

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

**RICHARD GRAFFANINO,
RIVER DELL REGIONAL SCHOOL
DISTRICT, BERGEN COUNTY,
NEW JERSEY**

Agency Docket #223-9/13

Walt De Treux, Esq., Arbitrator

Hearing Dates: 12/3-9-19-20/13

Briefs Received: 1/13/14

Decision Date: 1/31/14

Appearances: For Petitioner School District – Rodney T. Hara, Esq.;
Steven R. Nevolis, Esq., *FOGARTY & HARA*
For Respondent Graffanino – Sheldon H. Pincus, Esq.,
BUCCERI & PINCUS

Introduction and Statement of Relevant Facts

Respondent Richard Graffanino had been employed by the River Dell Regional School District since 2002, teaching computer technology courses in middle school and engineering courses in high school.

On April 17, 2013, six female 8th grade students received permission from a substitute teacher to leave Graffanino's classroom to meet with Assistant Principal Michael Giorgio. The students relayed a series of complaints about Graffanino, including comments he made regarding another teacher; the showing of music and other videos in class, including videos in which he has appeared as an actor; the showing of one particular video in which he is partially clothed and kissing a woman in bed; negative interactions with certain students; grading practices; and sharing and betting food with certain students.

Giorgio reported the students' complaints to Principal Richard Freedman and Superintendent Patrick Fletcher. On May 3, 2013, Freedman met with Graffanino to give him the opportunity to respond to the allegations. On May 10, 2013, Freedman notified Graffanino by letter that he was referring his concerns about grading, classroom demeanor, the use of videos, and the use of food in the classroom to the Superintendent. Further, in Graffanino's annual performance review, Freedman did not recommend Graffanino for a salary increase or for re-appointment for the next school year.

The District also referred the allegations regarding the reportedly sexual video and the comments about the other teacher to Charles Lange, Director of Special Services and the District's Affirmative Action Officer, for investigation. Lange interviewed Melissa Miller, the teacher about whom Graffanino reportedly made comments; the six female students; and Respondent. Lange concluded that Graffanino's conduct violated the District's non-discrimination/affirmative action and sexual harassment policies. Lange submitted his findings to the Superintendent for disciplinary action.

Based upon the recommendation of the Superintendent, on July 30, 2013, the Board of Education withheld Graffanino's salary increase for the 2013-14 school year. On September 10, 2013, the Board certified tenure charges against Graffanino with the Commissioner of Education and suspended him without pay.

The Board certified seven separate charges, as follows:

1. That Graffanino exhibited unprofessional and unbecoming conduct by showing and discussing in class a video in which he appears as an actor partially clothed kissing a woman in bed;
2. That Graffanino violated the Board's Non-Discrimination/Affirmative Action and Sexual Harassment Policies when he showed the video;
3. That Graffanino exhibited unprofessional and unbecoming conduct by discussing in class a personal relationship he allegedly had with a female teacher;
4. That Graffanino violated the Board's Non-Discrimination/Affirmative Action and Sexual Harassment policies for discussing the alleged relationship;
5. That Graffanino exhibited unprofessional and unbecoming conduct "by inappropriately using food in the classroom when interacting with students;"
6. That Graffanino exhibited unprofessional and unbecoming conduct "by inappropriately using videos during instructional time which were unrelated to the curriculum;"
7. That Graffanino exhibited unprofessional and unbecoming conduct "by favoring female students over male students when grading."

On October 10, 2013, the Department of Education deemed the charges sufficient, if true, to warrant dismissal or reduction in salary, and referred the charges to the undersigned Arbitrator for hearing. Prior to hearing, the School District withdrew its seventh charge regarding unfair grading, based on an expert

report submitted by Respondent that called into question the conclusions reached by the District¹.

On December 3, 9, 19, and 20, 2013, hearings were held at the District offices in River Edge, New Jersey, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. Both parties filed post-hearing briefs, and the matter was submitted to the Arbitrator for a decision.²

¹ The District had alleged that Graffanino gave female students more favorable grades than male students. It based its charge on a statistical analysis performed by the District. Respondent has his own expert, Dr. Joel Pitt, examine the data. Dr. Pitt's analysis determined that Graffanino's grading pattern was not statistically different from the general breakdown of grades by gender throughout middle school and high school, i.e., girls on average received higher grades than boys. Upon reviewing and receiving Dr. Pitt's report, the District withdrew the tenure charge related to grading.

² By statute, the Decision was originally due January 17, 2014. Because of the number of hearing days, the voluminous record, and the parties' desire to file briefs, the Arbitrator requested an extension to January 31, 2014 to issue his Decision; the extension was approved by the Department on December 23, 2013.

