

DOCKET # 259-9/15-12/14

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In the Matter of the Tenure Charges Preferred by

**STATE OPERATED SCHOOL DISTRICT OF THE CITY
OF NEWARK, ESSEX COUNTY, NEW JERSEY**
"District

ARBITRATOR'S

OPINION

-against-

and

LEONARD YARBOROUGH

AWARD

"Respondent"

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BEFORE:

ARTHUR A. RIEGEL, ESQ., ARBITRATOR

APPEARANCES:

FOR THE DISTRICT:

SCARINCI & HOLLENBECK, LLP by RAMON RIVERA & SHANA DON, ESQS.

FOR THE RESPONDENT:

STUART BALL, LLC by CHARLES AUFFANT & WILLIAM THIERSTEN, ESQS.

LEONARD YARBOROUGH, RESPONDENT

PROCEDURAL HISTORY

On August 10, 2015, Sandra Marques, Principal, Hawkins Street School (Marques) filed tenure charges with the New Jersey Commissioner of Education (Hearing Officer Exhibit [HOX] 4). The charges were served on Respondent on September 9, 2015.

A pre-hearing conference was held on October 2, 2015. At that conference, a calendar was developed relative to the submission of and responses to interrogatories, to the submission of and responses to motions and to the production of witness lists and documents to be introduced at the hearings. In addition, a date for oral arguments relative to motions made was set, December 18, 2015. Additionally, a tentative schedule of hearing dates was established.

Subsequently, the parties exchanged initial disclosures and discovery. Further, Respondent submitted a motion to dismiss the charges on December 1, 2015 (HOX2). The District submitted its opposition to the motion to dismiss on December 15, 2015 (HOX3). As indicated above, oral arguments concerning the motion to dismiss were offered on December 18, 2015. The Arbitrator denied the motion to dismiss the charges on January 6, 2016. Hearings were conducted on January 14, 15, 21, February 2, 8, 11, 2016. Post hearing briefs were submitted on May 1, 2016

THE CHARGES

CHARGE ONE: INEFFICIENCY

Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher in the following manner:

1. Respondent was rated Ineffective in his 2012-2013 Annual Summative Evaluation.
2. Respondent was rated Partially Effective in his 2013-2014 Annual Summative Evaluation.
3. Respondent was rated Partially Effective in his 2014-2015 Annual Summative Evaluation.
4. Respondent failed to implement curricular goals and objective(s).
5. Respondent failed to design coherent instruction.
6. Respondent failed to assess student learning.
7. Respondent failed to create an environment of respect and learning.
8. Respondent failed to manage student behavior.
9. Respondent failed to manage classroom procedures.

10. Respondent failed to establish a culture of learning.

11. Respondent failed to communicate clearly and accurately.

12. Respondent failed to use questioning and discussion techniques with flexibility and responsiveness.

13. Respondent failed to engage students in learning.

14. Respondent failed to provide feedback to students.

15. Respondent failed to attain student achievement that meets or exceeds performance benchmarks.

16. Respondent has failed to reflect on teaching.

17. Respondent has failed to contribute to the School and District.

18. Respondent has failed to grow and develop professionally.

19. Respondent has demonstrated unprofessional and inappropriate behavior before students and staff.

Wherefore, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the School District, and he should be dismissed.

CHARGE TWO: CONDUCT UNBECOMING

1. The District re-states the allegations contained in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.

2. On or about October 21, 2013, Respondent used inappropriate corporal punishment, shoving an elementary school student.

3. On or about February 28, 2014, Respondent again used inappropriate corporal punishment, grabbing the arm of an elementary school student and shoving him.

4. Respondent demonstrated a pattern of hostile and threatening conduct before students and staff.

5. The above-referenced conduct individually is a violation of NJSA 18A:6-1, and cumulatively reflects a pattern unbecoming a public educator.

Wherefore, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the School District, and he should be dismissed.

