misconduct, the potential harm to her students and the inability of the District to place its trust in her stewardship, I find termination to be the appropriate penalty.

AWARD

The charges of conduct unbecoming and other just cause are substantiated. The District has demonstrated just cause for termination.

Deborah Gaines

Dated: November 20, 2017 _____

Deborah Gaines, Arbitrator

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

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

Date: November 20, 2017

Debal Gans