Issue

Has the River Dell Regional School District established the allegations of unprofessional and unbecoming conduct as set forth against Richard Graffanino in the tenure charges? To what remedies are the parties entitled?

Relevant District Policies

NON-DISCRIMINATION/AFFIRMATIVE ACTION Policy 2224

Harassment

The Board of Education shall maintain an instructional and working environment that is free from harassment of any kind, including sexual harassment...

Findings of discrimination will result in appropriate disciplinary action.

SEXUAL HARASSMENT Policy 2225

Prohibited Behavior

Sexual harassment shall consist of unwelcome sexual advances, requests for sexual favors, and other inappropriate verbal or physical contact of a sexual nature when made by any employee to another employee or student...

C. Such conduct has the purpose or effect of interfering with an individual's educational or work performance and thereby creates an intimidating, hostile or offensive educational or work environment.

Prohibited sexual harassment includes unsolicited and unwelcome contact that has sexual overtones. This includes but is not limited to:

B. Verbal contact such as sexually or obscene comment(s), including remarks about a person's body or rumors about a person's sex life; queries, including those about a person's sexual fantasies, preferences, or history; threats, slurs, epithets, jokes about gender specific traits or sexual propositions...

NON-DISCRIMINATION/AFFIRMATIVE ACTION – CERTIFIED STAFF Policy 4111.1

Harassment and Favoritism

Harassment, intimidation or bullying means any gesture or written, verbal or physical act that takes place on school property...and that:

D. Has the effect of insulting or demeaning any staff member or group of staff members in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school/workplace.

Sexual Harassment

...No employee shall create an atmosphere that, as a result of sexual comments, innuendos or actions, causes other employees to feel substantially uncomfortable in the workplace.

Analysis and Decision

The first and second charges filed against Graffanino both relate to the video in which he is partially clothed kissing a woman in bed. The third and fourth charges both relate to his alleged comments about fellow teacher Miller. As noted, the District withdrew the seventh charge. Accordingly, there are four separate instances of alleged misconduct that must be considered – the inappropriate video, the comments about Miller, the use of food in the classroom, and the showing of music and other videos unrelated to the curriculum.

Inappropriate Video

In addition to his teaching duties, Graffanino is an actor with several television and film credits. He posted certain of his screen appearances to his YouTube channel so that interested parties (directors, agents, etc.) could view his work. Around February 2013, his YouTube channel included a scene from a New York University graduate film titled, “The All American.” The scene showed Graffanino’s character in bed with a female; it conveys the impression that the characters are waking up after having sex the night before. The pair is lying on their backs, with a sheet covering the woman just below her bare shoulders and covering Graffanino’s character to his waistline, exposing his bare torso. The actors engage in some brief, awkward small talk, and they kiss as the actress rolls on top of Graffanino’s character. They get out of bed and share more small talk as they dress. The scene lasts just over two minutes.

District witnesses explained why the film scene was inappropriate for middle school students, but the inappropriateness of the film is not in dispute. Respondent has not alleged that the film was proper viewing for 8th graders. In fact, certain student witnesses testified that he tried to cover up the YouTube thumbnail of the video so the students could not see it. If such testimony is credited, it is a clear acknowledgement by Graffanino that the video was not appropriate for his class. Graffanino's does not assert that the video is fit for classroom viewing; but rather, he adamantly denies he ever showed it in class. Graffanino's denial is contrary to the evidence.

The six female students who met with Assistant Principal Giorgio all testified that the inappropriate video was shown in class. Their accounts are not identical, but the differences do not significantly undercut the main thrust of their testimony that the video was shown in class. In fact, their testimony would be more suspect if their accounts too neatly mirrored each other.

Student I.G. testified that she had heard from other students about the video. She knew Graffanino was an actor, and some male students had googled his name and found pictures of him. I.G. and other girls asked Graffanino about his acting, and he brought up his YouTube account on a school-issued laptop in the classroom. The YouTube channel shows thumbnails of the scenes, and I.G. remembers one of the girls clicking on the inappropriate video to play it with Graffanino present.

Student G.R. testified that Graffanino had given students his YouTube access name, "Rich Graff." She further stated that Graffanino's first period class had viewed the video during class time. She recalled that Graffanino tried to hide the thumbnail

of the inappropriate video, but the students asked to see it. She could not recall if Graffanino or a student clicked on the thumbnail. He explained to the students that it was “just acting.”

Student A.V. testified that Graffanino had given his YouTube access name to some male students. She recalled that students had been talking about the inappropriate video. During her class with Graffanino, he typed in his access name to bring up the YouTube channel. He tried to cover the thumbnail of the inappropriate video. She did not watch the video as it played, but the other female students did.