CHARGE THREE: AND OTHER JUST CAUSE

1. The District re-states the allegations contained in Charges One and Two and re-alleges and incorporates them by reference as if fully set forth at length herein.

2. The cumulative effect of Respondent's misconduct and inefficiency as set forth above constitutes other sufficient cause sufficient to warrant dismissal.

Wherefore, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the School District, and he should be dismissed.

POSITIONS OF THE PARTIES

CONTENTIONS OF THE DISTRICT

The District argued as follows:

Respondent is a tenured teacher. Tenure charges have been proffered against him. These charges are based upon Inefficiency, Conduct Unbecoming and Other Just Cause.

Charge One alleges Inefficiency. Respondent received ratings of Ineffective (2012-13) and Partially Ineffective (2013-14 and 2014-15). He was under a Corrective Action Plan (CAP) as of

March 2015. The plan was initiated at that time because he had been removed from the school until February of the 2014-15 school year.

When he returned to the Hawkins Street School in February 2015, he was placed in a third grade class. In order to address his deficiencies, he began working on the CAP with Vice Principal Orr (Orr). He was not formally observed at this time because he purportedly could not manage the class. In an effort to reduce the disruptiveness, Principal Marques (Marques) created a kindergarten position for Respondent. He was required to teach letter identification to 30 kindergarten students, in groups of five. Despite the efforts of Marques and Orr, Respondent rendered inefficient service for the period February-June of the 2014-15 school year.

NJAC 6A:10-4.4 (e)1 states that teachers who are present less than 40% of the school days shall receive at least two observations to earn a *teacher practice score*. Due to his administrative removals, Respondent had extended absences in 2013-14 and 2014-15 and the District was in substantial compliance with the evaluation requirements of the TEACHNJ Act.

Charge Two, Conduct Unbecoming, and Other Just Cause deal with the inappropriate use of corporal punishment on two occasions. Respondent's misconduct in this regard led to significant disruption in the school and in his classroom. His inability to manage his class shifted his responsibility to other teachers, security guards and to administrators.

Charge Three alleges that, based on the totality of the circumstances, Respondent neglected his duties as an educator. The District's un rebutted evidence shows that Respondent failed to follow district policies and procedures concerning student management and failed to invest in his own

professional development and to address his deficiencies despite the efforts made by the District and school personnel.

The District produced the following witnesses: Keith Barton, Executive Managing Director of Operations for the District, Principal Sandra Marques, Vice Principal Ronald Orr, Mitchell Center, Assistant Superintendent of the District, and Vice Principal Christine Magalhes DiTaranto. Respondent was the only witness for the defense.

The District's witnesses supported the tenure charges. Respondent's testimony did not adduce credible evidence to rebut the evidence produced by the District.

The District established the Tenure Charge of Conduct Unbecoming. It defined *Conduct Unbecoming* through citation to case law. It is understood that a charge of Conduct Unbecoming goes to a teacher's fitness to perform his/her duties and functions. A single incident involving Conduct Unbecoming is grounds for the revocation of tenure.

The record shows that, on two separate occasions, Respondent made physical contact with students in an effort to discipline them. This constituted corporal punishment and is a violation of District policy and State statute. Respondent's actions in this regard caused a risk of harm to the students and disrupted the school community.

Respondent was aware of the District policy of student disciplinary procedures and staff behavior. It is contained within the Hawkins Street School Handbook. Teachers are expected to respond to student misbehavior by seeking counseling and other proper interventions through referrals to the SST team.

Repeated acts of teacher hostility, whether directed at students or displayed in their presence, negatively impacts the educational environment and constitutes justification for removing the teacher from the school. In this case, Marques witnessed the incident involving NM. Her testimony was supported by contemporaneous documents and an un rebutted Memorandum of Conduct Unbecoming.

Respondent denied shoving NM but admitted yelling at him. Respondent showed no remorse for yelling at NM and offered no evidence in support of his denial of shoving the student.

