State of New Jersey
Department of Education

In the Matter of the Tenure Charges	*	
against	*	ARBITRATION DECISION AND AWARD
HOWARD SMITH (Teacher)	*	
by	*	DOCKET NO. 118-4/16
WAYNE TOWNSHIP BOARD OF EDUCATION	*	

Before: Joel M. Weisblatt, Arbitrator

Appearances:

For the Teacher
Ricci, Fava & Bagley
By: Ronald J. Ricci, Esquire

For the District
Machado Law Group
By: Isabel Machado, Esquire

D E C I S I O N

Introduction

On April 25, 2016, the New Jersey Department of Education, Bureau of Controversies and Disputes, (the "DOE") received the tenure charges against Howard Smith (the "Respondent" or the "Teacher") filed by the Wayne Board of Education (the "Board" or the "Petitioner"). The Respondent's answer was received by the DOE on May 6, 2016. Pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L.* 2012, c. 26, the undersigned Arbitrator was appointed to serve, by the DOE, on May 16, 2016.

The arbitration hearing was initially opened on June 8, 2016. The Respondent's Motion to Dismiss was decided on June 16, 2016 when the motion was denied by issuance of a formal written Ruling. Testimony was taken on: June 28, 2016; June 30, 2016; and July 8, 2016. Both parties were afforded an opportunity to argue orally, present documentary evidence and to examine and cross-examine witnesses. An extensive evidentiary record was established and a stenographic transcript of the proceedings was created. Both parties submitted detailed post-hearing briefs with supporting case law. The Arbitrator made a

written request for an extension of time for the issuance of the award, due to the number of days needed by the parties in order to properly present the case at hearing and to prepare and present their post-hearing briefs; the DOE approved the extension of time for the issuance of the award until August 31, 2016.

The Respondent is charged with "unbecoming conduct and other just cause" seeking the termination of his employment. In accordance with N.J.S.A. 18A:6-10 the Board bears the burden of proving that the Teacher warrants dismissal for "inefficiency, incapacity, unbecoming conduct or other just cause." The charges relate initially to one incident during the 2014-2015 school year in which the Respondent is charged with engaging in a physical altercation with a high school student. Additionally, the Teacher is charged with a series of incidents during the 2015-2016 school year involving charges of the harassment, intimidation and bullying ("HIB") of several students.

Positions of the Parties

Position of the Board

The Board contends that the Teacher engaged in a pattern conduct unbecoming beginning with an incident on February 18, 2015, at Wayne Valley High School. It maintains that the incident began in the Respondent's office in the boys' locker room and continued into the locker room itself. The Board stresses that the video evidence of the incident reveals that the Teacher is yelling and aggressive with his hands in the physical altercation with a high school student in his physical education class. It notes that the Teacher is significantly taller and heavier than the student. The Board emphasizes that there is no indication that the Respondent took any steps to de-escalate the situation and actually cornered the student. It is also noted that there is video evidence that the Teacher, just after the locker room incident, walked through the gym and bumped into the student with his shoulder. The Petitioner asserts that the Teacher's self-defense claim is "simply incomprehensible."

The Board further charges that the Teacher engaged in four separate improper acts of conduct in the following school year. These incidents all involved eighth grade students in a middle school health class taught be the Respondent in 2015-2016.

The first of the four incidents charged as an HIB offense involved stating to a student, "I take shits bigger than you." The Petitioner stresses that the Teacher admits to having made this statement. This statement is deemed to be a reference to the small stature of the student, adding to the inappropriate nature of the comment.

The second incident involves the charge that the Respondent told a different male student, in response to a question about vaginal discharge, that he should know what it is because he has it. This statement is deemed to suggest that the student was female and had acquired a sexually transmitted disease.

The third incident involved the charge of a statement to another student, during a video about anorexia with a female removing her sweatshirt to reveal the effects of the disease, that he would never get closer to seeing a naked

woman in his lifetime. This comment was portrayed as singling out the student and making him uncomfortable.

The fourth incident involved the charge that the Teacher suggested to a 14-year-old female student that she should be taking birth control pills. The Petitioner insists that this caused the girl to believe that the Teacher was insinuating that she was sexually active with a large number of boys.

The Board argues that "the ongoing conduct and behavior on the part of the Respondent mandates termination." It suggests that this is "habitually negative behavior" and that the Teacher has not responded to corrective measures. It points out that the Respondent received a suspension without pay, a loss of coaching responsibilities, a corrective action plan, and anger management training following the February 2015 altercation with a student. It further stresses that the Board reserved the right to bring new tenure charges if the Teacher's conduct justified such action.