Student K.M. testified that other students were talking about Graffanino’s acting career and his YouTube channel. She viewed the video on the phone of a student in Respondent’s first period class. When she went to his class, the female students asked about his videos, and Graffanino brought up the YouTube channel on the laptop. He tried to cover up the inappropriate video thumbnail, but she recalled that he eventually clicked on the thumbnail to show the video.

Student S.N. testified that other students were talking about the inappropriate video that they had accessed through Graffanino’s screen name. The female students in her class asked about the video, and she recalled that Graffanino “was proud to show it.”

Student I.O. testified that students in the earlier class reported that Graffanino showed videos of his acting. The female students in her class asked to see the videos, and Graffanino brought up his YouTube channel. He tried to cover the thumbnail of the inappropriate video, but the students asked to see it. She does

not recall if Graffanino or a student clicked on the thumbnail. Graffanino explained to the students that it was “just acting.”

As noted, the six female students differed as to some details, such as, who clicked on the thumbnail, whether or not Graffanino tried to cover up the thumbnail, and how many students viewed the video. But the core of their testimony is consistent – students in the first period class reported seeing the video; the student witnesses asked to see it; Graffanino accessed his YouTube channel; the video was played in class; and Graffanino explained it as “just acting.”

Graffanino countered in his testimony that he had successfully kept his acting career unknown to students and colleagues. When students began talking about his videos and reciting lines from the inappropriate scene, he realized that they had accessed his YouTube channel. In fact, views of his YouTube channel skyrocketed in February 2013. In response, he privatized the channel so that it could only be accessed by a password. Eventually, he removed the inappropriate video from the channel. He denied ever showing the video in class.

When Affirmative Action Officer Lange interviewed Graffanino, Graffanino reported that students G.R., S.N., and I.G. had exaggerated rumors about him in the past. He suggested that Lange interview students K.M., I.O., and A.V. because he believed they would be truthful. But K.M., I.O., and A.V. all testified that the inappropriate video was shown in class. After vouching for their truthfulness, Respondent now argues that their testimony is not credible.

Respondent asserts that the girls often threatened to report him to Giorgio and finally did so when they received low grades on a project. He refused to change

the grades despite their persistent requests. However, the students' report cards indicated that the low grade on one project did not significantly alter their grade, and all received high grades (in the "A" to "B" range) consistent with their other courses. Further, District administration officials testified that all the student witnesses were high-performing students with no disciplinary problems. The consistency of their testimony, their demeanor at hearing, and their school records belie any claim that the students would concoct a story against Graffanino to retaliate for a low grade on one assignment.

At hearing, Graffanino also presented the testimony of male student D.S.³ D.S. was not in class with the female students, but in Graffanino's first period class. D.S. testified that Graffanino showed the inappropriate video in that earlier class. His testimony supports the female students' assertions that students from an earlier class had seen the video and told them about it. After offering D.S. as a witness, Respondent argued that his testimony should be discounted because D.S. had previously told Respondent's private investigator that the film was not shown in class. But D.S. credibly explained that he thought about the question after the investigator left, and on reflection, recalled that the film was shown. D.S.' testimony was questionable in some details, explaining that the scene was shown on a large projection screen rather than a laptop (although there was no other description of how the film was shown to the first period class) and apparently confusing a film clip of Respondent appearing in the television show *Law & Order* with another crime

³ Respondent's other student witness, L.S., was in class with the six female students. Although she testified that the video was not shown in class, she also described how she sat at a computer monitor some distance from where the laptop was located. The video could have been shown on the laptop without her knowledge.

drama, *C.S.I.* However, these deficiencies in his testimony relate to less memorable details and do not significantly diminish his recollection of seeing the inappropriate film in class.

In addition to recommending witnesses that did not support his denial, Graffanino also claimed to have privatized his YouTube channel in February 2013. Yet, Assistant Principal Giorgio, Principal Freedman, Affirmative Action Officer Lange, and the District's Director of Technology Marianthe Williams all viewed the film on Respondent's YouTube channel in late April or early May 2013. Williams watched the video with the high school principal (who did not testify). None of these District officials had access to Graffanino's password, yet they were able to watch the scene, which they described in accurate detail at hearing. Further, although Graffanino showed that viewership declined after February 2013, the decline can just as reasonably be explained by loss of interest by the students as by the alleged privatization of the video. The testimony and evidence indicates, contrary to Respondent's assertion, that the video was not privatized in February 2013.

Finally, Graffanino showed the video on a school-issued laptop. Accordingly, the video should have been found on the laptop, and the date and time of the showing of the video should have been retrievable from the laptop. However, Graffanino failed to return the laptop to the District in a timely manner; and when he did, the files on the laptop had been shredded and were not retrievable.