As to the incident with TP, Respondent claimed that the student was acting out as an excuse for grabbing the student's arms. However, on cross-examination, Respondent denied grabbing TP by the arms and shoulders and alleged that the student was running around the room and knocking over chairs and desks. For his part, TP told Marques that Respondent had hurt his arms.

Marques noted that the majority of the students confirmed TP's statements. The principal found TP to be credible.

Under New Jersey law, a letter of reprimand is a form of discipline. It may form the basis for additional disciplinary action and can support a charge of Conduct Unbecoming.

Respondent poses a harm or the potential to cause harm to students. He had been administratively removed from his classroom for one day and received a Memorandum of Conduct Unbecoming. He was also administratively removed from his classroom from February 28, 2014 until the end of the 2013-14 school year while a second incident of corporal punishment was investigated.

Further, at the end of the end of the 2013-14 school year, tenure charges were served on Respondent. These charges were dismissed based on an interpretation of the 2012-13 school year as a *pilot year*. Respondent returned to Hawkins Street School in February 2014 and was given two Memoranda of Conduct Unbecoming based on interactions with school staff and administrators. The District met its burden of proving that Respondent has demonstrated unbecoming conduct.

With respect to the charge of Inefficiency, the District met its burden to dismiss Respondent under a preponderance of the evidence standard and the TEACHNJ Act. Under TEACHNJ, tenure charges for Inefficiency must be filed to teachers receiving the ratings that had been given to Respondent.

As to the number of classroom observations performed on Respondent during the 2012-13, 2013-14 and 2014-15 school years, the District either complied or substantially complied with the regulations. In order to dismiss a tenure charge based on a flawed evaluation process, there needs to be evidence that an error in the process materially affected the outcome of the evaluation.

The question to be resolved is whether the District was in substantial compliance with the evaluation process. A review of the record indicates that the District met its burden of substantially complying the required number of evaluations set forth in the statute.

Even if the rubric set forth in NJSA 18A:6-17.2 is found not to be appropriate for the judging of the evidence in this matter, the District met its burden under the well settled preponderance of the evidence approach. Despite significant reviews of Respondent's performance and significant efforts and time on the part of administrators to support Respondent's areas of weakness, Respondent did

not improve upon his inefficient performance. Thus, based upon a preponderance of the credible evidence, the District proved that Respondent is an ineffective teacher and that his tenure should be terminated.

The District established Other Just Cause to dismiss Respondent. The undisputed evidence of numerous classroom management and supervision issues and neglect of duty sufficient to revoke tenure.

There is evidence of a three year period of demonstrated poor performance, resistance and a refusal to accept support. Respondent shirked his duty to manage classroom behavior and to follow relevant protocols for addressing student behaviors.

He was given coaching and support to address challenging students. He did not implement the strategies he was shown and did not complete the paperwork needed for referrals to SST. He did not follow the District's Discipline Policy and attempted to shift the responsibilities onto administrators, including the principal, and security personnel. When Respondent testified, he did not comment about his unprofessional conduct when arguing with staff in the presence of students and becoming confrontational and pounding on a desk during his Annual Evaluation Conference.

Respondent was uncooperative during the creation of a CAP and was unprofessional in his interactions with colleagues and administrators. During the 2014-15 school year, Respondent engaged in altercations with another teacher. Principal Marques recorded several incidents that took place in February and March 2015.

Respondent's actions in failing to adhere to disciplinary policies and protocols and his refusal to take responsibility for his own behavior or that of students disrupted the Hawkins Street School.

A special assignment which Respondent requested was created for him. Despite this, he continued to act inappropriately with administrators, he refused to sign evaluations and raised his voice and pounded a desk during a post-observation conference. This pattern of conduct constitutes unbecoming conduct, which is sufficient to establish just cause to terminate Respondent's employment with the District.

Respondent has demonstrated inefficiency, unbecoming conduct and other just cause for dismissal. His tenured employment with the District should be terminated.

