

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

TENURE HEARING

XX

In the Matter of the Arbitration Between)
STATE-OPERATED SCHOOL DISTRICT,)
CITY OF NEWARK, NJ)

EMPLOYER)

OPINION

AND)

AND

VINCENT AJAYI)

AWARD

RESPONDENT)

XX

CASE NO. DOE 338-11/15

ARBITRATOR: GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

JOHN CROOT, ESQ.
ADAM HERMAN, ESQ.
MICHELLE TAKYI

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FOR THE RESPONDENT

JOSEPH FUSELLA, ESQ.
VINCENT AJAYI

COUNSEL FOR RESPONDENT
RESPONDENT

PROCEDURAL BACKGROUND

On August 26, 2015, Derrick Davis, Principal of Cleveland Elementary School in the State-Operated School District of the City of Newark, (hereinafter referred to as the Board/District) filed tenure charges against Vincent Ajayi (hereinafter referred to as Mr. Ajayi/Respondent), for conduct unbecoming, corporal punishment and other just cause warranting dismissal. On that same date, Mr. Davis submitted a statement of evidence with ten (10) separate documents in support of the tenure charges.

On October 26, 2015, Christopher Cerf, Superintendent of the State-Operated School District for the City of Newark, filed a Certification of Determination in support of the tenure charges. The Certification was filed in accordance with N.J.S.A. 18A:6-11; 18A:7-38 and 18A:6-14. Superintendent Cerf also determined that Mr. Ajayi should be suspended without pay for 120 days effective October 26, 2015.

On October 26, 2015, the Board of the State-Operated School District for the City of Newark, passed a resolution in support of the tenure charges and determined that there is probable cause to credit the evidence in support of the aforesaid charges. Additionally, the Board supported the Superintendent's determination that Mr. Ajayi is to be suspended without pay for 120 days effective October 26, 2015.

On October 30, 2015, John Croot, Counsel for the Board, submitted the Statement of Tenure Charges, Statement of Evidence, Exhibits and the Certification of Determination to David Hespe, Commissioner of Education, State of New Jersey.

On November 11, 2015, Mr. Ajayi submitted a response to the tenure charges. On November 23, 2015, the undersigned was appointed Arbitrator.

Hearings were held on February 23, March 31 and April 1, 2016. At every hearing a court reporter was present and the Arbitrator received a copy of the transcript. The parties submitted post-hearing briefs and those briefs were received on May 6, 2016. The arbitrator requested an extension of time to submit his award. That request was granted and the award is due on or before May 31, 2016.

All student witnesses are identified by their initials and were accompanied by a responsible adult at the hearings.

ISSUE:

While the parties did not stipulate to an issue, after reviewing all of the testimony and the documents in evidence, I have determined the issue is:

Should the tenure charges filed against Vincent Ajayi be sustained? If not, what shall be the remedy?

CHARGES:

Charge Number One

- a. Mr. Ajayi failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of middle school children.
- b. Mr. Ajayi used unnecessary and/or inappropriate physical contact in dealing with a student.
- c. Mr. Ajayi's inappropriate and unprofessional conduct violates District policy and law.
- d. Mr. Ajayi's actions were sufficiently flagrant and egregious to warrant termination.
- e. Mr. Ajayi's actions demonstrate that he is not fit to serve as a teaching staff member.
- f. Mr. Ajayi's inappropriate and unprofessional conduct placed A.H., F.K. and A.A. at risk of physical and emotional harm.

The foregoing misconduct by Mr. Ajayi constitutes conduct unbecoming and/or other just cause warranting his dismissal.

Charge Number Two

Mr. Ajayi is guilty of Conduct Unbecoming by way of the following:

- a. The Board repeats and reiterates the allegations set forth above.
- b. On March 27, 2014, Mr. Ajayi inflicted corporal punishment upon A.H., F.K. and A.A.
- c. Mr. Ajayi's conduct was neither reasonable nor necessary.
- d. Mr. Ajayi's inappropriate and unprofessional conduct violates District policy and law.
- e. Mr. Ajayi's inappropriate and unprofessional conduct placed A.H., F.K. and A.A. at risk of physical and emotional harm.
- f. Mr. Ajayi's actions were sufficiently flagrant and egregious to warrant termination.

The foregoing misconduct by Mr. Ajayi constitutes conduct unbecoming and/or just cause warranting his dismissal.

Charge Number Three

Mr. Ajayi is guilty of Conduct Unbecoming by way of the following:

- a. The Board repeats and reiterates the allegations set forth above.
- b. On March 27, 2014, Mr. Ajayi committed an assault and battery upon A.H., F.K. and A.A.
- c. Mr. Ajayi's inappropriate and unprofessional conduct place A.H., F.K. and A.A. at risk of physical and emotional harm.
- d. Mr. Ajayi's inappropriate and unprofessional conduct violates Board policy and law.
- e. Mr. Ajayi's actions were sufficiently flagrant and egregious to warrant termination.
- f. Mr. Ajayi's actions demonstrate that he is not fit to serve as a teaching staff member.

The foregoing misconduct by Mr. Ajayi constitutes conduct unbecoming and/or other just cause warranting his dismissal.