The Petitioner asserts that its past efforts at progressive discipline "failed to result in any meaningful

modification to Respondent's behavior." It characterizes the Teacher's behavior as "habitual negative conduct unresponsive to intervention." The Board expresses the belief that unless the Respondent's employment is terminated, he will continue to endanger student both physically and emotionally. It seeks an award sustaining the tenure charges and his dismissal.

Position of the Teacher

The Respondent contends that the Board has failed to meet its burden of proof with respect to the tenure charges at issue herein. He asserts that "the ultimate punishment of dismissal should not be imposed", stressing the Teacher's "long history of exemplary service for the Wayne Public School System."

The Respondent argues that the penalty imposed for the February 2015 incident was sufficiently severe for that charge. Further he maintains that the comment, "I take bigger shits than you," was adequately dealt with by the letter of the letter of reprimand issued regarding that incident. The Teacher insists that the other three incidents of misconduct charged were not proved.

With respect to the February 2015 locker room incident, the Teacher explains that he was suddenly placed in a difficult situation, confronted by an out of control student accompanied by other out of control students. The Respondent claims that he had never received training to deal with such a situation.

The Teacher suggests that the student, C.A., engaged in an assault and that the Respondent's reaction of fear of being struck by the student was a reasonable one. The Respondent characterizes the Board's view of the interaction as "one-sided", not giving any consideration to the Teacher's legitimate concern for his own safety. The Respondent believes that the Board further exaggerated the Teacher's role in the incident.

With respect to the charge that the Respondent told a student "that's the most you will see," the Teacher asserts that the Employer was unable to present consistent evidence as to who made that statement. He maintains that the testimony of three students (J.Z., S.C. and D.R.) was inconsistent as to this allegation, leaving the charge unproved. The Teacher relies upon his own testimony that he said to the class generally, "relax that's all you're

going to see" as they became unruly upon seeing the video of a female anorexic student removing her sweatshirt.

Regarding the charge that the Teacher said to D.R., in answer to a question about vaginal discharge, "you should know you have it," the Respondent dismisses D.R.'s testimony as "remarkably dishonest." The Respondent insists that the Board erred in giving credence to D.R.'s testimony. He concludes that the Employer did not prove that the Teacher told D.R. that he had vaginal discharge.

The Respondent also maintains that the Petitioner did not prove that the Teacher made an inappropriate comment to S.C. concerning birth control. While it is suggested by the Respondent that D.R. might have been intentionally dishonest, no such assertion is leveled at S.C. However, the Teacher believes that S.C. was confused about the statement.

Part of the defense presented is that "life experience" must result in a conclusion as to whether the Teacher "would say such a horrible thing to a young girl who was approximately 14 years old." The Teacher adamantly denies making the comment, noting his long experience

coaching high school girls as proof of his awareness of appropriate language. S.C.'s credibility is questioned on the basis on her inability to recall the exact words attributable to the Teacher and the delay in her coming forward to report the incident.

The Respondent admits telling A.Z. "I take shits bigger than you." The Teacher acknowledges that this was misconduct but emphasizes evidence that A.Z. was not offended by the statement. Respondent argues that the letter of reprimand placed in his personnel file is adequate disciplinary action for this incident.

The Respondent raises the legal proposition that there are limitations to the proper consequences of prior discipline with respect to new charges. It is acknowledged that prior discipline can serve as a factor in determining penalties in a future case but there must be an avoidance of re-imposing disciplinary actions for misconduct already addressed. There can be no gross distortion of the events to support the penalty imposed.

The Respondent concludes that he "has already been severely punished for the incident regarding C.A. and

received a letter of reprimand for the comment to A.Z. Appropriate discipline has already been imposed for the charges that the Respondent believes to have been established. The Teacher insists that the other allegations have not been proved are that the Employer's request for removal of the Respondent from his tenured position should be denied in its entirety.

Discussion and Analysis

The Teacher, Howard Smith, has worked for the Wayne Township Board of Education since 1997. Through the 2014-2015 school year he was assigned to Wayne Valley High School. In 2015-2016, the Respondent was assigned to George Washington Middle School. He was a physical education teacher at both schools; he also taught driver education at the high school and health at the middle school. Exhibit R-1 presents a collection of the Respondent's observations and evaluations over the years. There is no indication among these documents that the Teacher had any deficiencies prior to the incidents at issue in these tenure charges. The Arbitrator finds that the Teacher had a long-standing good record prior to February of 2015.