CONTENTIONS OF RESPONDENT:

Respondent argued as follows:

The tenure charges of Inefficiency warrant dismissal since the District failed to substantially comply with the evaluation and rehabilitative procedures set forth by the TEACHNJ Act. In addition, the tenure charge of Conduct Unbecoming must be dismissed because it is not supported by a preponderance of the evidence and is precluded by the Entire Controversy Doctrine.

TEACHNJ was signed into law on August 6, 2012. As of the 2013-14 school year, an evaluation rubric was established. Under the statute, teachers who are rated Ineffective or Partially Effective in two Summative Annual Evaluations are to be charged with Inefficiency. The only evaluations which may be used for this purpose are those conducted in accordance with the established rubric.

The Tenure Charges of Inefficiency, which can only be brought under Section 25 of TEACHNJ should be dismissed. There is nothing in Section 25 that would allow a charge of inefficiency to be heard under Section 8. Case law indicates that Section 8 refers to Conduct Unbecoming. Nothing in Section 8 allows for the charging of inefficiency.

Section 23(a) of the Act suggests that inefficiency charges must be brought pursuant to Section 25. This section sets forth the determinations to be made by an arbitrator in Section 25 cases.

In this case, the District failed to substantially adhere to the evaluation process. Its actions were arbitrary and capricious.

The statute requires a requisite number of observations, measurement of student progress through Student Growth Objectives (SGO) and assistance for underperforming teachers through professional development, which included CAPs.

The District failed to provide Respondent with the requisite number of observations. The statute indicates that teachers shall be observed at least three times during a school year. It adds that teachers on a CAP must be observed an additional time.

Respondent was on a CAP for the 2013-14 and 2014-15 school years. He did not receive the four required observations in either year. In 2013-14, Respondent received a long observation on October 4, 2013 and a short observation on November 15, 2013. He received his Annual Summative evaluation on May 15, 2014.

In 2014-15, he was again observed twice; a short observation on April 10, 2015 and a long observation on May 7, 2015. Although he received another short observation on June 16, 2015, it was not part of his Summative Evaluation since it was completed on June 2, 2015.

Thus, in 2013-14 and 2014-15, the District fell short of the required four required observations of teachers on a CAP. It must be noted that Peer Evaluations of teachers cannot be considered observations.

The District failed to comply with statutory procedures because Respondent should not have received summative evaluations without having the requisite number of valid Teacher Practice and Student Achievement components. Evaluations underlying charges of Inefficiency must be at least based on objective measures of student performance, i.e. SGOs., using standardized assessments.

This matter is also reflected in *Framework for Effective Teaching* policy manual. This policy defines a student learning goal as a long-term objective on which the teacher will focus for his/her students.

These policies are consistent with State regulations concerning evaluations of teachers. SGOs are explicitly mandated by statute as a component of student achievement upon which Summative evaluations are based. Under the law, SGOs must be specific and measurable, based on available student learning data, aligned to Core Curriculum and based on growth and/or achievement.

Each teacher, like Respondent, without a student growth percentile must have at least two SGOs developed in conjunction with his/her supervisor or a principal's designee. These SGOs can only be adjusted by the teacher in consultation with an administrator by February 15th of the school

year and may only be calculated by the supervisor. Once the SGOs have been calculated, they must be discussed during the annual summary conference, if available at that time.

Teachers are evaluated based on components of Teacher Practice and Student Achievement. Even teachers who are absent for a portion of student school days may receive a summative evaluation as long as they have both a practice score and a student achievement score based on the requisite number of observations and SGOs.

Teachers present for fewer than 40% of the number of school days must receive at least two observations. Student progress is measured by assessing the progress of students meeting two SGOs. Teachers without component scores in Teacher Practice and Student Achievement may not receive a summative rating for the year.

Respondent does not have valid component scores in Teacher Practice because he received only two observations in 2013-14 and three in 2014-15. Even though he was on administrative leave in both years, he was present 40% or more in each of the years. Since he did not have the required number of observations in either year, he did not have a valid score in the Teacher Practice component in both years.