Charge Number Four

Mr. Ajayi is guilty of Other Just Cause by way of the following:

- a. The Board repeats and reiterates the allegations in all the charges set forth above.
- b. All of the foregoing Charges, Counts and the facts alleged in the tenure charges are incorporated by reference as if fully set forth herein. The acts of misconduct described above, jointly and severally, demonstrate a series of infractions constituting a pattern of conduct unbecoming and/or other just cause warranting Mr. Ajayi's dismissal and reduction in salary.

The foregoing misconduct by Mr. Ajayi constitutes conduct unbecoming and/or other just cause warranting his dismissal.

Charge Number Five

Mr. Ajayi is guilty of violating N.J.S.A. 18A:6-1 by way of the following:

- g. The Board repeats and reiterates the allegations set forth above.
- h. On March 27, 2014, Mr. Ajayi committed an assault and battery upon A.H., F.K., and A.A.
- i. Mr. Ajayi's inappropriate and unprofessional conduct placed A.H., F.K. and A.A. at risk of physical and emotional harm.
- j. Mr. Ajayi's inappropriate and unprofessional conduct violates N.J.S.A. 18A:6-1.
- k. Mr. Ajayi's actions were sufficiently flagrant and egregious to warrant termination.
- l. Mr. Ajayi's actions demonstrate that he is not fit to serve as a teaching staff member.

RELEVANT STATUTORY PROVISIONS:

Corporal punishment is defined in N.J.S.A. 18A:6-1 which provides:

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 disturbance, threatening physical injury to others;
2. To 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.

18A:6-10. Dismissal and reduction in compensation of persons under tenure in public school system

No person shall be dismissed or reduced in compensation.

(a) if he or she shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

Except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub article, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this sub article provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

SUMMARY OF FACTS:

The genesis of all these charges relates to an incident that occurred between Mr. Ajayi and a student identified as student as A.H. on March 27, 2014, in Mr. Ajayi's Science class at Cleveland Elementary School. The then Principal,

Barbara Ervin, testified about the investigation she conducted concerning the March 27, 2014, incident. The record also reflects that an incident occurred on October 23, 2013, between Mr. Ajayi and A.H. The results of that incident will be incorporated into the Positions of the Parties, as well as the testimony of the students.

POSITIONS OF THE PARTIES:

For the Petitioner

The District argues that the uncontroverted evidence presented during the hearing clearly established that Mr. Ajayi, without justification, grabbed A.H., pulled him out of his seat, twisted his arm and pushed him. This violent and disturbing incident leaves no doubt that Mr. Ajayi is unfit to be a teacher. Additionally, the incident clearly showcased the Respondent's poor classroom management skills, short temper and complete lack of judgment and this type of behavior by a teacher has absolutely no place in a school setting.

The District strongly argues that the inappropriate physical contact with A.H. was not a recent development and approximately five (5) months before the March 27, 2014 incident, the Respondent was counseled about his inappropriate physical touching of other students.

In November, 2013, the Respondent met with Ms. Ervin on two separate occasions over a three-day period to address student complaints; namely that Mr. Ajayi grabbed and twisted one student's arm, that Mr. Ajayi grabbed another student by his neck and then "yoked" him up. Indeed, Mr. Ajayi was specifically advised by his Principal to refrain from touching students and to send students to

the office or contact the office to call for building security. Yet, just a few months later, Mr. Ajayi ignored this directive when he again engaged in reckless and inappropriate behavior in the incident with A.H. in March 2014.

The District references the testimony of students A.H., H.A. and L.S. in defense of its position that those students corroborate the District's position that Mr. Ajayi was the aggressor and assaulted A.H. and, as a result, the tenure charges were filed.

In fact, after Principal Ervin's investigation she concluded and testified, *"Although there is some discrepancy over who threw what and what was thrown, the physical contact is pretty much throughout. Teacher grabbed student and tried to push him out of the room."* Tr. 2¹

The District asserts that they have proven the tenure charges by a preponderance of the credible evidence. They acknowledge that *to "prevail in this case they must establish the truth of the charges by a preponderance of the credible evidence and they go on to define preponderance as the greater weight of the credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power."*

The District strongly argues that the preponderance of the credible evidence in the record establishes that charges One through Five must be sustained.

Mr. Ajayi is guilty of conduct unbecoming a teaching staff member by grabbing A.H., twisting his arm and pushing him on March 27, 2014. The District acknowledges that while unbecoming conduct is not specifically defined in the statute or regulations, case law from the Commissioner of Education and the

TR 1 is for February 23, TR 2 is for March 31 and TR 3 is for April 1, 2016. ¹ TR 2, 55:20-25 and 56:1-2

court system, the touchstone of the charge is the teacher's fitness to discharge the duties and functions of his/her position. Indeed, *"unbecoming conduct encompasses many categories of inappropriate behavior by tenured teachers."*

"Conduct unbecoming a public employee has defined as an elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the district, or which has the tendency to destroy public respect for municipal employees and confidence in the operation of municipal services."

