

**STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES**

In the matter of the tenure hearing of:

**The School District of the
Township of Irvington, Essex County
Petitioner**

and

**David Pickney
Respondent**

Opinion

and

Award

Agency Docket No. 303-10/15

Before: Stephen J. Rosen, Arbitrator

Hearing Dates: March 4, 2016 and March 24, 2016

Briefs Received: May 16, 2016

Appearances:

Petitioner:

Hunt Hamlin & Ridley
By: Ronald C. Hunt, Esq.
60 Park Place
Newark, NJ 07102

Respondent:

Oxfeld Cohen, P.C.
By: John Branigan, IV, Esq.
60 Park Place
Newark, NJ 07102

This matter arises out of tenure charges filed against the Respondent, David Pickney, on October 19, 2015. Those charges were certified on November 25, 2015. Petitioner filed the charges against Mr. Pickney pursuant to the State Evaluation System, AchieveNJ and the Teach NJ Act. By letter dated December 21, 2015, the Commissioner of Education referred the charges to me pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, C. 26 and P.L. 2015, C109. Hearings were held at the offices of the Board of Education, One University Place, Irvington, NJ. With the exception of the Superintendent of Schools and the Respondent, witnesses were sequestered. A transcript of the hearing was prepared. In consideration of receipt of the transcript, the parties agreed to submit briefs on May 2, 2016. At the request of the attorney for the Petitioner, and with the acquiescence of the attorney for the Respondent and the arbitrator, submission of briefs was rescheduled until May 16, 2016. Pursuant to the Statute, after 120 days, Mr. Pickney was placed on the District's payroll.

BACKGROUND:

Mr. Pickney began his employment with the District on September 1, 2001. He holds teaching certificates in social studies and general education.

During the 2013-2014 school year, under the TeachNJ Act, new teacher evaluation and observation methods were adopted by the District. Following the implementation of new guidelines, Respondent's evaluations were classified "Partially Effective" and "Ineffective." Based upon these evaluations, Mr. Pickney was placed on a Corrective Action Plan (CAP). The intent of the CAP is to improve a teacher's proficiency in the classroom. Under the CAP, a

District Supervisor conducts an additional yearly observation and schedules a post-observation meeting with the teacher within 15 teaching days.

Under N.J.A.C. 6A:10-4. 4(c), a teacher is required to be observed at least three times during the school year. When under a CAP, a teacher is to be observed at least four (4) times in the course of the school year. The Respondent's attorney argued that the District failed to adhere to the Statute.

The Petitioner submitted letters of reprimand and contended that a prior 60-day improvement plan failed to bring about an improvement in Mr. Pickney's effectiveness. The District contended that despite its efforts the only alternative was to ask that the tenure charges be sustained.

The Respondent had asked that the charges be dismissed given the Petitioner's failure to provide a list of witnesses in accordance within the time frame specified in N.J.A.C. 18A: 6-16 and P.L. 2012, C. 26 (C. 18A: 6-117 et al). The matter was referred by the Department of Education for arbitration on December 21, 2015. On January 11, 2016, counsel for the Petitioner asked for a list of witnesses. On January 13, 2016, Petitioner's counsel responded a list would be provided "shortly." The witness list was eventually transmitted to Respondent's attorney on January 22, 2016, but not a summary of their testimony.

In consideration of the Respondent's request, I considered the time of year (Christmas – New Year) that the matter was referred for arbitration by the Department of Education. I had also been informed by the law firm representing the District that it had reassigned the matter to a different attorney.

Given the change in the Petitioner's attorney of record and scheduling conflicts brought to my attention by both parties, the first hearing was not held until March 4, 2016. It was also my

understanding that the Respondent's attorney had been in possession of the case file compiled by the District. In consideration of these factors, I determined that the matter should proceed.

The Respondent's attorney argued that the District had submitted past incidents that occurred years before the instant matter. It was also contended that the penalty imposed by the District was unreasonable and excessive.

