STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES
TENURE HEARING

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In the Matter of the Arbitration Between:

SCHOOL DISTRICT OF THE CITY OF ORANGE)

CLAIMANT)

AND)

ROBYN HOLMES)

RESPONDENT)

MOTION

TO

DISMISS

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DOE # 102-5/17

ARBITRATOR: GERARD G. RESTAINO, ASSIGNED BY THE NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH C.18A:6-17.1

APPEARANCES:

FOR THE CLAIMANT
JESSIKA KLEEN, ESQ. — COUNSEL FOR CLAIMANT
JANELLE WINTERS, ESQ. — COUNSEL FOR CLAIMANT

FOR THE RESPONDENT
RONALD RICCI, ESQ. — COUNSEL FOR RESPONDENT
ROBYN HOLMES — RESPONDENT

PROCEDURAL BACKGROUND

Robyn Holmes, hereinafter referred to as the Respondent, is a tenured special education teacher employed as the Preschool Disabled teacher for Park Avenue School during the 2016-2017 school year. She has taught for twenty-six (26) years with an exemplary record.

On February 6, 2017, Assistant Principal, Ms. Devonii Reid, was notified by a paraprofessional that the Respondent had placed K.T.C , a non-verbal autistic student, under her desk. Ms. Reid entered the Respondent's classroom to assess the complaint and did in fact find K.T.C sitting underneath the Respondent's desk. At the end of the day on February 6, 2017, a meeting ensued with Ms. Reid, the Respondent and two (2) paraprofessionals.

Ms. Reid explained that the Respondent's action was inappropriate and reminded the paraprofessionals of their shared obligation to report inappropriate behavior that may lead to harm to students. Following that meeting Ms. Reid notified Dr. Paul Howard, Deputy Superintendent of Schools and Ms. Shelly Harper, Director of Special Services.

On February 8, 2017, a meeting was held with the Respondent, her Union Representative (not identified as NJEA or a local representative), Ms. Harper and Ms. Belinda Smiley, Human Resources Administrator. At that meeting Dr. Howard informed the Respondent that the Division of Child Protection and Permanency (CPP) was informed of the incident and has decided to conduct an investigation. Moreover, the Respondent was being reassigned to a position without student contact.

On February 10, 2017, Ms. Smiley submitted a summary of the February 8, 2017, meeting to the Respondent with copies to Dr. Howard, Ms. Harper, Dr. Myron Hackett, Principal of Park Avenue School, and Ms. Linda Siddiq , President of the Orange Education Association.

In that document Ms. Smiley indicated that the matter had also been referred to the Orange Police Department and that the District was awaiting the results of the CPP investigation. The Respondent was also informed that she is not allowed on the Park Avenue School premises and that she is not to contact staff, students or parents regarding this matter or for any other reason.

On February 14, 2017, Ms. Reid submitted a letter to the Respondent titled "Inappropriate Staff Conduct/Use of Corporal Punishment." In that letter Ms. Reid states in part that *"this letter serves as a written reprimand for your inappropriate behavior and failure to exercise the professional judgment of an Orange Public School employee."* Ms. Reid also stated that *"this reprimand is based upon my observation of the incident, discussion with each adult in the classroom and your acknowledgment of the acts described in the reprimand."*

Furthermore, Ms. Reid referenced what she had observed, and the actions of the Respondent were in violation of Board Policy 3281, Inappropriate Staff Conduct and Policy 3217, Use of Corporal Punishment. Ms. Reid also stated that a teaching staff member who is in direct violation of Policy 3217 *"will be subject to discipline by this Board and may be dismissed."*

Ms. Reid concluded by stating *"This letter should serve to underscore the importance of complying with Orange Public School policies, rules and regulations. I*

must inform you that further disciplinary action may occur potentially resulting in dismissal."

The Respondent signed that letter and acknowledged the following statement: *I acknowledge that I have received this written reprimand. I understand that my signature below does not imply agreement with this reprimand."*

On May 25, 2017, the District filed tenure charges against the Respondent charging her with Conduct Unbecoming, violation of Policies 3211, 3217 and 3281 based upon the February 6, 2017, incident. The second charge filed against the Respondent was Other Just Cause and incorporated all statements in Charge One into Charge Two.

The final statement as part of the charges states: *"The aforesaid facts demonstrate just cause warranting Respondent's dismissal from her position as a tenured special education teacher."*

I was appointed arbitrator in the matter at bar on June 12, 2017.