The first incident relied upon by the Board occurred on February 18, 2015. The evidence reveals that several students in the Teacher's physical education class came to his office by the locker room at the early stages of the class period. The Respondent was at his desk and felt unexpectedly confronted by the group of boys. The Teacher

testified that he felt threatened for his safety. The Teacher moved the boys out of the office into the locker room and was displeased that one of the boys was making a video of the Teacher (taking video in the locker room is strictly against the rules).

Once in the locker room, the Teacher and one of the boys, C.A., engaged in a verbal and physical altercation that was captured on video. That video is in evidence in this proceeding as Exhibit B-32. It establishes, in a clear and convincing manner, that both the Teacher and C.A. engaged in very aggressive behavior both physically and in loud and inappropriate language.

The Arbitrator has carefully considered the testimony of C.A. and the Teacher; the video evidence presents a clear and convincing picture of the incident. The scene does not support the Teacher's defense that he had no option of disengagement. He continued to aggressively advance toward the student at a point where separation and de-escalation appear possible. The Arbitrator believes that the Respondent may have been initially startled, perhaps even provoked, by the confrontation but his response, as caught on video, was quite inappropriate for a

teacher; his verbal and physical interaction with the student crossed the line into unacceptable conduct.

The Teacher's conduct was clearly improper. It is quite reasonable for the Employer to expect its teachers to be able to de-escalate volatile situations. The Respondent failed to de-escalate the conflict. Indeed, he actually continued to act aggressively and as provocatively as the student. The Teacher had the opportunity to disengage from the altercation but did not. This was serious misconduct.

Additionally, several minutes after the altercation ended in the locker room, the Teacher was caught on another video [Exhibit B-31, from a school security camera] walking into the student C.A. in the gymnasium. The Teacher could have avoided the student but it appears that he intentionally bumped C.A., using his shoulder, as he crossed the gym floor. This was further indication of the aggressive and unbecoming conduct on the part of the Teacher on February 18, 2015.

The Respondent seeks to defend his conduct with respect to the February 18, 2015 incident by claiming that he was in fear of his own safety and acted reasonably.

That effort falls far short of a convincing claim. It should be noted that two students, C.A. and K.G., appeared at the tenure hearing to testify as to the incident. K.G. testified that he believed it to be the Teacher who pushed C.A. first to start the physical element of the altercation. C.A. testified that he felt threatened by the Teacher's advancement and pushing. The evidence suggests that there was aggression on both sides of this altercation. Neither party is relieved of all responsibility however, the Teacher must be held to a somewhat higher standard, responsible to reduce rather than escalate any conflict with students.

It is significant to point out that the Teacher agreed to accept a substantial set of consequences in recognition of the severe nature of his misconduct and in order to avoid tenure charges at that time. Exhibit B-11 is an *Agreement and General Release* executed by the parties with respect to the February 18, 2015 incident. The Teacher authorized his counsel to sign this document on May 21, 2015 and it presents the terms of a resolution of the issues arising from the altercation with student C.A. The Teacher testified that he did not agree to the settlement although he did authorize it to be signed on his behalf.

He does admit that he agreed to the penalties set forth in B-11 and to the Corrective Action Plan.

The May 21, 2015 agreement document sets forth a number of agreed upon actions that are clearly disciplinary in nature. Consider the following elements of the agreement:

> The Teacher's employment and adjustment increments were withheld.
>
> The Teacher lost all coaching assignments.
>
> The Teacher was required to comply with a Corrective Action Plan for the 2015-2016 school year.
>
> The Teacher served an unpaid leave of absence for June of 2015 through the first day of school in September of 2015.
>
> The Teacher forfeited 30 accumulated sick days.
>
> The Teacher was transferred to the middle school assignment.
>
> The Teacher was required to attend anger management training.

The document expressly points out that the terms are "a compromise" and further specifies that "this Agreement, nor any consideration provided pursuant to this Agreement, shall be taken or construed to be an admission or concession by THE BOE [Board of Education] of any kind with respect to any fact, liability, unethical conduct or fault whatsoever." It is noteworthy that the non-admission

language of Exhibit B-11 applies only to the Board and not to the Respondent.