The Petitioner argued that the termination of the Respondent from the Irvington School District was supported by unsatisfactory evaluations over a two year period. The charge of inefficiency and failure to exercise good judgment were based upon the following:

1. On or about December 17, 2013, Respondent was evaluated by Teresa Steele-Hunter, Social Studies, Supervisor. This evaluation was announced. Respondent received the rating of Unsatisfactory, based on a score of 1.2.
2. A post evaluation conference was held on or about January 27, 2014. Respondent received the following recommendations: (1) be mindful of what you state to students, comments conveyed to students were inappropriate and culturally insensitive; (2) enroll in professional development with an emphasis on instructional strategies, differentiated instruction, assessments, classroom management, and lesson design; (3) read and utilize all handbooks distributed to you for enhancing instructional practices; (4) request permission from building administrators to visit classrooms of master and/or lead teachers to learn how to use grouping strategies effectively and to implement a lesson following the lesson design process; and, (5) construct lessons that engage students in higher order thinking and problem solving.
3. On or about April 2, 2014, Respondent was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This was an announced evaluation. Respondent received the rating of Unsatisfactory, based on a score of 1.0.
4. A post evaluation conference was held on or about April 25, 2014. Respondent received the following recommendations: (1) plan meticulously when constructing instructional activities so that a variety of activities are implemented to motivate and challenge students; (2) standard practices must be routinely enforced for upholding the tenets of the school's rules and regulations; (3) seek opportunities for enrolling in professional development for classroom management, differentiated instruction, student engagement, formative assessments, lesson design, and instructional strategies; (4) become more proficient in using technology (smart board) as an interactive tool; and, (5) be mindful of what you state to students with regards to your role as a professional.

5. On or about April 7, 2014, (Mr. Pickney) was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This was an unannounced evaluation. Respondent received a rating of Unsatisfactory, based on a score of 1.0.
6. A post evaluation conference was held on or about April 25, 2014. Respondent received the following recommendations: (1) review the Social Studies Curriculum Guide and Common Core Standards for a thorough understanding of the curriculum expectations for implementing the content with rigor; (2) use the English language correctly and appropriately, the use of slang does not belong in the classroom “what you gonna do?” and, (3) enroll in professional development with an emphasis on instructional strategies, differentiated instruction, classroom management, lesson design, and formative assessments.
7. On or about May 19, 2014, Respondent was evaluated by Ms. Chinaire Simmons, University Middle School, Assistant Principal. The evaluation for unannounced. Respondent received the rating of Developing, based on a score of 2.0.
8. A post evaluation conference was held on or about June 6, 2014. Respondent received the following recommendations: (1) plan for and implement differentiated instruction to meet the needs of all learners; (2) plan for and integrate tiered activities into lessons; (3) follow the lesson design process; (4) communicate and refer to the lesson objective throughout the lesson; (5) post and discuss a Daily Lesson Agenda with timed expectations; (6) challenge students with higher order thinking questions; (7) ensure that students are aware of assessment criteria; and, (8) seek your immediate supervisor’s guidance in implementing effective lessons in the immediate future.
9. On or about June 27, 2014, Ms. Chinaire Simons, University Middle School, Assistant Principal, completed a Summative Report. Respondent received the rating of Unsatisfactory, based on a score of 1.43.
10. The Respondent was also evaluated for calendar year of 2014-2015.
11. On or about December 12, 2014, was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This was an announced evaluation. Respondent received the rating of Developing, based on a score of 2.0.
12. A post evaluation conference was held on or about January 30, 2015. Respondent received the following recommendations: (1) enroll in professional development outside of the district for differentiated instruction, cooperative learning, instructional strategies for teaching social studies, and effective lesson planning; (2) design and implement lessons with rigorous activities that engage students in critical thinking and authentic writing assignments using rubrics; (3) continue to create and display teacher-made anchor charts, exemplars and rubrics; and, (4) complete all CAP requirements as directed.
13. On or about May 29, 2015, Ms. Andrea Tucker, University Middle School, Principal and Dr. Neely Hackett, Superintendent evaluated Respondent. This was an announced evaluation. Respondent received the rating of Unsatisfactory, based on a score of 1.2.