RESPONDENT

MOTION TO DISMISS

On August 23, 2017, the Respondent submitted a Motion to Dismiss the tenure charges on the grounds that the charges are *"precluded as Ms. Holmes has already been disciplined for the conduct that serves as the basis for the charges."*

The Respondent argues that the following cases grant credence and support to its position that the tenure charges must be dismissed:

Jill Buglovsky, School District of Randolph Township, Morris County

DOE 265-9/12 (Decided December 21, 2012)

John Carlomango, School District of the Township of Hillside

DOE 180-8/13 (Decided December 20, 2013

Lawrence Henchey, School District of Borough of New Milford, Bergen County

DOE 322-11/14 (Decided January 3, 2015)

The above decisions stand for well-settled case law that an employee, here a school teacher, cannot be punished twice for the same conduct. The arbitrators above determined that *double jeopardy* attached when the above respondents were charged twice for the same offense.

In the instant matter, the Respondent received a written reprimand (see February 14, 2017 letter) and now the District has filed tenure charges against the Respondent citing only the February 6, 2017, incident. Moreover, under Title 18A the written reprimand has significant consequences.

Therefore, *"the tenure charges filed against the Respondent are deficient and must be dismissed in their entirety."*

CLAIMANT

OPPOSITION TO MOTION TO DISMISS

The Claimant acknowledges the above cited cases by the respondent but offers Richard Graffanino, River Dell Regional School District, Bergen County, DOE 223-9/13 as support for its arguments.

The Claimant contends that the *"permissibility of tenure charges where prior discipline has been imposed turns on the timing of the discipline." (see Henchey,supra)* Moreover, *"a Board is not precluded from instituting tenure charges upon the same conduct giving rise to prior discipline where the tenure charges are filed*

contemporaneously."

In Graffanino the arbitrator held that the tenure charges were not precluded where the District previously withheld an increment for the same incident. The arbitrator determined that:

> *"The District's approach was not an attempt to duplicate punishment; but rather It was an attempt to fill a gap caused by the timing of the tenure charges. In the Interval before tenure charges were filed and again before an arbitration decision would issue, the District wanted to ensure that Graffaninos' salary was not increased. It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on respondent."*

The arbitrator in Graffanino noted that the Board had issued two forms of discipline concurrently, whereas in Henchey that Board had withheld an increment in 2013 for certain conduct and was attempting to revive those allegations nearly two years later. In Carlomagno, the Respondent had received a memorandum of discipline in December 2012 relating to specific conduct; the same conduct was raised as a count of tenure charges against him on May 28, 2013. Those tenure charges were filed five (5) months later but *"the disciplinary memorandum in question specifically stated that further instances of this type of behavior will be grounds for more severe disciplinary action. Thus, indicating that the initial memorandum of discipline constituted the finality of the discipline for that conduct and that future additional conduct would be necessary to prompt additional discipline."*

In Buglovsky the Respondent received a letter of reprimand on April 27, 2009, for inappropriate use of computer networks in violation of District policy. More than three (3) years later that Board raised the same charges for improper use of the computer network as grounds for tenure charges.

Unlike the cases cited by the respondent, the Board did not wait a significant

amount of time to file the tenure charges or revive the incident to impose duplicate discipline. The fact pattern in the instant matter are wholly distinguishable from the Respondent's cited cases. In conformance with Graffanino the *"Claimant here provided the letter of reprimand filling the gap, pending a determination regarding tenure charges."*

Most importantly, from a *"practical standpoint Respondent's interpretation of the case law would significantly constrain Boards of Education from addressing the actions of teachers during the period when tenure charges are being considered, prepared and certified. Especially in an instance such as this where the conduct of the teacher implicates student safety, District administration must be permitted to take Action to protect students and in doing so must inform the teacher of the allegations against them."*

For the foregoing reasons the Respondent's motion to dismiss should be denied, and this matter should proceed to a hearing on the merits.

DISCUSSION AND OPINION

For the reasons set forth below, Graffanino is distinguishable from the matter at bar and is not controlling. The February 10, 2017, memorandum from HR Administrator, Ms. Smiley, to the Respondent summarized the February 8, 2017, meeting with Dr. Howard and others. However, there is no reference that tenure charges would be filed as a result of the February 6, 2017, incident. Additionally, the memorandum references that the Orange Police Department and CPP would be conducting their own investigations, and the District would await the results. There is nothing dramatic about that memorandum in that it does not indicate that the results of

those investigations may be grounds for further disciplinary charges including tenure charges.