The District relies heavily upon the decisions by the Commissioner of Education and under the Teach NJ determinations, which have been effective since August of 2012. In fact, the District references that the Commissioner has often stressed that those persons who went into the teaching profession exercise a significant influence on those who teach and... must exhibit a high degree of exemplary behavior.

In the instant matter, there can be no doubt that Mr. Ajayi's actions on March 27, 2014, constitute conduct unbecoming, thereby warranting his removal from his tenured position. The testimony of A.H. establishes without reservation that he asked one of his classmates for a piece of candy. From there, the situation morphed to the Respondent approaching A.H. and asking him multiple times why he threw the candy. Yet the Respondent testified that he asked A.H. once why he threw the candy and then asked him at least three times to give him the piece of candy. At that point, despite A.H.'s denial of throwing the candy, the Respondent grabbed A.H.'s right arm and pulled him out of his chair causing

A.H.'s untied boot to come off. He also grabbed and twisted A.H.'s arm, pushed him and forced A.H. to the door.²

In fact, A.H.'s testimony made it specifically clear that he did not initiate any physical contact; rather, Mr. Ajayi became frustrated and became unnecessarily physical with A.H. Additionally, both A.H. and L.S. credibly testified that after A.H. denied throwing the object (whether it was candy or juice box), the Respondent got really impatient and angry and grabbed A.H. by his arm. It was at that point, as referenced above, the Respondent grabbed and twisted A.H.'s arm and pushed him toward the door.

On the other hand, Mr. Ajayi's version of the event simply was not credible. According to the Respondent's testimony, after A.H. refused to give him the object, A.H. stood up and said "Fuck. I didn't throw it" and then pushed Mr. Ajayi.³

The Petitioner contends that Mr. Ajayi did not produce any witnesses to corroborate his version of the events. Interestingly, even the investigator from the Institutional Abuse Investigation Unit (IAIU) and supervisor determined that Mr. Ajayi was the aggressor. Indeed, both wrote in the joint letter that statements received from those present during this incident determined that the teacher, Vincent Ajayi, had grabbed A.H. by his collar and arm for being disruptive in the classroom. Furthermore, there is absolutely no mention of any aggressive physical action taken by A.H. against Mr. Ajayi. See Respondent Exhibit Q (RVA-19 and RVA-20).

² TR 1, 14:13-16, 16:10-18.

³ TR 3, 11:12-23

The Petitioner contends that even if it is determined that A.H. pushed Mr. Ajayi in the classroom on March 27, 2014, there was absolutely no need for Mr. Ajayi to grab and push A.H. The Respondent clearly had the opportunity and ability to step back and take proper administrative action, rather than to take physical action against a seventh grade student. There was no attack by A.H. Instead of backing away or calling the main office or security, Mr. Ajayi chose grab both of A.H.'s hands and push him.⁴

Moreover, Mr. Ajayi acknowledged that the March 2014, incident with A.H. was very similar to what transpired with R.H., which was documented in the November 2013 memorandum.⁵ In the November 2013 incident with R.H., the Respondent grabbed the student by his neck when he refused to give Mr. Ajayi a basketball. (See District Exh. 8).

Based upon what had occurred since Mr. Ajayi's short time at Cleveland Elementary School, he has established a horrifying and inappropriate pattern of handling situations with dangerous physical contact. There is simply no rational defense for the Respondent's action, and it is inexcusable that he used physical force in grabbing A.H., twisting his arm and pushing him, especially since he was on notice to refrain from touching students.

Mr. Ajayi's actions on March 27, 2014, constitute corporal punishment. The District references N.J.S.A. 18A:6-1, which defines corporal punishment. Dealing with the instant matter, the Petitioner argues that,

"The record demonstrates that none of the exceptions to the corporal punishment statute apply to the incident involving A.H. There was no attack by A.H. Mr.

⁴ TR 3, 12:8-10

⁵ TR 3, 31:18-25; 32:1-7

Ajayi, to the extent he wanted A.H. out of the classroom, could have and should have called the main office or a security guard for assistance. There was no emergent situation in the classroom requiring Mr. Ajayi to use physical force on A.H."

The District references a Teach NJ decision in Franklin Township Board of Education and Dorrell Hilliman, DOE 65-3/13. In that case, Arbitrator Licata decided that even though the student initially threw a book, the teacher lost the ability to raise a self-defense argument when he threw books back at the student. Arbitrator Licata upheld the school district's request for the teacher's termination.

Mr. Ajayi's actions on March 27, 2014, constituted assault and battery. In regard to that argument, the District contends that to establish a "*tort of assault, a victim must show that the aggressor acted with intention to cause harm or offensive contact and that the victim was put in imminent apprehension.*" As the record established, there can be no dispute that Mr. Ajayi's action on March 27, 2014, constituted an assault and battery upon A.H. when he grabbed A.H.'s right arm and pulled him out of his chair causing A.H.'s untied boot to come off. Clearly, Mr. Ajayi's actions were both an offensive and non-consensual touching, which placed A.H. in imminent apprehension. The weight of evidence therefore warrants sustaining Count III of the tenure charges and Mr. Ajayi's removal from his tenured teaching position.