14. A post evaluation conference was held on or about June 17, 2015. Respondent received the following recommendations: (1) review lesson plans of master teachers for exemplars in effective planning for small group instruction; (2) professional development is needed for higher order questioning; (3) use 3 to 5 seconds of wait time between asking a question and accepting a response; (4) post authentic anchor charts around the classroom that reflect the current unit of study; (5) review lesson plans of master teachers for exemplars on ensuring that the measure is appropriate to assess the content or skill covered in the lesson; and, (6) continue to become familiar with the Social Studies Core Content Standards.
15. On or about June 15, 2015, Respondent was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This evaluation was unannounced. Respondent received the rating of Unsatisfactory, based on a score of 1.0.
16. A post evaluation conference was held on or about June 16, 2015. Respondent received the following recommendations listed as follows: (1) enroll in professional development for differentiated instruction, cooperative learning, best practices for teaching Geography, and writing lesson plans; (2) plan for and implement more authentic writing assignments (avoid drawing and coloring); (3) create and post anchor charts relative to what you are teaching; and, (4) review the content standards for Social Studies for alignment to the department's pacing guide and curriculum guide for Geography.
17. In August 2015, Respondent's Summative Report was completed by Ms. Andrea Tucker, University Middle School, Principal. Respondent received the rating of Unsatisfactory, based on a score of 1.8.
18. Furthermore, Respondent's Corrective Action Plan that was completed for the 2014-2015 school year, indicates that the Respondent did not meet the goals of CAP.
19. Respondent's conduct violates the State Evaluation System, AchieveNJ and the TeachNJ Act.
20. In addition to receiving inefficient evaluation scores, Respondent received the below letters of reprimand since the start of his employment:
 - a. Reprimand dated May 1, 2006, from Dr. Wilma Crespo, University Six School Principal – Failure to Submit Lesson Plan;
 - b. Reprimand dated February 12, 2013 from Ms. Theresa Steele-Hunter, Social Studies, Supervisor – Failure to Implement Previous Recommendations for Classroom Instruction and Environment;
 - c. Reprimand dated February 13, 2007 from Dr. Wilma Crespo, University Six School, Principal – Watching TV During Social Studies Class;
 - d. Reprimand dated June 15, 2011 from Ms. Cheryl Chester, Union Avenue Middle School, Principal – Failure to Record Grades for Students;
 - e. Notice of Increment Withholding Letter dated June 27, 2011 from Dr. Ethel Hasty, former Superintendent;

- f. Confirmation of Increment Withholding Letter dated July 1, 2011 from Ms. Alberta Sharif, Director of Human Resources;
 - g. Reprimand dated October 26, 2011 from Ms. Cheryl Chester, Union Avenue Middle School, Principal – Inappropriate Contact and Language Towards a Student;
 - h. Increment Withholding Letter dated June 22, 2012 from Ms. Alberta Sharif, Director of Human Resources;
 - i. Reprimand dated March 6, 2014 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Inadequate Instructional Practices;
 - j. Letter from Ms. Teresa Steele-Hunter, Supervisor of Social Studies to Mr. Musa Malik, Manager of Human Resources dated May 9, 2014 – based on Mr. Pickney’s Failure to Respond to Request for Post Observation Questions;
 - k. Reprimand dated May 9, 2014 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Failure to Respond to an Administrative Directive;
 - l. Reprimand dated September 29, 2014 from Dr. Angelica Allen, Assistant Superintendent for Curriculum and Instruction – Playing Music with Profanity and not Providing Instruction to English Language Learners;
 - m. Reprimand dated May 13, 2015 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Failure to Follow Procedures Regarding the Submission of Student Growth Objectives;
 - n. Reprimand dated May 14, 2015 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Playing Vulgar Music in Class; and,
 - o. Letter dated June 2, 2015 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Lyrics to the Song Referenced in Reprimand dated May 14, 2015;
21. Petitioner firmly believes that when staff members receive continuous inefficient evaluation scores, in addition to letters of reprimand as shown above, such actions are unacceptable because it negatively affects the academic development of students.