In October 2013, the District notified Graffanino by letter that he needed to return the laptop. Graffanino testified that he did not receive the letter. Prior to

hearing, the District filed a motion for sanctions in response to the Respondent's failure to fully respond to discovery requests aimed at obtaining the video clip. At the first day of hearing, the Arbitrator ordered Respondent to provide all contact information to the School District regarding the film, its director, etc. so that the District could obtain a copy of the film. Graffanino was also directed to return the laptop to the District that same day. When Graffanino reported that the laptop was located in New York, the Arbitrator directed him to return the computer as early as possible the following day.

Respondent returned the computer the following day. When the District's computer forensics expert examined the computer, he discovered that the files had been shredded the day the laptop was returned, preventing him from determining whether the video had been on the laptop and when it had been shown⁴. Graffanino explained that a shredding program had been previously installed on the computer and operated on its own at regular intervals. He also admitted to shredding certain documents (e.g., scripts) that he could not legally disclose to outside parties. But prior to turning over the laptop, Graffanino did not explain to his attorney, the District, or this Arbitrator that he had to shred certain documents even though he knew a computer forensics expert would be examining the laptop.

Because of this intentional spoliation of evidence, the District filed a motion seeking to bar Respondent from presenting any evidence or defense to the tenure charges related to the video. By Order dated December 19, 2013, this Arbitrator

⁴ Technology Director Williams was able to find a link to the video on the School District's servers; but because they refresh at certain intervals, she could not open the link or view its history.

directed Respondent to obtain a copy of the video and advised the parties that because of Respondent's deletion of the files, an adverse inference would be drawn against Respondent regarding the issue of whether the video was shown in class on the school-issued laptop. Respondent produced a copy of the video one week later.

Based on the consistent and credible testimony of the female students and D.S., the ability of District officials to view the video after Graffanino claimed he privatized it, and Respondent's failure to rebut the adverse inference drawn by his spoliation of the laptop evidence that would have shown the date and time the video was viewed, I find that the District has established that Graffanino showed the inappropriate video in the classroom.

As discussed at the outset, the video is clearly inappropriate to be shown to middle school students. As explained by District officials, 8th grade students are discovering their own sexuality, and they view teachers as role models. Seeing their teacher as an actor in a sexual situation would be confusing and disturbing to the students and would raise many questions. Although the students pressured Graffanino to show the film, Graffanino's response, according to Superintendent Fletcher and Principal Freedman, should have been to immediately shut down discussion of the video and refer the matter to administration. Instead, Graffanino either clicked on the film or allowed it to be shown, and explained it away as "just acting."

For these reasons, I find his actions constitute unprofessional and unbecoming conduct. Further, the showing of the video violates the District's sexual

harassment policies as it created an offensive educational environment and caused discomfort for the students.

Comments regarding another teacher

Melissa Miller has been a 7th and 8th grade art teacher in the River Dell Regional School District for 14 years. Her classroom was situated near Graffanino's classroom, and students in Respondent's class frequently had to borrow supplies from Miller's room. The six female students who testified for the District stated that Graffanino often seemed reluctant to give them permission to go to Miller's classrooms for the supplies. The girls often asked him why he did not like Miller or why Miller did not like him. Graffanino testified that he generally avoided the questions. However, around November or December 2012⁵, Graffanino finally responded to the girls' inquiries.

According to five of the female students (K.M. was not present), Graffanino explained that he and Miller had "a thing" in the past and he rejected her. Graffanino testified that he tried to shut down the questioning by telling the students "something happened." He recalls that another student (who was not one of the five District witnesses and was not called to testify) asked whether that meant he and Miller had "a thing." Graffanino denied it, and further explained that Miller had a party that he did not attend and she stopped speaking to him.

This incident resurfaced in April 2013 when, prior to going to Giorgio's office to report their complaints about Graffanino, three of the female students stopped in

⁵ The District witnesses did not state when the incident occurred. Graffanino testified that it was in November or December 2012.

Miller's classroom. The students asked Miller if she had dated Graffanino and he rejected her. They told her about Graffanino's comment. Miller testified that she was upset, humiliated, embarrassed, and demoralized by the remark. As a married mother of two children, she was concerned what the students thought of her, was concerned what her colleagues might think, and felt increasingly threatened by Graffanino.

The female students reported the comment and their conversation with Miller to Principal Giorgio. In addition, Miller visited Giorgio that same day to report on the girls' visit. Giorgio testified that Miller was extremely upset and crying and ultimately left school early that day. Later that night, she filed a formal complaint of sexual harassment with Principal Freedman.

This incident was not Miller's first negative encounter with Graffanino. In Graffanino's first year with the District, Miller developed an unfavorable view of Graffanino after he allegedly failed to pay for his share of pizza that was split between Miller, Graffanino, and another teacher, Chris Concato. Concato shared a classroom with Graffanino and was close friends with Miller. Graffanino and Concato did not get along⁶; Miller thinks her friendship with Concato influenced Graffanino's attitude toward her.