The proper penalty is removal of Mr. Ajayi from his tenured position because unbecoming conduct is conduct which adversely affects the morale or efficiency of the agency to which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in

the operation of governmental services or which violates an implicit standard of good behavior.

The District contends that,

"A finding of unbecoming conduct does not require that any specific rule or regulation has been violated but may be based primarily on a violation of an implicit standard of good behavior. In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident sufficiently flagrant."

In support of this, the District references Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, o.b. 131 N.J. 326 (E.A. 1944).

The District argues that the instant matter does not involve an isolated incident with Mr. Ajayi; rather, it involves a pattern of unacceptable conduct that culminated in a violent incident which was witnessed by an entire class. Mr. Ajayi's attempt to characterize A.H. and other students as disciplinary problems cannot provide an excuse for the use of violence or corporal punishment.

The District contends that the statutes and case law are clear and that Mr. Ajayi as a teacher was to serve as a model of appropriate behavior during his daily interactions with students. The March 2014 incident, along with his pattern of improper physical contact with students at the Cleveland Elementary School, leaves no doubt, and no alternative, that Mr. Ajayi is not fit to serve as a teacher and must be removed from his position as a tenured teacher.

For the Respondent

The Respondent is *"charged in four (4) counts with conduct unbecoming a teacher / just cause and in one (1) count with engaging in a pattern of conduct constituting unbecoming conduct."* It is alleged in Four Counts (Counts One,

Two, Three and Five), that Mr. Ajayi used unnecessary and/or inappropriate physical contact in dealing with the students identified as A.H., F.K., and A.A., that he inflicted corporal punishment on those same children, that he committed assaults and batteries upon these students and that he violated N.J.S.A. 18A:6-1.

In response to those arguments, the Respondent contends that *"The District has grossly overstated its position in preparing the sworn tenure charges against the Respondent and it has taken what is essentially one allegation; that of inappropriate contact, and transformed it into four separate and distinct counts."*

The Respondent further contends, *"Additionally, this has been done in the hope of obtaining some compromise verdict from the finder of fact. Rather than considering such compromising coming to a final conclusion, it is respectfully urged that the Arbitrator contemplate merger of the nearly identical counts referenced and consider them only as one real allegation."*

The second observation to be highlighted in the defense of the Respondent is the failure of the District to establish one (1) of the four (4) allegations by the applicable standard under the law for all intents and purposes and amounts to a failure of proof as to all of the allegations involving inappropriate contact with Mr. Ajayi. Stated in another way, in the event that it is decided that the conduct that is alleged by the District was undertaken by Respondent in self-defense, defense of others, to quell a disturbance that was in large measure incidental to redirecting a student or students who were physically

acting out, all the charges describing assault of, unnecessary and/or punitive conduct by Respondent should not stand.

Moreover, the District has patently demonstrated its own uncertainty about and discomfort with the facts it seeks to rely upon to approve the allegations comprising its case. *"The shotgun approach adopted by Petitioner, whereby an attempt is put forth to buttress blanket allegations with unsupportable and unfocused evidence, belies the inherent weaknesses presented in the District's theory."* Accordingly, the Respondent contends that the District has failed to prove any of the allegations contained in Counts One, Two, Three or Five.

Count Four of the tenure charges filed against the Respondent allege a pattern of unbecoming conduct by Respondent. As to this charge, the District asserts a pattern of unbecoming conduct by Mr. Ajayi, erroneously relying upon a series of infractions which remain unproven and in most cases, unmentioned by witnesses.

As to the present incident viewed as a whole, there are insufficient proofs to substantiate any kind of pattern whatsoever. *"First, it should be noted that the other two (2) students allegedly involved in the March 2014 situation did not testify and consequently, there is no direct evidence from either F.K. or A.A. as to any inappropriate contact perpetrated by the Respondent. Second, A.H., during the course of his testimony concerning the present matter, either on direct or cross-examination, mentions nothing of any relevance as to any interaction Mr. Ajayi had with either F.K. or A.A. Third, the other two (2) eyewitnesses to the*

March 27, 2014, allegations, H.A. and L.S. likewise did not testify to anything about Respondent touching F.K. or A.A.”

The Respondent argues that any effort by the District to establish a pattern of unbecoming conduct by relying upon incidents occurring prior to March 27, 2014, fails based upon the evidence and the testimony in the record, particularly testimony from students.

The Respondent argues that any matters which allegedly took place on November 19, 2013, and November 21, 2013, which are specifically cited in the Petitioner's complaint, neither of the purported victims (i.e. T.E. and R.H.) testified at the arbitration hearing. As such and given the totality of the District's proofs, there is no residuum of competent evidence to support any hearsay evidence admitted as to these students and/or the proof of Count Four.

The Respondent also contends that the internal investigation conducted by Principal Ervin was insufficient to say the least. She accepted the complaints by T.E. and R.H. at face value with little, if any, further inquiry. She then, in a rush to judgment, accused Mr. Ajayi of inappropriate contact without properly considering his Staff Incident Report as to T.E. (RVA-4) or the *“absolute absurdity of R.H.’s allegation that the Respondent inexplicably grabbed him because another student was bouncing a basketball.”* (see RVA-18)

The Respondent argues that the incidents were so weak and lacking in substance that they did not even rise to the level of prompting formal administrative allegations against Mr. Ajayi. In fact, after Ms. Ervin advised the authorities of the facts surrounding the November 2013 student reports, the NJ

Division of Children and Families specifically found no reason to even take the initial step of conducting a formal inquiry as to either circumstance. (See RVA-19).