The February 14, 2017, letter from Assistant Principal, Ms. Reid, is much more revealing. The word reprimand is used four (4) times, and Board policies 3281 and 3217 are mentioned. Moreover, after discussing the use of Corporal Punishment, Ms. Reid states at the bottom of page one (1) that a teaching staff member who uses Corporal Punishment *"will be subject to discipline by this Board and **MAY be dismissed**."* (emphasis supplied)

On the top of the second page Ms. Reid states: *"This letter should serve to underscore the importance of complying with Orange Public School policies, rules and regulations. I must inform you that further disciplinary action **MAY occur potentially resulting in dismissal**."* (emphasis supplied)

The use of the word may in both sections of the letter clearly establishes that tenure charges were not being contemplated at that time. The use of the word further is exactly on point in the Carlomango case where the arbitrator said *"the disciplinary memorandum in question specifically stated that further instances of this type of behavior will be grounds for more severe disciplinary action. Thus, indicating that the initial memorandum of discipline constituted the finality of the discipline for that conduct and that future additional conduct would be necessary to prompt additional discipline."*

The Respondent had been disciplined via a written reprimand and thus cannot again be charged with the same conduct as a basis for tenure charges.

In Graffranino, Superintendent Fletcher told the NJEA representative *"that he was going to withhold Graffranino's increment and file tenure charges. He was not imposing*

separate penalties, but rather a two-part disciplinary measure that was justifiable under the timing and circumstances." Contrast that with the instant matter. The affidavit of Dr. Howard and dated March 24, 2017, references the February 8, 2017, meeting with the Respondent and her Union representative in which she stated *"...I specifically advised Ms. Holmes and made it clear to her that she **MAY** be dismissed from her position with the District upon the conclusion of the investigation."* Dr. Howard also referenced the February 14, 2017, letter to the Respondent from Ms. Reid in which Ms. Reid advised the Respondent that she ***MAY be dismissed from her position***.

Graffanino was mandatory; increment withholding and tenure charges. Here it is speculative and not done contemporaneously or concurrently. The incident occurred on February 6, 2017, and the charges were filed one hundred (100) days later on May 25, 2017. That defies the dictionary definition of contemporaneously; occurring or living at the same time, or concurrently; occurring or existing simultaneously or side by side. Carlomango was disciplined in December of 2012 and five (5) months later May 28, 2013, tenure charges were filed against him for the same infraction/conduct that led to the December 2012 memorandum of discipline. The arbitrator set that aside as being double jeopardy.

The Statement of Evidence signed by Dr. Howard makes no reference to any date of an infraction, violation of policies, rules/regulations, other than February 6, 2017. Another factor that has to be reviewed is the fact that in Graffanino, Superintendent Fletcher did not want that Respondent to receive any salary increase. That position is not found in the Statement of Evidence of Dr. Howard's affidavit.

The practical imperative of the Claimant's action was to deprive the Respondent of her due process rights by attempting to use the written reprimand dated February 14, 2017, as the basis for tenure charges. The Claimant has a high degree of comfort level but a careful review of its actions shows that comfort level to have a short life expectancy. If this was a case of progressive discipline incorporating additional infractions or policy violations, beyond the February 6, 2017, incident which would potentially lead to tenure charges being filed, the Claimant would have a basis for its actions. Nevertheless, the record is devoid of the continued vitality of the tenure charges filed by the Claimant. A mere scintilla of evidence to justify a written reprimand is wholly inadequate to support enhancing that written reprimand to tenure charges and dismissing the Respondent from employment.

Discharge is the highest form of economic capital punishment an employer can impose upon an employee. That action of the Claimant requires persuasive evidence to support the action. There were no sufficient or compelling reasons set forth by the Complaint to sustain the filing of tenure charges.

For the foregoing reasons, and having duly heard the proofs and allegations of the parties, I Award the following:

AWARD

The Respondent has met its burden of proof and the Motion to Dismiss the tenure charges is granted. The tenure charges filed against Robyn Holmes are dismissed in their entirety with prejudice, and she is to be returned to her position as a Special Education classroom teacher.

Dated: September 30, 2017

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 30th day of September, 2017, before me personally came and appeared Gerard G. Restaino to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Judith K. Restaino, Notary Public
Lake Twp., Wayne County
My Commission Expires Nov. 10, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES