STATE OF NEW JERSEY

In the Matter of Arbitration

-between-

School District of the Township of Irvington, Essex County
(District)

-and-

Andrei Foca-Rodi
(Respondent)

RE: Agency Docket No.44-2/14

APPEARANCES

For the Employer
Navarro W. Gray, Esq.

For the Respondent
Albert J. Leonardo, Esq.

BEFORE: STEPHEN M. BLUTH, ARBITRATOR

BACKGROUND

The District preferred charges against Andrei Foca-Rodi (hereinafter "Respondent" or "Foca-Rodi") on or about February 25, 2014 pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act. The District seeks Foca-Rodi's discharge as a result. Respondent contends the charges against him are devoid of merit. He asks they be dismissed.

Andrei Foca-Rodi is a tenured music teacher. At the time this dispute arose he was assigned to Irvington High School where he instructed students in Music.

According to the District, on or about January 28, 2014, Respondent was culpable of leaving his class unattended. As a result the District preferred charges on or about February 25, 2014. Pursuant to New Jersey statute, I was selected to decide the dispute. Hearings were held on April 29 and June 6, 2014. At these hearings both parties were afforded full opportunity to adduce evidence, make oral argument, and otherwise support their respective positions. Both submitted written closing statements. Upon receipt of same, I closed the record. This Opinion and Award follows.

DISCIPLINARY CHARGES

Person Bringing Charges:	Dr. Neely Hackett, Superintendent
Address:	Irvington Board of Education 1 University Place 4th Floor Irvington, New Jersey 07111
Brought Against:	Andrei Foca-Rodi, Music Teacher Irvington High School

I, Dr. Neeley Hackett, Superintendent of the Irvington School District, charge Andrei Foca-Rodi, a tenured Teacher, with conduct unbecoming. Said charges have been demonstrated by the Respondent as follows:

The Respondent was hired on, or about, April 28, 2009, as a Vocal Music Teacher.

1. The Respondent holds the following certification: Teacher of Music.

2. On, or about, January 28, 2014, Mr. Foca-Rodi, after being informed that Science Teacher Ezzard Wilson made disparaging comments about him by students, left his class in the basement unattended during a mid-term exam, to confront Mr. Wilson, whose class is located on the second floor. Mr. Wilson's class was taking a mid-term exam. Mr. Foca-Rodi yelled at Mr. Wilson, pointed his finger in Mr. Wilson's face, and refused to leave Mr. Wilson's doorway causing Mr. Wilson to request the assistance of building security.

3. Set forth below are the supporting facts for the charges of incapacity. These charges, as supported by the evidence, warrant the Respondent's dismissal from employment.

STATEMENT OF EVIDENCE IN SUPPORT OF CHARGE

1. Petitioner references and restates each Paragraph of the Disciplinary Charges as if set forth at length herein.

2. At all times relevant, Respondent was a tenured employee with the Irvington School District. Respondent was employed as a Music Teacher from April 2008 through the present date. He obtained tenure in this position on, or about May 1, 2011.

3. Petitioner possesses the following in reference to the incidents alleged to have occurred:

    a. Memorandum from Sandra Y. Boone-Gibbs, Irvington High School Principal.
    b. Memorandum from Ezzard Wilson, Science Teacher at Irvington High School.
    c. Statement from Andrei Foda-Rodi, the Respondent.
    d. Statement from Irvington High School security.
    e. Statement from N.W., a student in Mr. Wilson's class.
    f. Statement from L.J., a student in the Respondent's class.
    g. Statement from C.M., a student in the Respondent's class.
    h. Statement from A.P., a student in the Respondent's class.

4. The following individuals will offer testimony regarding the conduct giving rise to these charges:

    a. Ms. Sandra Y Boone Gibbs, regarding what the investigation she conducted surrounding this incident.
    b. Mr. Ezzard Wilson, regarding the events that took place in, and near, his classroom with the Respondent.
    c. Irvington High School Security, regarding events that were witnessed on January 28, 2014.

I, Dr. Neely Hackett, Superintendent of the Irvington School District certify that the foregoing statements made by me are true. I am aware that if any statements are willfully false, I am subject to punishment.

Dr. Neely Hackett, Superintendent

POSITIONS OF THE PARTIES

The District contends it had cause to discharge Respondent due to an act of misconduct that constituted conduct unbecoming a teacher. It bases its claim on several factors. First, the District advises, it is undisputed he left his classroom unattended. To buttress this contention, it cites the testimony and written statement of Science Teacher Ezzard Wilson, who averred that on January 28, 2014 Respondent came to his second floor classroom while his students were taking a test and began to berate him in a loud manner. At that time Wilson asked Respondent to leave, but he refused to do so. This led Wilson to call security to have Respondent removed from the area, the District avers.

Additionally, the District refers to the testimony of Security Officer Geraldine Hutchins, who related she heard noise and observed Respondent arguing with Ezzard Wilson. This caused her to call security, according to the District (District Ex. 2). Also, the District cites the testimony of Security Officer Timothy Felix, who related he was stationed in the basement level and heard noise on the second floor, which led him to leave the basement and go upstairs, where he observed that Respondent "was upset (District Ex.3)." The District cites, too, the testimony of

Security Officer Darlene Brown she observed Respondent at Wilson's door, with Wilson inside the classroom. This led her to request Respondent to leave the floor and to take whatever the issue was to his union representative (District Ex. 4).

Further, the District cites the testimony of High School Principal Sandra Boone-Gibbs that Respondent's actions interrupted a mid-term examination in violation of school policy. Also, she opined, the incident demonstrated Respondent could not control himself in spite of having been trained by the District in proper procedures and behavior (District Ex. 5).

Moreover, the District stresses, Respondent's conduct exceeded the threshold and standard for "conduct unbecoming" a teacher. As a result, it argues, Respondent must lose his tenure. To buttress this claim, the District cites In the Matter of the Tenure Hearing of George Zofchak.[1] In that matter, the District relates, the teacher left the classroom unattended and on one occasion he disrupted another teacher's classroom.

Further, the District refers to In the Matter of the Tenure Charges of Kevin Hariman whose employment was terminated due to intimidating behavior and verbal

[1] Docket No. 512-12/01

harassment to other teachers. It refers, as well, to In the Matter of the Tenure Hearing Hearing of Irandokht Toorzani, whose employment was terminated because she left her classroom unattended.[2]

The District emphasizes in the instant matter Respondent testified he left his classroom with a security officer, went to another floor in the building and interrupted Ezzard Wilson's classroom to confront him about hearsay statements he received from some students. Additionally, the District relates, Respondent acknowledged he has left his classroom in the past and asked a security guard to watch the room. Also, the District reminds, although Respondent claimed other teachers left their rooms unattended all the time, his co-worker and friend Jessica Meloro asserted she would never leave her classroom unattended or with a security guard. It points out, too, the security guard Respondent claimed to have instructed to watch his class testified he did not watch Respondent's classroom. Moreover, Respondent's actions interrupted Meloro's class because, as she testified, she heard yelling from outside the District explains.

Finally, the District maintains, Respondent's actions were in clear violation of various Irvington Board of

[2] Dkt. No. EDU 3510-2012; Dkt. No. EDU 09713-1

Education policies and the New Jersey Culture and Climate Goals mandated by the State in spite of admittedly having received training on at least one of the policies. Therefore, for the reasons cited herein, the District insists the charges against Respondent must be upheld and his employment terminated.

Respondent contends the charges against him are baseless. He explains at the beginning of his period 2A class two students advised him Wilson had made some disparaging remarks about him, especially that Respondent was a racist and a horrible teacher. Nonetheless, Respondent explains, he distributed and administered his mid-term exam and then collected them. However, Respondent declares, he was still upset about Wilson's remarks and to make matters worse, the students were speaking about it in front of other students. As a result, Respondent entered the hallway and asked Security Guard Timothy Felix to briefly watch his class while he went to get lunch cards for his students and to speak with Wilson. According to Respondent, Felix agreed to do so and stayed in the hallway outside Respondent's classroom.

Further, after he retrieved the lunch cards, he went to the second floor, knocked on Wilson's door, and asked him to come into the hallway, Respondent relates. After

Wilson had done so, Respondent inquired as to the reason Wilson had made such comments. Respondent emphasizes, at no time did he enter Wilson's classroom, nor did he yell, scream, curse or physically touch him. He stresses Wilson did not allege Respondent made any threats or accuse him of yelling or screaming. Rather, according to Respondent it was Wilson who yelled and screamed. After security arrived, Respondent returned to his classroom where he found all his students present and there was still time left in the class period he avers.

Also, Respondent stresses, the entire incident lasted three to five minutes, a fact corroborated by Wilson. Moreover, the testimony of Security Guards, Hutchins, Felix and Brown all confirmed the incident was brief, he stresses.

Further, Respondent advises, Principal Boone-Gibbs did not personally witness the incident, nor did she produce the videotape that was purportedly made at the time. He cites, as well, Boone-Gibbs' testimony he told her he asked a security guard to watch his class prior to leaving it.

Additionally, Respondent acknowledges he did not handle the situation in the best possible manner. He also maintains he would handle the situation differently in the future. He concedes he made an error in judgment in the

instant matter. As a result, he relates he has sought counseling with regard to his decision-making and anger management. To support this claim Respondent reminds he submitted a note from his therapist (Resp. Ex. 2).

Moreover, Respondent reports, in the course of his employment in the District he has received positive evaluations (Resp. Exs. 3-13). Further, his only other disciplinary matter was due to his failure to take attendance after a fire drill, a lapse that led to a letter of reprimand.

As to penalty, Respondent insists the charges be dismissed in their entirety and with prejudice. The basis for this claim, Respondent explains, is the Board did not carry its burden of proof as the evidence presented does not support the charges. Therefore, the Board should be directed to reinstate Respondent to his tenured position, he declares. Also, he claims, he should receive all back pay and other benefits.

Respondent opines even if the charges against him are sustained, the question becomes that of an appropriate penalty. In proceedings such as this, he declares, the factors to be taken into account include the nature and circumstances of the incident, the teacher's prior record, the effect of such conduct on the maintenance of discipline

among students and staff and the likelihood of such behavior recurring.

Further, in cases such as this that are litigated pursuant to the American Arbitration Association rules, the arbitrator is provided wide discretion in reviewing the appropriateness of a penalty that has been imposed or is being sought by the employer, Respondent declares. He emphasizes the TEACHNJ legislation unambiguously provides the arbitrator's determination is final and binding and may not be appealable to the Commissioner or State Board of Education.

Additionally, Respondent cites several cases wherein matters determined to be instances of misguided judgment have resulted in minor penalties. For example, he avers, In The Matter of the Tenure Hearing of Joseph Prinzo, Passaic County Technical Institute, the finding was that absent evidence to support a conclusion the actions had any lasting effect on the operation of the school or the students involved, a single incident that transpired over a relatively de *minimus* period of time and was not premeditated, cruel or vicious did not warrant discharge.

Rather, the penalty imposed was a thirty day loss of pay thirty day and.[3]

Moreover, Respondent cites In the Matter of the Tenure Hearing of Adam Mierzwa. In that case there was a finding dismissal was too harsh a penalty when a teacher used poor judgment on three different occasions. Instead the penalty was reduced to 120 days loss of salary, a four-month suspension and anger management.[4]

Also, Respondent cites In the Matter of the Tenure Hearing of Alan S. Tenney to buttress his claim discharge is too severe a penalty in this matter.[5] In that case, the teacher left his class unattended for 23 minutes. That person lost three months' salary as a penalty. Finally, Respondent cites In the Matter of the Tenure Hearing of Carmen Quinones whereby a physical education teacher left a student in the park and left her class unattended. In that matter the penalty was forfeiture of 120 days pay.[6] Based on these cases and his satisfactory evaluations, Respondent argues he should be acquitted of the charges against him. However, he asserts, if a penalty is to be imposed, it must be something short of discharge from service.

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[3] Dkt. No. EDU 10324-00.
[4] Dkt. No. EDU 8220-07.
[5] 1983 S.L.D 836
[6] 1996 N.J.A.R. 2d (EDU)649

DISCUSSION AND FINDINGS

I have carefully examined the testimony and other evidence in this matter. Based on that review I determine the District had cause to discipline, but not discharge Respondent. I so find for several reasons. First, there is no question Respondent left his classroom unattended for a brief period of time. This was clearly inappropriate and demonstrated poor judgment, in my view. That action demonstrated poor judgment, at best. Thus, there is no question in my mind Respondent should be punished for his misconduct as he engaged in conduct unbecoming a teacher.

Since I have found Respondent culpable of misconduct, the question that arises is what is the appropriate penalty? The District asserts Respondent's misconduct is so severe loss of tenure is the only appropriate penalty. I do not agree. This is so for several reasons. First, while it is true Respondent left his class unattended, it was for an extremely short period of time. Also, there was a security guard outside his classroom. Had a problem arisen the guard could have resolved it.

Further, I note, Grievant has served as a music teacher in the District since April 2008. Thus, at the time of the incident he had been employed approximately six years. During that period he was never the subject of

disciplinary action, nor was he accused of misconduct. The only blot on his record is a letter of reprimand for failing to take attendance after students returned from a fire drill. Thus, while not completely pristine, Respondent's employment record is such that loss of tenure is neither appropriate nor proportional for the misconduct, in my view.

Also, it is well settled in labor relations that, except for acts of egregious misconduct such as theft or fighting on the job, an employee's record should be taken into account when assessing a penalty. I have examined Respondent's evaluations and note he has received effective ratings on forty-three occasions. Given this fact and the lack of any serious prior misconduct, I conclude loss of tenure is not appropriate.

Additionally, at the hearing Respondent appeared to be authentically remorseful about what he had done. He admitted he used poor judgment and conceded he could have better handled the situation. Moreover, Respondent advises, as a result of his actions he sought counseling, and, in fact, was still undergoing treatment for decision-making and anger management. This indicates to me he is completely aware of his wrongdoing and is taking appropriate steps to ensure it never recurs. Based on all these factors, I

conclude, Respondent does not pose a future threat to either students or faculty. However, his misconduct in the instant matter was such that a penalty is in order. For that reason, I determine, the appropriate penalty is reinstatement with no back pay. Also, I find, Respondent must remain in treatment for decision-making and anger management until such time his counselor certifies he no longer needs to participate in counseling. It is so ordered.

AWARD

Respondent is culpable of conduct unbecoming a teacher on January 28, 2014. The appropriate penalty is reinstatement with no back pay. He shall also remain in counseling for decision making and anger management until such time his counselor certifies he no longer needs to participate in counseling.

STEPHEN M. BLUTH, ARBITRATOR

State of New York)

)SS:

County of Nassau)

On this, the 9 day of July, 2014, before me a notary public, the undersigned officer, personally appeared Stephen M. Bluth, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

In witness hereof, I hereunto set my hand and official seal.

Notary Public

CHERIE L BLUTH
Notary Public, State of New York
No. 01BL6253737
Qualified in Nassau County
Commission Expires Jan. 03, 2016