The Respondent contends that even giving the District the benefit of its evidence and all of the reasonable inferences to be drawn from that evidence, a pattern of unbecoming conduct cannot be established either by limiting the assessment of facts pertaining only to the March 27th incident or by expanding consideration of any legally sufficient evidence presented from November 2013 and synthesizing that with the later proofs of the March 27, 2014, encounter.

The Respondent also argues, as the District did, that the standard of proof in the instant matter is the preponderance of credible evidence. The Respondent contends that N.J.S.A. 18A:6-1 was not violated by the Respondent because *“At all times and under all circumstances of the present case he acted reasonably, without the use of unnecessary force and in compliance with both the letter and spirit of N.J.S.A. 18:A6-1.”*

The Respondent argues that A.H. is presently a 15 year old student at Shabazz High School in Newark and was previously enrolled at Cleveland Elementary School where during the 7th grade he was taught Science by the Respondent. A.H. testified that he did not throw any candy or a juice box in the vicinity of the Respondent, yet the Respondent grabbed and twisted his arm and as he was holding A.H. he was moving A.H. toward the door forcing the student out of the room. A.H. testified that the Respondent let go of the student when a

Child Study Team member entered the classroom and took A.H. downstairs.⁶

Contrast that with the testimony of the students.

Furthermore, A.H. denied touching Mr. Ajayi during the March 27th incident because he did not want to get in trouble again and learned his lesson.⁷ In fact, A.H. denied that the Respondent asked him for the candy after he picked it up, and he is unsure whether he provided a written statement to Ms. Ervin concerning the March 27, 2014, incident. A.H. knew that if he ever put his hand on the Respondent again after the October 2013 assault, *“Mr. Ajayi could press charges on me and face a whole bunch of stuff, and face penalties including the possibility of expulsion from school.”*⁸

The testimony of H.A., a 16 year old Ninth Grade student presently enrolled at American History High School in Newark who was formerly enrolled in Cleveland Elementary School, where she was a pupil in Mr. Ajayi’s Science class. Her testimony indicates that someone threw a juice box at Mr. Ajayi and that Mr. Ajayi told A.H. to get out of the classroom and A.H. refused. She further testified that the Respondent grabbed A.H. by his arm and tried to take him out of the class. A.H. was swearing a little and subsequently AH pushed Mr. Ajayi away. She also testified that she was escorted to the office by the Vice Principal, Mr. Davis, and she spoke with Ms. Ervin.⁹

⁶ TR I, 15:11-16

⁷ TR I, 21:5-14

⁸ TR I, 36:16-37:15

⁹ TR 2, 113:1-16

H.A. testified that Ms. Ervin prepared the written statement and she signed it.¹⁰ She also testified that A.H. eventually left the room when the security guard took him outside.¹¹

L.S., presently a 15 year old Ninth Grade at Bars High School in Newark, was previously a student at Cleveland Elementary School and was in Mr. Ajayi's Seventh Grade Science class. She testified that a piece of candy was thrown that hit Mr. Ajayi, who thought that A.H. had thrown it at him and grabbed his shirt. A.H. tried to get away, and Mr. Ajayi grabbed his wrist and twisted it.¹² She also testified that she was not sure what had happened,¹³ and A.H. left the classroom after the incident by slamming the door and she thinks he went to the office.¹⁴

L.S. also testified that she never got a chance to speak to anyone about the incident because apparently A.H. told her mother what had occurred and her mother reported the incident to the school office.¹⁵ Most importantly, L.S. testified that she never spoke to Ms. Ervin about the incident, although a written statement allegedly authored by L.S. and prepared by Ms. Ervin was submitted as evidence in the case and marked D-7. ¹⁶ Incredibly, L.S. testified that *"she did not review the statement submitted under her name until I think this month."*¹⁷

¹⁰ TR 2, 116:3-11

¹¹ TR 2, 119:12-19

¹² TR 2, 121:22-24

¹³ TR 2, 123:2-4

¹⁴ TR 2, 123:5-15

¹⁵ TR 2, 123:20-24

¹⁶ TR 2, 123:25-124:9

¹⁷ TR 2, 126:16-127:8

Barbara Ervin, the then Principal of Cleveland Elementary School, testified that there were student complaints regarding physical incidents with the Respondent which were described as pulling, snatching, grabbing and pushing.¹⁸ She also testified that the first two (2) times these matters were referred to the Department of Children and Families (DCF), who found that the alleged actions by the Respondent did not rise to anything beyond administrative meeting with the teacher and providing strategies.¹⁹ A memorandum of those incidents (see Respondent D-8) was prepared and issued to the Respondent.