As to the SGOs, Respondent was required to have two SGOs for each of 2013-14 and 2014-15. Marques testified that no SGOs were established for 2013-14. She said that Respondent was measured on student growth areas, which she noted were different from SGOs.

As to 2014-15, the school was authorized to use student growth areas in lieu of SGOs for 2014-15. However, no such authorization was given for the 2013-14 school year. Thus, Respondent

should not have received a summative rating for 2013-14. Therefore, without a summative rating for both 2013-14 and 2014-15, the District was precluded from bringing forth tenure charges for Inefficiency.

The District failed to comply with the statutory requirements for CAPs. CAPs need to address areas in need of improvement identified in the evaluation rubric, set forth specific, demonstrable goals for improvement, include responsibilities of the employee and District in the implementation of the CAP and include time lines for meeting the goals.

Respondent received CAPs for the 2013-14 and 2014-15. He was on administrative leave until February of the 2014-15 year and began teaching kindergarten in March 2015. He was on the CAP for only three or four months.

Case law in tenure cases suggest that TEACHNJ anticipates observations being scheduled throughout the year, a mid-year review and a CAP will provide the assistance needed for an underperforming teacher to correct deficiencies.

Respondent was not given an appropriate amount of time in which to improve his evaluations. In addition, the District did not provide specific support for Respondent, as required by the CAP. While Marques and Vice Principal DiTaranto indicated Respondent's specific needs, Vice Principal Orr said that a teacher was assigned to assist Respondent for one week and Marques conceded that the resources provided to Respondent were provided to all teachers. The District failed to provide any professional development that was tailored to assist Respondent overcome his deficiencies.

The District engaged in arbitrary and capricious conduct. It has brought charges of Inefficiency against Respondent three times. Instead of spending three years trying to remove Respondent from his profession, it should have met its obligation to provide the support needed for him to remedy his deficiencies.

It acted in an arbitrary and capricious manner by failing to adhere to the TEACHNJ requirements. As such, the evidence cannot support the revocation of Respondent's tenure and the dismissal of charges of Inefficiency must be dismissed.

The Conduct Unbecoming charges must be dismissed because they are not supported by a preponderance of the evidence and they are barred by the *Entire Controversy Doctrine*. Unfitness to remain a teacher can be demonstrated by a single incident if it is serious enough, while less serious matters should be subject to progressive discipline.

He cites judicial case law relative to the use of corporal punishment. He stresses the *Murphy* case that indicated that a loss of pay was warranted but dismissal was not.

Corporal punishment is defined by statute. Respondent is being charged with unbecoming conduct based on two incidents of alleged corporal punishment. He was accused of shoving students on two different occasions.

In one instance, Respondent raised his voice but did not commit corporal punishment. There was no finding of abuse and half the students in the class said that there was no physical touching, Despite the preponderance of evidence that Respondent did not commit corporal punishment, he was disciplined with a letter of reprimand.

In the second instance, Respondent gently put his hands on an unruly and out of control student and guided him to where he had been seated. Respondent was put on administrative leave for the rest of the year despite the presence of an investigation that vindicated him. He ultimately returned to the classroom.

Respondent denies shoving or exerting undue physical force on any student. He was merely trying to quell disturbances from out of control unruly students and to prevent these students from injuring themselves and/or others. The instances do not rise to the level of corporal punishment and do not support a charge of Conduct Unbecoming.

Even if Respondent engaged in Conduct Unbecoming, progressive discipline should be employed. Thus, his tenure should not be revoked because of these two incidents. He had been previously disciplined and the District should not be permitted to further discipline him.

Furthermore, the District was obligated to bring all of its claims during the 2012-13 and 2013-14 school years. Under the *Entire Controversy Doctrine*, the District should be precluded from bringing this charge in the current set of charges.

All of the tenure charges should be dismissed.

OPINION

After considering the documentary and testimonial evidence, the undersigned concludes that Leonard Yarborough is guilty of Charge II. Charges I and III are dismissed. For the sake of clarity, each of the charges will be addressed separately.