Miller testified that through the years, she and Graffanino "mutually existed," interacting only when necessary for work-related reasons. She asserted that she

⁶ In November 2004, Graffanino and Concato had a confrontation during which Graffanino referred to Concato as "fagboy" or "fatboy." Concato filed a complaint with the Affirmative Action Officer. The AAO recommend that Graffanino apologize to Concato and directed them to attend a mediation session "in light of the apparent longstanding friction and strained relationship."

was civil to him, but Graffanino did not show her certain courtesies, such as greeting her in the morning, holding the door for her, or thanking her when she let students in his classroom if he was running late. She felt “extremely uncomfortable in his presence,” and he made her feel “uneasy.”

In May 2009, she directed her students to store some sculptures in part of Graffanino’s classroom; Concato had given her permission to do so. She heard Graffanino yelling at the students because he objected to the art being stored in his classroom. He then came into Miller’s classroom and yelled at her. She did not respond, but she contacted Giorgio. Giorgio met with Miller and Graffanino; and during that meeting, Graffanino yelled at her again, calling her a liar and unprofessional. (Graffanino does not dispute the incident, but denies yelling at Miller.)

Later that night, Miller emailed Giorgio, asking him to report the incident to Principal Freedman. The matter was referred to Affirmative Action Officer Lange. It does not appear that Lange took much action on the complaint until the following school year. Lange testified that the complaint was informally resolved with both parties agreeing to stay away from each other and using Giorgio as an intermediary if they needed to interact or had a disagreement. It is not clear how well informed Graffanino or Miller were of this informal resolution or when it occurred. As late as April 2010, Miller was still emailing Lange, questioning “why this process is taking so long.” She followed up again in May 2010, bringing Superintendent Fletcher into the discussion. At some point, however, she and Graffanino returned to “mutually existing.”

This past history between Miller and Graffanino is not a basis for the tenure charges, but it informs the charges and Miller's reaction to the comment regarding she and Graffanino having "a thing." Respondent argues that Miller was hypersensitive in her reaction; but the past history between the two teachers – which Graffanino does not dispute – puts her emotional reaction to the comment in perspective. Since she and Graffanino did not get along and have had confrontations in the past that led to a harassment complaint, a remark that implies that she and Graffanino had a personal relationship can be expected to cause a more visceral reaction than if it was a comment made in jest by a friend.

I credit the testimony of the students that Graffanino told them he and Miller had "a thing" and he rejected her. Their testimony was generally consistent, and consistent with what they reported to Miller and Giorgio. None recall Graffanino talking about a party to which he was invited and did not attend. (Miller testified that she did have a Halloween party in 2002, but Graffanino was not invited.) As the female students were found credible regarding the showing of the inappropriate video, nothing in their accounts of the comment about Miller diminished that credibility.

In addition to that comment, S.N., K.M., and I.G. testified that Graffanino had commented to the class that Miller was "very pretty" or prettier than his wife. On April 24, 2013, Social Studies teacher Anthony Manderano told Miller that students in his classroom had reported the same comment from Graffanino. The students who were discussing the comment did not include the six female student witnesses in this proceeding.

Based on credible testimony and evidence, I find that the District has established that the comments to students in the classroom regarding a past personal relationship with Miller and about her appearance constitute unprofessional and unbecoming conduct. I further find that the comments violate the District's Sexual Harassment Policies, including the policy for certified staff (#4111.1), as the comments "create an atmosphere that...causes other employees to feel substantially uncomfortable in the workplace."

Miller informed Lange that she had been "experiencing anxiety, fear, humiliation and unhappiness on a daily basis since [her] first formal complaint," and she is "humiliated that many of the students I instruct are aware of the rumors and perceive me differently." She reported being "the brunt of jokes made by several colleagues" and feels "upset and depressed...at my place of work." She offered that her emotions "affect[] my wellbeing and my job performance."

Miller's reaction to the comments was real and justifiable, particularly in light of the previous negative interactions and "mutually existing" relationship with Graffanino. They are the type of reaction that the sexual harassment policies were designed to prevent.

The students also reported feeling uncomfortable with the comments. For example, one student wrote during Lange's investigation,

"After these incidents I feel very nervous and not safe going to his class. I feel scared that he will say more stuff to us that we don't need to know...I feel extremely uncomfortable in that class, and I don't know what's going to come next and that scares me."

For these reasons, I find that the District has established the allegations set forth in the tenure charges related to the comments to Miller.

Food in the Classroom

In their meeting with Assistant Principal Giorgio, the female students reported that Graffanino “does this thing where he will bring us food if we bring him food.” They further stated that he bet with students on NFL games with food as the wager.