RESPONSE OF THE RESPONDENT

Under N.J.A.C. 6A: 10, the District is required to follow guidelines in the observation of and follow-up conference with classroom teachers. These mandatory guidelines were not met by the Petitioner.

Under N.J.A.C. 6A: 10, “Each teacher shall be observed as described in this section, at least three times during each school year but not less than once during each semester. For all teachers, at least one of the required observations shall be announced and preceded by a pre-conference, and at least one of the required observations shall be unannounced. The chief school administrator shall decide whether the third required observation is announced or unannounced.”

During the 2013-2014 school year, the Petitioner failed to adhere to the required guidelines. As a result, the post-observation meetings were not held in the required time period. On two occasions, the Petitioner was forced to nullify an evaluation because the time frame was not followed. However, the District still included one of the two nullified evaluations in the Respondent's Summative Evaluation for the 2014-2015 school year.

A review of the Respondent's record reveals that his evaluations fell from usually "Effective" to "Partially Effective" to "Ineffective." Beginning in school year 2013-2014, Respondent was deemed ineffective and placed on a Corrective Action Plan (CAP) for the 2014-2015 school year.

As required, a teacher under a CAP is to be observed at least one additional time above the previous year. The record shows Petitioner failed to schedule the required number of observations and post-observation conferences. As stated in N.J.A.C. 6A: 10-4, 4 (c):

"Observation conferences shall include the following procedures: A supervisor who is present at the observation shall conduct a post-observation conference with the teacher being observed. A post-observation conference shall occur no more than 15 teaching staff member working days following each observation." (Emphasis added)

Under N.J.A.C. 6A: 10-2, 5 (k), a teacher under a CAP is to be observed at least four (4) times. One observation took place on October 20, 2014 but was nullified when Petitioner failed to meet the 15-day post-observation time limit. However, the October observation was included within the year end summative evaluation. In addition, the third and final observation under CAP took place on the last teaching day of the year, which left no time for a fourth observation.

Respondent's attorney noted that the District did issue several letters of reprimand during Mr. Pickney's period of employment as a teacher but never suspended him. The Petitioner

considered the letters of reprimand a justification to satisfy the standard of just cause. Under just cause the Petitioner would be required to suspend the Respondent before seeking his dismissal.

Removal of a tenured teacher is a serious action. Before a tenured teacher is removed, the District must adhere to the provisions contained under N.J.A.C. 6A: 10. Because the Petitioner failed to observe the guidelines, the Respondent's opportunity to remove any alleged deficiencies was denied. The standard of proof is significant in the removal of a tenured teacher. As described in the following decision:

"Tenure protects employees from unfounded dismissals. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed 2d 502 (1983). Tenure statutes are 'designed to aid in the establishment of a competent and efficient school system by affording to [covered employees] a measure of security in the ranks they hold after years of service.' Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). Further, tenure laws 'should be given liberal support, consistent, however, with legitimate demands for governmental economy.' *Ibid.*"

The just cause standard requires that the Petitioner prove by a preponderance of evidence that the dismissal of a tenured teacher was warranted. In a 2009 decision, In the Matter of the Tenure Hrg. of Lisa Weaver State Operated Sch. Dist. of the City of Paterson, Passaic County, 159-, 2009 WL 1108536, at *21 (N.J. Adm. Apr. 20, 2009).

"Evidence is said to preponderate 'if it establishes 'the reasonable probability of the fact.' 'Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423. (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis."

The Petitioner's failure to conduct observations and post-observation conferences had a negative impact on Mr. Pickney's efforts to correct alleged insufficiencies. This failure had a detrimental impact on Respondent's evaluations. The Petitioner's multiple violations of the Stature prompted Mr. Pickney to file grievances. As stated previously, the rescheduling of

observations resulted in two observations (April 2 and 7, 2014) within five (5) days, with no post-observation held in between. The post-observation meeting was not held for both observations until April 28, 2014.