The Respondent has been a teacher in the Newark Public Schools for 15 years and prior to his suspension taught Science at Cleveland Elementary School. Prior to that he was a Science teacher at Samuel Berliner School and aside from the present situation has never been the subject of disciplinary charges. He testified that a list of students in jeopardy of failing was compiled by him prior to March 27, 2014 and A.H. is on that list. A letter was sent to the parents of all of the individuals on the list, and the Respondent signed it as did Ms. Ervin.

The Respondent testified that on March 27, 2014, his back was turned to the class, and something struck him in the back of his leg and he turned and saw that A.H. was picking up the object. He asked A.H. whether he threw the object and then asked him to hand him the object, which A.H. refused to do. The Respondent testified that he asked A.H. three times to give him the object but he refused to do so. At this point, A.H. stood up and said "Fuck, I didn't throw it" and

¹⁸ TR 2, 29:6-17

¹⁹ TR 2, 29:18-30:3

pushed the Respondent with both hands, and the Respondent fell back.²⁰

Fearing that A.H. would kick him and hurt him as he did before (referencing the October 2013 incident), the Respondent grabbed both of his hands.²¹ A.H. at this point began to swing around and as he was not holding A.H. tightly he let him go. The situation escalated as A.H. struck the Respondent more than twice on his lower left side and, in response Mr. Ajayi again grabbed A.H.'s hand and turned him toward the door. A.H. became very aggressive; the Respondent did not want A.H. to hurt him again or hurt anyone else. In particular, the Respondent was concerned about the dangerous materials in the classroom.²²

The Respondent was unable to summon help using the intercom system because it had been broken by a student and was inoperable for at least a two month period. However, he did send two emails requesting that it be repaired and those were introduced as RVA-1 and RVA-2. Mr. Ajayi also denied that there was a security guard stationed on the third floor and he was unable to summon help utilizing the cell phone because of the suddenness of the attack.

The Respondent testified, "*A.H. was a disruptive and angry student who disrupted his class almost on a daily basis; he would not stay in his seat, he would throw things at students and he would touch students inappropriately.*"²³

The October 23, 2013, incident was a serious behavioral issue that arose with respect to A.H. walking around the classroom and being told by the Respondent to go back to his seat. A.H. suddenly became aggressive,

²⁰ TR 3, 11:16-25

²¹ TR 3, 12:1-10

²² TR 3, 13:9-14:10

²³ TR 3, 17:19-18:3

screaming at the Respondent and then punched Respondent in the chest and kicked him several times. RVA-7 details the incident for which A.H. was disciplined.

The Respondent contends that A.H. had at least three distinct and powerful motivations to testify falsely in the case brought against Mr. Ajayi, and these factors provide strong indications and inclinations for A.H. to offer less than the truth. First and foremost, A.H. testified that he did not like the Respondent as a teacher and in fact did not get along with him. His dislike for Mr. Ajayi permeates the case in several forms. *"Most significantly, the prior assault perpetrated by A.H. in October of 2013 where he punched and kicked Mr. Ajayi speaks volumes as to his animosity toward and disrespect for the teacher. This hatred could only have been exacerbated by the fact that A.H. was suspended as a result of his behavior, which surely caused problems at home for him with his parent(s) or guardian(s). Secondly, prior to the March 27th incident, the Respondent had sent a letter to A.H.'s parent(s) or guardian(s) requesting that a parent conference be scheduled to address concerns about A.H. Most importantly, A.H.'s progress report was enclosed, which provided solid evidence that A.H. was in danger of failing one or perhaps more subjects."* (See RVA-9, RVA-10).

The proximity of the letter, dated March 14, 2014, to the event, which occurred less than two (2) weeks later on March 27, 2014, and the discord that the correspondence potentially caused at home for A.H. cannot be overlooked as possible contributing factors in his unwarranted attack upon the Respondent.

Additionally, after the October 2013 incident, which caused A.H. to be suspended for several days, he was cautioned by Principal Ervin as to what potential consequences could befall him should he put his hands on Mr. Ajayi again. Among those was not only an administrative punishment directly related to his continued attendance at Cleveland Elementary School, but also the possibility of criminal charges being filed. Put succinctly, A.H. does not want to face these consequences.

The Respondent contends that it could be argued that the received warning would be a strong reason for A.H. to not confront Respondent in the first place, but a look at the facts presented by the case quickly dissolves this position. A.H. was, by all measures, an undisciplined and disruptive student who was not in firm control of himself. He was constantly out of his seat, disturbing and touching other students in class, and even admitted that his misbehavior in class included being too talkative and getting into fights. He was not doing well academically as evidenced by the March 14 letter. It is likely that rather than assuming a submissive stance when he was confronted by Respondent after he picked up the thrown candy, he adopted an aggressive posture and impulsively assaulted the teacher in the same manner as he had done before. Any admonitions issued by the Principal were long forgotten by the time he assaulted the Respondent.