The female students implied that Graffanino favors students who bring him food, but the District did not offer sufficient proof that such favoritism occurs. Further, their report on betting with food was based on conversations they had with male students. No boys from the 8th grade class testified, and the girls were only able to offer general statements as to the alleged betting. Their testimony alone is not sufficient proof to establish that Graffanino bet food with students on NFL games.

Graffanino did, by his own admission, share and exchange food with students in the classroom. Graffanino explained that he is a trained professional chef and always has his own food in the classroom because he does not have a designated lunch period. He further explained that in the aftermath of an intense October 2011 snowstorm and Super Storm Sandy in 2012, students came hungry to his classroom. He would bring bagels and hot cocoa so they would have something to eat. Even prior to the weather-related occurrences, he would share his food with students if they asked. Responding to his generosity, parents would often send in food and/or recipes, and he would exchange the same with them through the students.

The use of food became an issue with District Administration. During the 2011-12 school year, Principal Freedman directed Graffanino not to bring food into

the classroom. Freedman learned that food was still present in the class in January 2012. He sent Graffanino an email stating, "I thought I was being clear before...I don't want any cookies, sweets, food, etc...in any way being a part of your class routine...No more food." Graffanino responded that "[s]tudents bring me things on their own..." He questioned why all teachers did not have guidelines regarding the sharing of food. The two exchanged a series of emails on this issue, which resulted in Freedman, stating "...this is a clear directive from me that I expect you to follow." Freedman also sent a directive to all teachers, asking that "no food consumption by students take place during class time..."

Less than a month later, parents had delivered food to Freedman's office for Graffanino. He instructed Graffanino that "[i]n no way is there to be any food in the classrooms that you use whether being consumed or simply brought in." Graffanino responded that he does not require students to bring food, but rather, they do it on their own. He emphasized that they do not eat in the classroom.

Graffanino's June 2012 Annual Performance Report mentioned, "It is further expected that all school rules concerning food in classrooms will be clearly followed." Nonetheless, during the 2012-13 school year, Freedman became aware that Graffanino was still sharing food with students. On January 16, 2013, Freedman met with Graffanino; and in a letter summarizing the meeting, told him, "There will not be food of any kind shared in your classroom, or in school, between yourself and your students." He directed him to tell parents to stop the practice of sending food in with their kids.

Graffanino testified that after January 2013, he stopped bringing in food for the students except for approved parties⁷. He admitted, however, that students still brought food in for him despite his objections. Anytime he returned food, he did not allow the students to eat in the classroom.

By Respondent's own admission, he continued to exchange and/or take food from students when he was repeatedly warned to refrain from doing so. His defense is that students brought the food over his objection. But there is no indication he followed Freedman's directive to tell the parents not to send in food. And he acknowledged that when they did bring in food despite his request not to, he took the food on some occasions. This action sent a mixed message to students about the propriety of bringing in food. Graffanino also argued that Freedman should have had his secretary refuse the food offerings from parents that were left at Freedman's office. Freedman could have done so, but he instructed Graffanino to inform the parents. Graffanino failed to do so.

In one of their email exchanges, Graffanino labeled the food controversy "a silly issue." Whether or not one views it as "silly," the District considered it an important matter. It articulated several reasons for banning food, including the fact that it had no relationship to the curriculum; interferes and disrupts classroom instruction; compromises the professional relationship between student and

⁷ Student K.M. testified that Graffanino asked her to bring back a key lime pie from her March trip to Florida. The District cites this request as a further violation of the food rules. Although Graffanino should have measured his request given his past clashes with Freedman over food, the request does not rise to the level of a violation. K.M. did not bring back a key lime pie, and Graffanino never discussed it again. The comment was just as likely an ill-conceived (given his previous food violations) passing remark on her trip to Florida.

teacher; and poses a risk to students with food allergies. Equally significant, the female students, who did not participate in the food exchange, had developed the impression that Graffanino favored those students who brought him food. That reason alone provides support for Freedman's directive to keep food out of the classroom.

Because of Graffanino's own admission that he exchanged and/or accepted food from students despite repeated admonishments to refrain from doing so, I find that the District has established the allegations set forth in the tenure charge related to food in the classroom.

Use of music and other videos

The District has alleged that Graffanino showed videos of himself, movies, and music videos during class time even though the videos had no relationship to the curriculum. It argues that the videos interfered with and disrupted instruction and compromised the professional relationship between teacher and student.