ANALYSIS OF THE CHARGES

CHARGE I:

This charge alleges Inefficiency. A fundamental issue in this case relates to the evaluation process requirements set forth in TEACHNJ. According to the statute, teachers who are rated Ineffective or Partially Effective in two consecutive years must be charged with Inefficiency.

The District asserted that the process it followed was in substantial compliance with the statute, while Respondent argued that the District was out of compliance with the statutory requirements. As such, Respondent maintained that Charge I must be dismissed.

It is appropriate to first review the evaluation requirements under TEACHNJ. This charge references the 2012-13, 2013-14 and 2014-15 school years. Respondent received end of year evaluations in each of the years. He was rated Ineffective in 2012-13 and Partially Effective in 2013-14 and 2014-15.

TEACHNJ became effective during the 2013-14 school year. It had no bearing on the 2012-13 school year. Thus, the discussion of the statutory evaluation requirements is limited to 2013-14 and 2014-15.

As noted above, under the statute, teachers who are rated Ineffective or Partially Effective in two consecutive years must be charged with Inefficiency after the second of the consecutive years.

Consistent with this requirement, the instant charges were served and the instant proceeding was convened.

There are substantive requirements under TEACHNJ. First, the Annual Summative evaluations must be based on three lesson observations. In addition, teachers who are serving under a Corrective Action Plan (CAP) must have one additional observation. In short, these teachers must be observed a minimum of four times.

A review of the record indicates that Respondent was observed twice in 2013-14 and twice in 2014-15. The District pointed out that a relevant provision of the statute indicates that teachers who are present less than 40% of the total school days for students must receive a minimum of two observations during that academic year in order to earn a teacher practice score. For purposes of this analysis, *teacher practice* reflects the efficiency or competency with which the teachers practices his/her teaching.

The District stressed that this exception pertains to this case. In order to determine the applicability of this exception to the statutory requirement, an analysis of Respondent's attendance in 2013-14 and 2014-15 had to be done.

The record suggests that there are 191 days of teacher attendance in the school year. 40% of 191 days is 76 days. Thus, according to the *40% exception*, a teacher had to have taught 76 or fewer days for there to have been a reduction in the number of observations from three or four, depending on the CAP status, to two.

A review of Respondent's attendance data suggests that Respondent was present on more than 100 student school days in 2013-14. This number is significantly higher than the maximum of 76 days permitted under the *40% exception* rule.

Respondent needed to be observed four times during the 2013-14 school year, three times based upon TeachNJ and once because he was on a CAP. One must recall that that Respondent was rated Ineffective in 2012-13 and was under a CAP in 2013-14.

A second evaluation requirement in 2013-14 is that teachers set one or two Student Growth Objectives (SGOs). A review of respondent's 2013-14 Annual Evaluation reveals that there were *student learning goals* set. They were not called SGOs but substantively, they were very similar.

It should be added that the outcomes of these goals was not determined. Respondent was removed from the school as of March 1, 2014 and did not return before the end of the year.

Thus, the District did not comply with the TeachNJ requirement of Respondent being observed four times during the 2013-14 school year. Therefore, the 2013-14 Annual Evaluation is invalid and cannot be considered under Charge I.

Turning now to 2014-15, Respondent was present on approximately 80 student attendance days. In addition, the District was given a waiver with respect to SGOs. Ordinarily, the District would have been in substantial compliance with the evaluation regulations in 2014-15.

However, Inefficiency charges are brought after two consecutive years of Ineffective or Partially Effective ratings. In this case, the District did not comply with the statutory evaluation requirements in 2013-14. Therefore, even if 2014-15 was found to be in compliance with the TEACHNJ requirements, at most it could only be the first of the two consecutive years of Ineffective or Partially Effective ratings.

As a consequence, despite best efforts by its counsel, the District's failure to comply with the evaluation standards must result in the dismissal of Charge I.

CHARGE II:

The gravamen of Charge II is that Respondent used inappropriate corporal punishment on two different occasions, once on October 21, 2013 and again on February 28, 2014. The District concluded that Respondent was guilty of Conduct Unbecoming.