Under N.J.A.C. 6A: 10, the Petitioner was not permitted to convene one post-observation meeting for two separate observations. One post-observation can be combined with a teacher's summary conference only if it is "within the required 15 teaching staff member working days following the observation for the purpose of evaluation." If two post-observations were permissible, it would have been specifically stated in the regulation.

The negative impact of the combined post-observations is confirmed by the fact Mr. Pickney received the same exact numerical score for the April 7, 2014 evaluation as he did for the April 2, 2014 evaluation. Without feedback of any deficiency noted in the April 2 observation, he was at a disadvantage when he was observed on April 7.

After the post-observation session was held, the Respondent was then able to improve his rating when observed on May 19, 2014. While the Petitioner noted that Mr. Pickney consented to the scheduled observations in April, he believed that he did not have a choice.

Mr. Pickney testified that he was not consulted or had any input prior to the implementation of the CAP in the 2014-2015 school year. The absence of a teacher's input is a violation of N.J.A.C. 6A: 10-2.5 (a).

"A corrective action plan shall be developed by the teaching staff member and a teaching staff member serving in a supervisory capacity to address deficiencies outlined in the evaluation when the employee is rated ineffective or partially effective. The corrective action plan shall include timelines for corrective action and responsibilities of the teaching staff member and the school district for implementation of the plan."

Respondent's attorney took issue with the actual number of countable observations conducted during the 2014-2015 school year. The end of the year summative evaluation lists

four observations although the first observation on October 20, 2014 did not result in a post-observation conference, thereby nullifying this observation.

There was also confusion concerning observations conducted in the 2013-2014 school year. The December 17, 2013 observation was not relevant because the post-observation conference was not held within the 15-day window. Since the October 20, 2014 observation score was not revealed, its possible impact on the end of the year Summative Evaluation cannot be assessed.

If the nullified December 7, 2013 observation was permitted to stand, Respondent was observed four times in the 2013-2014 school year. Therefore, Respondent should have been observed five times in 2014-2015, since under the CAP a teacher is to be observed one additional time over the previous year.

The final, or technically third observation, for the 2014-2015 school year took place during the last teaching week of the year on June 15, 2015. This observation took place before the May 29, 2015 post-observation conference convened on June 17, 2015. This was the second time that the Respondent was denied the opportunity to receive constructive suggestions on a timely basis.

The post-observation conference for the June 15, 2015 observation was scheduled for July 10, 2015, when Respondent had already left for his summer vacation. Thus, there was never a post-observation conference.

An observation scheduled for the last week of classes and the failure to conduct a post-hearing conference by June 30, 2015 meant the Petitioner was not in compliance with the Statute. Whatever the reason, the Petitioner did not attempt to comply with the applicable regulation.

Timeliness is relevant since recollection of an observation diminishes over time. The Petitioner noted that the Respondent had rescheduled several “benchmark” meetings as required under his CAP. However, each time a benchmark CAP meeting was rescheduled, it was for just a few days. There is no evidence that Mr. Pickney sought to intentionally avoid these meetings.

Counsel for the Respondent took issue with various letters of reprimand that were placed in Respondent’s personnel file. These documents were inadmissible since they were not plead in the Statement of Charges prepared by the Petitioner.

The Respondent was not put on notice for these alleged incidents. Although the documents were contained within the Petitioner’s Statement of Evidence, Mr. Pickney was not specifically charged. Thus, the Respondent cannot be found guilty for incidents for which he was not charged.

The Petitioner’s inclusion of the letters of reprimand amounts to double jeopardy. These letters were not contested because the Respondent did not believe, at the time, they necessitated further action. The District’s reliance on these letters constitute punishing Mr. Pickney twice for the same incidents. Although the Petitioner considered the letters warranted just cause, they did not remove the Respondent until they charged him with inefficiency.