A.H.'s testimony must be viewed with a jaundiced eye given his strong motivations to lie, but even absent those motivations, his testimony fails to contribute to the desired result sought by the District. His testimony simply does

not make common sense. A.H. would have us believe that after leaving his seat to retrieve a piece of candy which he requested be thrown to him by another student, the teacher repeatedly accused him of throwing the candy and then, without provocation, grabbed and twisted his right arm. As the teacher was moving A.H. toward the door in this fashion, a Child Study Team member entered the room at which point Mr. Ajayi released A.H. who was then escorted to the office. A.H.'s denial that as part of the interaction with the teacher he was asked to turn over the object is incredible. The Respondent, a seasoned teacher, could not have been interested in escalating the incident to the threshold of physical aggression and beyond. Mr. Ajayi had been punched and kicked by A.H. only a few months before, and the Respondent had been sent at least one (1) memo admonishing him to act with care and circumspection in handling students, as he had done in the past. It is highly unlikely that the Respondent, an educator of 15 years with an excellent record, wanted to subject himself not only to be beaten up again but also to the possible administrative sanctions. Rather, *"It is far more likely that the teacher was interested in getting his students back on task after he was struck by the candy. The incident surely would have come to a conclusion if A.H. had been more cooperative and given the object to the Respondent."*

A.H.'s denial that he ever touched the Respondent during the March 27th incident seems most unlikely given his prior assault on the teacher, his constant acting out in class, and the aggressive posture he assumed in the exchange with the Respondent. If A.H. truly wanted to avoid a confrontation, he would have

been more respectful, cooperative and demure when Mr. Ajayi asked him whether he tossed the candy. Instead, A.H. acted to goad the teacher into a more serious encounter.

Moreover, A.H.'s admission that he learned his lesson from the October 2013 incident does not ring true. As the record established, *"A.H. was a daily source of frustration for Mr. Ajayi and he was an integral part of the chaos which all too often define a Seventh Grade Science class, which was the focus of this incident."*

H.A. testified that despite identifying A.A. as the person who threw the object to A.H., she did not actually see A.A. make the toss. Her own words require a very careful review of her testimony. She stated, *"We have this thing of getting into groups in class and talking about what happens during class. My friend kept saying, A.A., A.A., A.A. actually did see it was her so it was her."*²⁴ She also testified that she only knows who had thrown the object from what other people told her.²⁵

The Respondent contends that the impact of this astonishing testimony is that it calls into question all other parts of her testimony pertaining to the description of the event. *"We simply do not know, nor can we determine, with any degree of certainty, what portion or portions of her testimony are based upon what she herself observed or what other students may have told her. This doubt makes all of her statement under oath unreliable. In short, her testimony as a corroborating witness deserves little, if any, weight."*

²⁴ TR 2, 117:3-6

²⁵ TR 2, 117:7-11

L.S. testified that she did not give a statement as to what had occurred and that it was her mother who had reported the information. Her mother had found out what had occurred from A.H. She also testified that she never drafted any statement or gave any written statement to Ms. Ervin and only saw a statement that she was supposed to sign, but she never was involved with the drafting of that statement and never signed the statement.

The Respondent argues that the investigation conducted by Principal Ervin was flawed to say the least. The Principal did everything in her power to make certain that the investigation turned out exactly as she wanted and that the conclusions she reached were not as a result of a full, fair and neutral inquiry, but rather nothing more than a rush to the judgment of finding that the Respondent committed the assault alleged without conducting any kind of real analysis of the facts presented.

Support for this argument can be found in the fact that Mr. Ervin testified that she had supervised A.H. since the Fourth Grade and he was not, in her opinion, an aggressive child, even as a Seventh Grader, as were some of the other students in the classroom. She had come to this conclusion despite the fact that A.H. had punched and kicked the Respondent once before and had been suspended from school as a result. She further mistakenly assumed that A.H. had learned his lesson from the first incident and that based upon the conversation she had with him after the initial assault in 2013, "*A second time he did not swing or hit the Respondent.*" Giving the Respondent's uncontroverted testimony that A.H. was disruptive on a daily basis, and A.H.'s admission that he

was often involved in fights, Ms. Ervin's opinion as to the non-violent nature of A.H. is clearly erroneous, and her reliance upon that mistaken opinion in coming to an investigative conclusion is misguided.

Secondly, the fact that Ms. Ervin came to the final conclusion that she did before the inquiry even commenced and based upon pre-conceived notions is evident from the cross-examination conducted concerning the method in which statements were taken from student witnesses and a comparison of those statements. The undisputed facts in evidence show that Ms. Ervin received information from students and she alone selected and then placed that information on paper, utilizing her own words and placing her own spin on what the students told her. Needless to say, that does not make for an accurate description of an event by a witness.

It actually provided the Principal what she was looking for to document a case against the Respondent. Moreover, she refused to admit that the statements taken by her were, to put it mildly, inconsistent. She took no codified statements from A.H., F.K. or A.A. instead incorporating their versions into her description of the incident, a narrative which again did not fit the way the incident actually occurred.

Third, and most egregiously, Ms. Ervin submitted a written statement into evidence as attributable to a witness who, in fact, did not give that statement. Under oath Ms. Ervin stated that she spoke with L.S., a student witness, after the incident and even though that statement was unsigned, it was consistent with the information provided by L.S. At the arbitration hearing, L.S. testified that she

never spoke with Ms. Ervin, but rather the factual version of the incident reflected in her statement was provided by her mother. This certainly calls into question what the Principal testified to as to L.S., but based upon the legal principle of false in one, false in all.