Graffanino admitted showing certain videos in class. He testified that he showed a clip of the television show, *Law & Order* (in which he appeared), to highlight editing and production values to his computer class. He showed another scene from a show (in which he appeared) about bullying during the District's anti-bullying week. Graffanino acknowledged showing the movies *October Sky* and *Apollo 13* and other YouTube videos because they related to a rocket project the students were doing in class. Finally, he admitted to showing music videos for five minutes at the end of his first period class five or ten times as a reward for the

students who were in the class for an extended period of time (first period is combined with homeroom) and generally produced the best projects.

The District did not offer sufficient evidence to refute Graffanino's assertion that the movies and YouTube videos were related to the rocket project. It also did not effectively challenge his claim that the film clips in which he appeared had some relation to the computer curriculum or to anti-bullying week. Rather, it objected to his appearance in the videos, suggesting that it affected the student-teacher relationship. Assuming the videos had some instructional value, I am not persuaded that Graffanino's appearance in the videos undermined or affected his relationship with the students. Unlike the inappropriate video discussed earlier, Graffanino was not presented in any compromising position. The students did not allege that his appearances in these other productions made them feel uncomfortable.

The music videos were unrelated to the curriculum, a fact Graffanino does not deny. As such, they did interfere with instructional time. The testimony did not reveal the content of the videos, although one of the female students described them to Giorgio as videos of "rock bands he likes." It is not clear whether the content was appropriate for middle school students.

The District has established that the showing of the videos was unprofessional, as they did not enhance or relate to the curriculum and served no instructional purpose. The use of the music videos is not a serious violation as compared to the other allegations in the tenure charges; but nonetheless, it occurred by Graffanino's own admission.

For this reason, I find that the District established the allegations set forth in the tenure charge related to the showing of videos, but only as to the showing of music videos.

In summary, the District has established the allegations set forth in Tenure Charges #1-6, with the charge in #6 limited to the showing of music videos. Accordingly, disciplinary action against Respondent was warranted.

Level of Discipline

The District asserts that the tenure charges warrant Graffanino's dismissal. Respondent counters that the tenure charges, if established as true, do not warrant any greater penalty than the withholding of the salary increment that has already been imposed. It further charges that the withholding of the increment and the filing of tenure charges constitute "double jeopardy," i.e., Graffanino is being disciplined twice for the same offenses.

New Jersey Education Association Field Representative Ray Skorka testified that in his 20 years of experience with the NJEA, he has never had a school district withhold a salary increment and file tenure charges for the same offenses. Nonetheless, in their discussions, Superintendent Fletcher advised him that he was asking the Board of Education to withhold the increment and he intended to file tenure charges.

Fletcher testified that he recommended the withholding of the increment, in addition to the tenure charges, because there was a short period of time during the

start of the 2013-14 school year when Graffanino would receive pay since the tenure charges were not certified until mid-September. He also explained that Respondent would be returned to payroll, by law, 120 days after the filing of tenure charges if an arbitration decision had not issued. In fact, Respondent returned to the payroll mid-January 2014 pending this Decision and Award. Fletcher did not want the District to increase Graffanino's salary for those limited periods of time outside of his unpaid suspension.

Although the District's tactic in withholding the salary increment and filing tenure charges is uncommon, I find that it does not constitute "double jeopardy." Double jeopardy, of course, applies only in criminal cases; but Respondent is arguing duplicative punishments, two separate disciplinary actions for the same offenses. 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 Graffanino's 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.

Further, Superintendent Fletcher was upfront at all times with the NJEA about his intention to pursue tenure charges. He did not request withholding, then decide later to impose additional sanctions. Rather, he advised NJEA that he was moving for withholding the salary increment and filing tenure charges. He was not imposing separate penalties, but rather a two-part disciplinary measure that was justifiable under the timing and circumstances.

Accordingly, the issue remains as to whether Graffanino's offenses warrant dismissal. Clearly, the showing of music videos is the least serious offense of those charged. Standing alone, it likely would have resulted in no more than a verbal or written reprimand. Likewise, the use of food in the classroom would not, standing alone, warrant dismissal. Given Graffanino's repeated violations despite the Principal's directives, an appropriate penalty would likely be a formal written warning and/or a very brief suspension.

Respondent also argues that the withdrawn tenure charge related to grading inflated the seriousness of the tenure charges and disproportionately influenced Fletcher's decision to seek Graffanino's dismissal. More specifically, Respondent argues that Assistant Principal Giorgio's interview of the female students in a group rather than separately was not "well designed to determine the truth;" Affirmative Action Officer Lange was "totally ill equipped at conducting an investigation" and rushed to judgment about Respondent; and Principal Freedman had a demonstrated bias against Graffanino that precluded Respondent from receiving "a fair shake." Respondent asserts that the Superintendent's "reliance on the tainted judgments of subordinates passes through and taints" his and the District's recommendations for dismissal. I find that argument to be without merit.