If the letters of reprimand qualify under just cause, then the Petitioner was obligated to impose progressive discipline prior to a discharge. Except for two letters concerning an inappropriate song, none of the letters indicate repeated violations of policy.

In addressing the matter of just cause and progressive discipline, Respondent’s attorney argued that the District never considered a suspension before filing tenure charges. None of the letters of reprimand rise to the level for the removal of the Respondent.

After being issued a letter of reprimand, the Respondent corrected his behavior. Although Mr. Pickney believed the Roots video was appropriate during Black History Month, he discontinued using this video when told it was unacceptable. When he was informed the song he played in class showed poor judgment, he no longer used this song. In response to any possible objection to a video, the Respondent listed those selected in his lesson plans. Listing the title of a video in his lesson plan provided his Supervisor with the opportunity to review what he selected before it was shown in class.

The Respondent also stated that the song his superiors considered inappropriate did not actually contain the lyrics. Mr. Pickney testified that when he met with his supervisors they admitted there were no lyrics played in class. The reference to lyrics did not surface until one month after the write up of the incident. The song, "Fancy," by Iggy Azalea, was a popular song at the time and one the students listened to before he played it in class.

In addressing the District's action, the Respondent's attorney stated that teachers have been suspended for reasons far worse than the charges leveled against Mr. Pickney.

The Respondent, it was argued, was subjected to a level of discipline that exceeded the charges. "At the very worst, Respondent should be suspended for a minimal amount of time." By not even considering suspending the Respondent, Petitioner has displayed an unwillingness to uphold the principles of just cause.

DISCUSSION AND FINDINGS

Under N.J.S. A: 6-17. 2, the arbitrator is required to observe the following criteria when deciding the dismissal of tenured teachers for inefficiency.

- (1) (if) the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan;

- (2) there is a mistake of fact in the evaluation;
- (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
- (4) the district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affect the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

The Petitioner submitted four (4) evaluations for the 2013-2014 school year. They were conducted on December 17, 2013, April 2, 2014, April 7, 2014 and May 14, 2014. The 2013-2014 school year Summative Assessment Report showed an overall "unsatisfactory" assessment score of 1.43.

In the event that a teacher is deemed to be Ineffective or Partially Ineffective, the District is required to develop a Corrective Action Plan (CAP). As stipulated under N.J.A.C. 6A: 10-2.5. and described in a New Jersey Department of Education guidance Summary of Legal Requirements for Evaluation and Tenure Cases, a CAP should adhere to guidelines that address timeliness and minimum number of observations.

District Supervisor of Social Studies Teresa Steele-Hunter testified that she observed Mr. Pickney on December 17, 2013 and rated Respondent unsatisfactory. She recommended that Respondent enroll in a Professional Development course. Ms. Steele-Hunter also listed

classroom management, differentiation of instruction, student engagement and instructional strategies deficiencies.

Ms. Steele-Hunter observed the Respondent again on April 2, 2014. Like the December observation, it had been announced in advance. Prior to an announced observation, the observer schedules a pre-conference with the teacher. Ms. Steele-Hunter stated that the Respondent failed to complete a required pre-conference form before meeting with her. Mr. Pickney was given an Unsatisfactory rating. Supervisor Steele-Hunter testified that her visitation revealed that the Respondent had not shown meaningful improvement since her last observation in December.

A third observation took place on April 7, 2014. Attorney for the Respondent argued it was unfair to schedule an observation just five (5) days after the previous classroom visitation. Ms. Steele-Hunter testified she had been on medical leave from December until April and found it necessary to schedule an observation on April 7, 2014. She stated the Respondent was informed he had the option to reschedule it to a later date but agreed to the April 7, 2014 observation. Even if the April 7th observation is discounted, the Respondent received an Unsatisfactory rating for the April 2nd observation.