The disciplinary penalties imposed by the parties' agreement relating to the February 18, 2015 incident are quite substantial. This reflects the fact that both parties perceived that incident to be severe misconduct on the part of the Teacher. There can be no question that the disciplinary aspects of Exhibit B-11, agreed to by the Teacher, serve to place the Respondent on clear notice that further unbecoming conduct would have the most severe consequences. The substantive elements of the terms of Exhibit B-11 cannot be construed in any other way. The existence and resolution of the February 18, 2015 misconduct provides a most significant context for the 2015-2016 incidents set forth in the charges herein.

There are four incidents that occurred in the 2015-2016 school year that the Board alleged to be misconduct falling within the harassment, intimidation and bullying prohibition. Each involved the charge that the Grievant acted inappropriately in interaction with one or more students. Three former eighth grade students from the

Respondent's health class appeared at the tenure hearing to testify. The allegations involve four separate incidents.

One of the incidents is undisputed by the Respondent. He admits to saying to A.Z., "I take shits bigger than you." Exhibit B-14 documents the incident that occurred on January 5, 2016. This document is a letter of reprimand written by Principal Jack Leonard of the Washington Middle School. The letter reflects the Teacher's admission to making the statement and defense that it made in jest and not threatening nor intimidating. The Teacher was placed on notice that the students should not be engaged in this manner and of the importance of professional behavior in all conversations and interactions.

It is significant to note that the Teacher testified that he made the "I take shits bigger than you" comment to A.Z. He described the incident as a "slip of the tongue" and believed that A.Z. was the only one who heard it. The Teacher testified that he thought the Principal's letter was "a strongly written letter." He testified that the interaction was more playful and not upsetting to the student.

The second allegation of the Teacher's misconduct in health class was presented through the testimony of student D.R., who appeared at the tenure hearing. D.R. testified that the Teacher, during a class addressing sexually transmitted diseases, uttered an insulting comment in response to a question about vaginal discharge. The student testified that the Teacher stated, in response to this question, "I thought you would know because you have it."

It is significant to note that the Teacher adamantly denies making this statement. The Respondent attacks the witness' credibility, noting that the complaint only came to light after the Teacher disciplined D.R. for a separate incident of student misconduct. The Arbitrator finds that the cross-examination of D.R. raised some issues relating to the consistency of his testimony but his general credibility withstood a skilled cross-examination. The Arbitrator believes that the statement about vaginal discharge was made as claimed by D.R.

The statement about vaginal discharge, made to a then 13 year-old student, is another instance of inappropriate conduct on the part of the Respondent. It flies in the

face of the concept of professional behavior in all conversations and interactions with students. The January 2016 comment to D.R. was unbecoming conduct by the Teacher.

The nature of the third allegation of unbecoming conduct is less clear than the others. The scenario involved a video about eating disorders shown in class. An anorexic girl is shown in the video removing her sweatshirt and this caused the already unruly class to become boisterous. Student J.Z. testified that when another student, A.Z., began to hoot and holler about the girl undressing, the Teacher said to A.Z., "that's the most you'll ever see." On cross-examination, J.Z. indicated that the Teacher was "talking in the general direction of A.Z." This witness took the incident to be directed at A.Z. rather than the class generally.

The Respondent testified that he never directed a comment to any single student in response to the unruliness when the girl removed her sweatshirt in the class video on anorexia. He believes that he may have made a general statement to the class when they began to hoot and holler to the effect of "easy boys that's all you're going to see." The key to the context of this allegation is whether

the statement was directed toward a single student and whether it included the word "ever." The connotation of "that's all you're ever going to see" is quite different than "that's all you're going to see." The former, if directed toward a single student is intimidating and improper. One can easily understand the latter comment among a group of hooting and hollering 13 and 14 year old boys and girls.

The Arbitrator finds that the evidence is not sufficiently convincing to prove the allegations about this third incident. It is the Board's burden to prove the charges by a preponderance of the evidence and this particular element of the charges was not adequately supported by credible evidence. That aspect of the charges relating to the allegation that the Respondent stated to a student "that's all you're ever going to see" is dismissed as unproven.

The fourth charge of unbecoming conduct in the 2015-2016 school year involves the claim that the Teacher made inappropriate comments to a female student, S.C, concerning birth control. The testimony of this 14 year old

eighth grade girl was quite compelling. She testified that she did not recall the exact wording but did unequivocally state that the Teacher expressed the belief that S.C. should be on birth control. The student testified that her initial reaction to this was that it was funny but then she understood the comment to imply that she would be with many boys and it made her feel uncomfortable.