For purposes of this discussion, NJSA 18A:6-1 proscribes the use of physical force against students in educational settings. The statute states as follows:

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

(2) obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property;

and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section.

With definition in mind, it is necessary to consider the facts of the two cited instances. They

will be addressed separately.

October 21, 2013

Principal Marques testified that she entered the classroom and witnessed Respondent shoving an eight year old student, NM, while screaming at him (TS page 163). Marques considered Respondent's actions to constitute corporal punishment. She removed Respondent from the classroom for a day and issued a Memorandum of Conduct Unbecoming (DX3).

For his part, Respondent indicated that he raised his voice in order to cause NM to stop disrupting the class (TS page 698). He insisted that he did not inflict corporal punishment.

He observed that NM had been questioned about the incident by the school nurse and school social worker. He stressed that NM told both of these people that Respondent did not shove him (TS page 102-13).

Marques arranged for the matter to be investigated. The students in the class were interviewed and their statements were summarized and were added to the Report of Incident (DX1&2). The statements of the students varied. However, two comments were clear. First, a significant number of students confirmed that Marques had entered the room at the time of the incident and, second, a significant number of the students interviewed stated that Respondent became angry at NM, yelled at NM and pushed or grabbed him (NM)

The confirmation of Marques's presence at the time of the incident adds credibility to her testimony about seeing Respondent shoving NM. Further, the confirming statements of the students also makes it more likely than not that Respondent pushed or shoved NM.

It is true that there were students who did not say that they saw Respondent make physical contact with NM. To a large extent, this should be expected. Eye witness testimony is not always reliable because witnesses often view the same incident in very different ways. As to what NM may have told the nurse and the social worker, students who had misbehaved may be reluctant to say that they were shoved for fear that they will be subject to additional criticism.

What is dispositive here is that Marques was clearly present at the time of the incident and her rendition of what happened was confirmed by students. In sum, the undersigned is persuaded that Respondent inflicted corporal punishment on NM.

Respondent argued that he had already been disciplined for this matter and that further discipline would constitute double jeopardy. This argument fails.

The memorandum he received (DX3). While it is entitled a *Letter of Reprimand*, it is, in fact, a counseling memo. It recites a discussion that took place between Marques and Respondent and counsels Respondent of the potential for future discipline. There was no discipline imposed but cautioned as to the potential for disciplinary action in the future.

A review of the statutory definition makes it clear that none of the exceptions to corporal punishment are applicable here. The Arbitrator concludes that Respondent was having difficulty managing NM and resorted to physical means of controlling the child.

February 28, 2014

The second alleged instance of corporal punishment took place on February 28, 2014. The incident was reported to Marques. Respondent was charged with grabbing TP by the arm and hurting the student. Marques reported the matter to DCP&P. The matter was investigated and a report was generated by that agency (DX6).

There were two important findings in the report. For purposes of this hearing, Respondent was found to have grabbed TP by the arms and shoulders and to have pushed him to the floor. In addition, TP was found to not be an abused child as defined in NJSA 9:6-8.21.

The instant hearing has been convened to determine if corporal punishment was employed. The DCP&P report is relevant in terms of the investigation it conducted. Its findings suggest that Respondent did, indeed, employ corporal punishment. While the agency is charged with determining if there was abuse, this proceeding has been convened to determine if corporal punishment was used.

There are different statutory standards for corporal punishment and abuse. It may well be that the standard for abuse was not satisfied, However, such a finding does not preclude the presence of corporal punishment.

Respondent stated that TP was a danger to himself and others and was knocking over furniture (TS702). Respondent's version of the incident was not confirmed by the report. It simply stated that TP refused to follow Respondent's directives.

The Arbitrator concludes that grabbing a student by the arms and shoulders and then pushing the student to the floor constitutes corporal punishment. With that being said, the undersigned finds that the District met its burden of proving Specifications 2-5 of Charge II.