Giorgio held the initial meeting with the students. His role was to hear and record their concerns. He passed those concerns on to the Principal. There is no indication that he was vouching for the accuracy of the students' allegations, or that he was trying to determine their truthfulness.

Further, there is no credible evidence that he was biased against Graffanino to the extent he was advocating for his dismissal. He had encountered early disciplinary issues with Graffanino related to the food issue and the 2009 confrontation between Respondent and Miller. And his 2009 email exchange with Miller regarding that incident indicated that he did not hold Graffanino in as high esteem as he did Miller⁸. Nonetheless, Graffanino testified that he thought Giorgio was supportive of him, particularly in his continuing situation with Miller.

Lange's investigation certainly could have been more thorough. He did not delve as deeply into the allegations and interviews as one may expect. Further, his "informal resolution" of the 2009 Miller complaint appeared to be poorly communicated to the parties and required continual pleading for follow-up by Miller. Nonetheless, Lange's investigation uncovered the basic facts leading to the tenure charges, facts that were borne out by the District's witnesses and evidence and, on certain charges, by Graffanino's own admissions. More significantly, there is no evidence that Lange had any bias against Graffanino or toward Miller or that he reached his conclusions through any method other than good faith analysis.

Finally, Graffanino cited various instances from which he concluded Freedman was biased toward him. He opined that Freedman set up a confrontation between Respondent and Concato in mid-2000 when Concato tried to goad him into a fight. Respondent also charged that Freedman "used his power to cover up the inappropriate actions of other staff member toward me" and "has manipulated any

⁸ An email from Giorgio to Miller read in part, "I think you are professional, not a liar, and a wonderful person. No worries. I took it where it came from. It's not a coincidence that you and Chris [Concato] get along with everybody and he [Graffanino] doesn't."

piece of information in an attempt to ruin my career.” Specifically, he cited Freedman’s denial of a personal day and his unwillingness to purchase supplies that Graffanino required.

None of the broad allegations against Freedman or the specific allegations were supported by sufficient evidence. There is no competent evidence to suggest that Freedman was biased toward Graffanino. Freedman was the Principal, so he did have to handle any disciplinary or performance issues with Graffanino, which put them in an adversarial position at times. But Respondent has not demonstrated that Freedman’s exercise of authority was abused in any way outside of the normal principal-teacher relationship.

In short, I find that Respondent has not established that District officials’ recommendations to the Superintendent was the result of bias or otherwise tainted the Superintendent and District’s decision to file tenure charges.

Further, although the charge of unfair grading was a serious charge and successfully challenged by Respondent’s expert prior to hearing, Superintendent Fletcher credibly testified that he would have pursued dismissal even absent the grading allegation.

Accordingly, when determining the appropriateness of dismissal, the focus is not on the music video or food charges or the impact of the grading charges, but on the showing of the inappropriate video and the comments made to students about another teacher.

Showing the inappropriate video to middle school students and discussing a personal (and apparently untrue) past relationship with a fellow teacher to students

are serious offenses, properly regarded as unprofessional and unbecoming conduct and violations of the District's sexual harassment policies. The District argues that Graffanino's conduct compromised his relationship with students; eroded the faculty's trust; and betrayed the trust of the Administration. That may be true generally; but more specifically, Graffanino's showing of the inappropriate video and his comments to the students regarding Miller indicate a failure in professional judgment and a lack of recognition of the appropriate student-teacher relationship. Those actions also show a clear disregard for District policies. The exchanging and sharing of food with students in violation of specific directives against such use of food and the showing of music videos, while less serious offenses, reinforce the conclusion that Respondent lacked professional judgment and regard for school policies and administration authority. Particularly significant, the video and his comments about Miller made students uncomfortable, upset and intimidated Miller, left her open to negative perceptions or jokes by students and staff, and impaired the educational efforts of the students and Miller. Discharge is an appropriate response to the seriousness of the offenses.

Further, an issue to be considered in any disciplinary action is whether the employee can improve. If so, a penalty less than discharge may be appropriate. But in this case, Graffanino continued to deny showing the video or making comments about Miller despite considerable evidence demonstrating he did engage in such conduct, has offered less than credible testimony regarding the circumstances of each incident, and engaged in a course of conduct that suggested an attempt to conceal or delete evidence that may have confirmed whether or not he showed the

inappropriate video in the classroom. Further, the District's previous efforts to counsel and direct Respondent on certain conduct (e.g., food) were met with disregard. It is not likely that a penalty short of discharge, such as withholding of the salary increment, would alter Respondent's conduct.

For these reasons, I find that dismissal is an appropriate penalty.

Award


The District has established the allegations set forth in the tenure charges. Accordingly, the tenure charges are sustained, and dismissal for Respondent's misconduct is warranted.



WALT De TREUX

AFFIRMATION

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.



WALT De TREUX