S.C. explained that the health class was unruly and did not show adequate respect for the Teacher. She acknowledged that this was not appropriate and revealed the understanding that she played a certain role in the class' misbehavior. S.C. described the moment of the comment indicating that she was not paying attention and that she was engaged in discussion with other students. The scenario suggests that a teacher might be frustrated by the lack of proper attention, however, it in no way provides a valid basis to make a comment as inappropriate as the one that S.C. attributes to the Teacher. Such a comment is inexcusable as it raises issues of sexual harassment and intimidation to a student in a very vulnerable setting.

S.C. was a most credible witness. Her description of the incident appears true and accurate. The fact that she

does not recall the exact wording used by the Respondent does not necessarily diminish the validity of her recollection. The delayed reaction to the statement is also not a factor requiring the testimony to be discounted. Her demeanor and presentation were absolutely consistent with a witness telling the truth. There appeared to be no basis to believe that she would manufacture this charge. The Arbitrator makes a factual finding that the Teacher made a comment to student S.C. to the effect that she should be on birth control. This was unbecoming conduct of a serious nature on the part of the Respondent.

* * *

It is important to reiterate that this arbitration proceeding is a trial de novo. No prior finding, for example the various HIB investigative reports, was given independent probative value. Only those witnesses who testified at hearing, providing Respondent with an opportunity to cross-examine, were considered as evidence with regard to the tenure charges at issue herein.

* * *

The evidence must be analyzed in accordance with the legal standard under N.J.S.A. 18A:6-10 that a tenured teacher may not be dismissed "except for inefficiency, incapacity, unbecoming conduct, or other just cause." It

is understood that teachers work in a sensitive environment in our society. It is well-settled:

> That the school authorities have the right and duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as part of ordered society cannot be doubted.
> Adler v. Bd. of Educ. of the City of N.Y.
> 342 U.S. 485 (1952)

With respect to the tenure statute at issue herein, this concept has been repeatedly expressed, consider In re Grossman 127 N.J. Super 13 (App. Div. 1974) noting that the touchstone is whether fitness to discharge a teacher's duties and functions is compromised. Unbecoming conduct is generally recognized as behavior adversely affecting morale or weakening respect for the employees or the public services [see Karins v. Atl. City 152 N.J. 532 (1998)].

In the case at hand, the Board has met its burden of proving, by a preponderance of the evidence, a sequence of separate events that constitute unbecoming conduct. The context for the misconduct is dominated by the serious incident of February 18, 2015, when the Teacher engaged in a verbal and physical altercation with one of his students. Even if the Teacher had been initially provoked by or become fearful of the student, the evidence clearly reveals that the Teacher remained overly aggressive and failed to

take reasonable steps to disengage with the student. This is problematic conduct for a teacher entrusted with the care and education of students.

The Respondent accepted a set of disciplinary penalties in relation to that incident that cannot be viewed as anything other than the most stern of warnings that any further unbecoming conduct could not be tolerated and would lead to the filing of tenure charges. The Teacher was on notice that his employment was at the edge of a precipice requiring the most careful attention to his conduct. In essence, the Board engaged in progressive discipline by providing warning and notice in response to the February 18, 2015 misconduct.

In the context of the February 18, 2015 altercation and the responding disciplinary penalties, the Teacher's acts of misconduct during the 2015-2016 school year are most troubling. They appear to establish a pattern of a loss of control over the need for the teacher to conduct himself within the bounds of reasonable expectations for the position. Three transgressions of inappropriate conduct were proved on the record. While standing alone, it is debatable as whether these might warrant dismissal,

in the context of a teacher on notice due to a most serious prior diversion from acceptable conduct, they form the basis to accept the dismissal of employment sought by the Board. Efforts at progressive discipline did not appear to be effective.

In conclusion, it is determined that the Board has met its burden of proving the tenure charges brought against the Respondent. Specifically, it proved conduct unbecoming in relation to the incident of February 18, 2015 and three incidents during the 2015-2016 school year. This pattern of unbecoming conduct, including serious transgressions, also establishes just cause for the dismissal of the Respondent from his position as a tenured teacher.

A W A R D

For the reasons set forth in the Decision herein IT IS HEREBY DETERMINED that the Board has met its burden of proving the tenure charges of unbecoming conduct and other just cause brought against the Respondent. IT IS HEREBY ORDERED that the Respondent be dismissed from his position as a tenured teacher.

Dated: August 26, 2016

Skillman, N.J.

Joel M. Weisblatt, Arbitrator

On this 26th day of August 2016, before me personally came and appeared Joel M. Weisblatt, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Attorney-at-law