As required under N.J.A.C. 6A: 10-2.5, a Corrective Action Plan (CAP) was developed for the 2014-2015 school year. Assistant Principal Chinaire Simons was selected to coordinate the implementation of the CAP. Ms. Simons testified that the Respondent did not meet the criteria in any of the four designated domains. Ms. Simons contended that Respondent failed to complete assignments or attend monthly meetings on a timely basis

The hearing record reveals that not all monthly CAP meetings were convened within a specific time period. Both the Petitioner and Respondent were at times responsible for rescheduled meetings. There is no evidence that rescheduled meetings had a negative impact on

the CAP. However, the Petitioner considered the postponement as indicative of Respondent's commitment to correct deficiencies.

In the 2014-2015 school year, Respondent was observed on December 12, 2014, and was given a "Developing" rating. Director Steele-Hunter noted in her comments that Mr. Pickney had shown some progress but indicated there were areas that needed further improvement. In particular, Respondent was encouraged to design lessons with more rigorous activities.

On May 29, 2015, Middle School Principal Andrea Tucker and Superintendent Hackett conducted an unannounced evaluation. The observation which did not require a post-observation conference resulted in an Unsatisfactory rating.

Ms. Steele-Hunter observed the Respondent on June 15, 2015. Ms. Steele-Hunter testified that her observation was delayed because a prior evaluation had been completed not long before her classroom visitation. Ms. Steele-Hunter wrote that there was no discussion, no collaboration or reading of any articles. The class drew and colored pictures. She rated Respondent's evaluation Unsatisfactory. There was no post-conference held, although the Director attempted to meet with Mr. Pickney on the last day of the school year. The Respondent in an exchange of e-mails with Ms. Steele-Hunter explained he would be in and out of New Jersey and unable to meet with her.

Ms. Steele-Hunter testified that the Respondent had incorrectly completed an end-of-the-year Student Growth Objective report in 2015. As a result of completing the document incorrectly, Ms. Steele-Hunter suggested it was useless to the District.

Superintendent Hackett testified that the decision to revoke Respondent's tenure was based upon a history of poor performance. Dr. Hackett stated, prior to her appointment as Superintendent, Respondent received several letters of reprimand and an increment that was

withheld. She also testified that Respondent was issued a letter of reprimand when he failed to record grades for two months. There were additional letters of reprimand cited in Mr. Pickney's personnel record. Attorney Branigan argued that these letters of reprimand were not germane to the charges. This argument is relevant to the extent that certain letters of reprimand did address past violations of rules and policies that occurred several years ago.

In a letter of reprimand drafted by the former Assistant Superintendent for Curriculum and Instruction, Dr. Angelica Allen, dated September 29, 2014, Respondent was criticized for playing the song "Fancy." Dr. Allen stated that the song contained inappropriate lyrics that had no place in a classroom. Mr. Pickney contended he played only the music and not the lyrics. However, the inappropriate language was confirmed in an arbitration award issued after the letter of reprimand was grieved.

The Respondent's record reveals in 2011-2012 Mr. Pickney's increment was withheld. Yet, attorney for the Respondent argued that Mr. Pickney had received satisfactory evaluations prior to the years identified by the District. Attorney Branigan contended that earlier evaluations should be given weight. As stated previously by Respondent's attorney, just cause demands that a suspension should precede removal.

Superintendent Hackett described a pattern of behavior that started several years ago and has continued into the present. She cited a reprimand in 2006 for a lack of a lesson plan, and in 2015 Respondent again did not submit an acceptable lesson plan. In spite of available professional development resources, Dr. Hackett contended, the Respondent had not demonstrated improvement or shown a willingness to change. Furthermore, she testified that the requirements contained in the CAP had not been followed by the Respondent. Superintendent

Hackett stated that Mr. Pickney was advised to attend workshops and collaborate with teachers who are considered effective.