Further, Respondent asserted that, under the Entire Controversy Principle, the charges of corporal punishment had to have been raised in the charges served after the 2012-13 and 2013-14 school years. He stressed that the failure to do so then precludes their being considered at this time.

It is clear that the two earlier sets of charges had been dismissed on procedural grounds. As such they are a nullity and the fact that the corporal punishment was not charged earlier does not suggest that the District's earlier error, if it was a legal error, cannot be cured by including the charges in a subsequent set of charges that, in fact, survived a Motion to Dismiss.

Respondent's argument suggests that the corporal punishment charges could never be litigated if those charges were not part of the 2012-13 charges. Such a position is extreme and flies in the face of numerous examples of manners in which errors can be remedied.

In short, the District met its burden of proving Charge II. Therefore, Respondent is guilty of Conduct Unbecoming.

CHARGE III:

This charge alleged *Other Just Cause* for dismissal. It restated the allegations found in Charges I and II and alleged that the cumulative effect of Respondent's misconduct and inefficiency constitute other just cause for dismissal.

Charge I has been dismissed based on improper evaluations. To consider them under Charge III would constitute an *end run* around the statute. It would, in effect, resurrect dismissed charges under a different heading. That would thwart the apparent intent of TEACHNJ.

Respondent was found culpable of Charge II. To consider them again under Charge III would raise the specter of double jeopardy. One may not be charged with the same misconduct twice. To do so would result in a respondent being penalized twice for the same misconduct.

In sum, Charge III is dismissed.

PENALTY

Having reviewed the case law, the undersigned is persuaded that dismissal is excessive in this case. Charge I was dismissed because of the District's failure to properly implement the evaluation procedures and standards set forth in TEACHNJ. Charge III was dismissed due to its redundancy of Charge I.

The issue here is the determination of an appropriate penalty. When considering this question, the focus must be on Respondent. Specifically, if he is to be reinstated, the matter to be resolved is whether Respondent has grown as a result of the process of going through this hearing.

The Arbitrator has serious doubts about Respondent's recognition of his need to re-examine his professional bearing. A review of his testimony suggests that he has taken little or no responsibility for his actions.

He was found culpable of two instances of corporal punishment. He essentially blamed the students for his actions. There was little that showed any introspection on his part. He failed to recognize that he needs to focus on additional ways and means of managing his classes.

He seems to believe that it may be beyond his ken to properly manage students who are beyond the kindergarten level. His teaching certificate does not limit him to teaching kindergarten.

He expressed little remorse for his conduct. As noted above, he held the students, not himself, accountable for the corporal punishment. He insisted that he is an effective teacher when that may not be true.

It is the view of the undersigned that the past may be prelude to the future if Respondent does not seriously hold himself accountable for his actions. If he fails to do so, he may be part of the disciplinary process again. If he successfully does so, he will likely have a satisfying career as a teacher. He has serious choices before him and the undersigned trusts that he will make good ones.

As to the penalty, Respondent cited *Murphy* as being a case that is on point. Like Respondent, Murphy was found guilty to have engaged in corporal punishment twice. S/he was not discharged but was denied pay for 120 days.

Given the totality of the circumstances here, the undersigned concludes that a similar penalty is appropriate here. Thus, the Arbitrator finds that appropriate penalty to be imposed on Leonard Yarborough is a 120 day suspension without pay. Therefore, based on the above, the undersigned makes the following

AWARD

1. Leonard Yarborough is guilty of Charge II.
2. The following charges are dismissed: Charges I & III.
3. The penalty imposed on Leonard Yarborough is a 120 day suspension without pay.

Dated: May 24, 2016
Hewlett Harbor , NY



ARTHUR A. RIEGEL, ESQ.
ARBITRATOR

AFFIRMATION

STATE OF NEW YORK)
COUNTY OF NASSAU)

I, Arthur A. Riegel, am the individual described in and who executed the foregoing instrument, which is my Opinion and Award.



ARTHUR A. RIEGEL