The Respondent testified he had been told he could postpone the April 7, 2014 observation. However, he believed he had little choice in permitting two observations within five (5) days. Both observations were rated as Unsatisfactory. The Respondent stated that he was denied an opportunity to improve on April 7th since the post-observation conferences were combined. He contended that any deficiencies observed on April 2nd would have been repeated again on April 7th without the benefit of a post-observation between both visitations, Respondent noted that he did show improvement (Developing) in an unannounced classroom visitation on May 19, 2014. However, as I stated previously, Mr. Pickney's April 2nd observation was nonetheless rated "Unsatisfactory."

The Respondent testified that the song in question was played without lyrics. He argued that Ms. Steele-Hunter and Ms. Tucker acknowledged they did not hear the lyrics. Both administrators contended they heard lyrics.

Mr. Pickney did not dispute that he had not followed the directions for the essay contest. Respondent allowed his students to create posters when the assignment specified written submissions. He was also reprimanded for not first submitting his student's work to an administrator for approval.

The Respondent testified that he did not complete the Student Growth Objectives (SGO's) correctly at the end of the school year. He acknowledged he received SGO training on more than one occasion, but contended he was not sufficiently instructed in regard to "Methodology" changes instituted during the year. The attorney of the District noted that the Respondent failed to request assistance.

The comments contained in the observation of May 29, 2015 referred the same routine on a daily basis. Respondent's lesson plans included the same activities encompassing ineffectively what is known as the Kagan strategies. The plans did not list any additional activities that were appropriate for a Social Studies class. In particular, the observer found no graphic organizers or written assignment related to the subject. Ms. Steele-Hunter wrote that ELL students were merely copying from a textbook the names of countries and dates. Mr. Pickney did not dispute the comments but considered his approach effective. The Respondent cited for low standards argued the charge his teaching was not rigorous was without merit.

Attorney Hunt stated the Respondent had an opportunity to grieve any observations he considered inaccurate or unfair. The Respondent testified that when he returned in September 2015, he received the tenure charges and was denied the option of filing a grievance. In particular, the April 2nd and April 7th, 2014 observations were not grieved although Mr. Pickney was aware of the content. The District also argued that the Unsatisfactory ratings were given during the period of the CAP when Respondent was under an improvement plan.

As argued by the Respondent's attorney, the District did not conduct an additional observation while subject to the CAP in the 2014-2015 school year. As stated under N.J.S.A. 18A: 6-17. 2, "the arbitrator shall only consider whether or not the employee's evaluation failed to adhere substantially to the evaluation process... In the event that the employee is able to demonstrate that this is applicable, "the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed."

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As previously noted, the Respondent's attorney argued that Mr. Pickney should be reinstated since the District failed to conduct a fourth observation in 2014-2015. The statute directs the arbitrator to consider if the District "failed to adhere substantially to the evaluation process." While the District did not conduct a fourth observation and complete each post-observation meeting within fifteen days, I do not believe it materially affected the outcome of the evaluation process.

There were a total of seven (7) observations in a two-year period. The December 17, 2013 was nullified because a post-observation meeting was not scheduled until the end of January 2014. In each observation Respondent failed to achieve a satisfactory rating. During 2014-2015, Respondent was provided a Corrective Action Plan and, according to the testimony of his supervisors, was encouraged to take advantage of assistance within and outside the District. Respondent's supervisors indicated he resisted attempts to eradicate deficiencies and improve his performance in the classroom. Superintendent Hackett, Social Studies Supervisor Steele-Hunter and Assistant Principal Simons each testified that Respondent did not meet the standards necessary to retain his employment in the District.

Based upon the hearing record, I have determined that the District has met its burden of proof. The tenure charges filed in Agency Docket No. 303 -10/15 are sustained.

AWARD:

The tenure charges filed by the Irvington School District against David Pickney, Agency Docket No. 303 – 10/15 shall be sustained

6/1/16
Date

Stephen J. Rosen
Stephen J. Rosen

State of New Jersey }
County of Essex } ss:

On this 1st day of June, 2016, before me personally came and appeared Stephen J. Rosen to me known to be the individual described and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan G. Rosen
SUSAN G. ROSEN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 8/4/2019