Accordingly, the Respondent asks that Ms. Ervin's testimony should be discounted in its entirety.

Mr. Ajayi's testimony of what had occurred on March 27, 2014, makes the most sense of any testimony adduced at the hearing. He testified that after he was hit with an object, he asked for the object and A.H. refused to give it to him, and while he was standing A.H. adopted an aggressive posture as he had done in the past. He shoved the Respondent who fell back. As previously indicated, fearing that the matter would escalate and creating a danger to himself and other students in the classroom, especially in light of the chemicals, breakables and equipment present, the Respondent took hold of A.H.'s hands and tried to move him toward the door in an effort to eject him from the class. A.H. resisted and given the speed in which the situation had developed, the broken intercom, the unavailability of his own cell phone, this was the Respondent's best and only alternative. A.H. broke free and struck the Respondent at least twice in the left side and the Respondent's fear of being punched, kicked or worse, was realized. He again grabbed A.H. to protect himself, his students and to continue to remove A.H. from the class when the Child Study Team member entered and the incident came to a conclusion.

Under the statute, N.J.S.A. 18A:6-1, the Respondent had the absolute right to employ the minimum amount of force, which he did exert upon A.H. to not only quell the disturbance which the student created, threatening physical injury to others, but to protect himself and the rest of his class from personal injury.

Given the circumstances in the case in the instant matter, the Respondent's actions in taking control of the situation were more than reasonable as he utilized a minimal amount of force to halt the attack with no resulting harm to A.H., himself or anyone else. There is absolutely no indication that Mr. Ajayi's actions were retaliatory in nature. The Respondent argues that it has been held that the exertion of physical control over an insubordinate and insulant pupil in order to quell a disturbance is not unreasonable and not in violation of N.J.S.A. 18A:6-1. In support of that, the Respondent references the tenure hearing of Calabrese, Ridgefield, C.D. 304-82, 29 Oct. 82.

The Respondent contends that in the case at bar, his actions were reasonable and should not be held illegal. Additionally, the Respondent's lack of disciplinary history and his service to the District, including exemplary evaluations and certificates for attending a variety of different training programs, establish that this is not a case where the Respondent decided that he was going to retaliate against A.H.

For all of the above reasons, the Respondent argues that the District has failed to prove the tenure charges brought by preponderance of credible evidence. Petitioner's proof do not establish that the allegations contained in the tenure charges are more probable than not, nor does its evidence carry the

power to convince. Stated another way, the case against Respondent does not permit a finding of either conduct unbecoming a public school teacher or engaging in a pattern of such conduct grounded in probability supported by common experience and, hence, should fail.

The Respondent asks that he be returned to work with full back pay and all emoluments of employment.

DISCUSSION AND OPINION

Both parties insist that the fact pattern in evidence clearly establishes that their position is correct concerning the instant matter. However, the unique facts of each case can and do control how a particular set of tenure charges filed against a teacher will be adjudicated. The facts in evidence clearly and unequivocally establish that both parties have flawed positions. The most damaging position for the Respondent is the November 21, 2013, memo from Principal Ervin concerning student complaints. In that document, Mr. Ajayi was admonished for putting his hands on students. (see RVA-18/ D-8) Principal Ervin stated,

"...Please refrain from touching your students since you have not established a rapport that will allow you any kind of physical contact. Effective immediately, you are to send students to the office as you have done since the beginning of the school. In addition, you are to contact the office to send security for students that refuse to leave as the Principal, Vice Principal, Chief Innovative Office, Guidance Counselors and Social Workers and all three Security Guards have escorted students from your class in the past without incident."

Yet, despite that admonition, a situation occurred five months later, on March 27, 2014, dealing with the Respondent putting his hands on AH.

The major flaw in the Petitioner's position is the improper investigation conducted by Principal Ervin. Even though the Principal interviewed some of the students who were in the classroom at the time of the incident, the students did not submit any written statements. Principal Ervin indicated in her testimony that many times our students do not read and write well. Therefore, she asked them what occurred and she wrote down everything they told her.²⁶ Unfortunately, from what was said to what was written down, there was a gap based upon the testimony of those students, which will be discussed below.

The most egregious of the interviews conducted by Principal Ervin was the interview with student L.S. That document was introduced but was unsigned. The student testified on March 31, 2016, and the incident occurred on March 27, 2014, almost two years before her testimony.

L.S. testified that she never met with Principal Ervin and, in fact, A.H. told her mother about the incident and her mother reported it to the school officials.²⁷ Therefore, Exhibit D-7, which is the witness statement submitted by Principal Ervin on March 27, 2014, can't be utilized in these proceedings because, as testified to by L.S. she never gave the information to the Principal.

The introduction of D-7 does a lot of damage to the credibility of Principal Ervin because she tried to introduce a document that was fraudulently obtained. There is no signature on the document, and as L.S. testified, she never met with the Principal. Therefore, the only way the students' version of what occurred

²⁶ TR 2, 69:2-7

²⁷ TR 2,, 124:1-20

must come from the testimony in the record as testified to at the hearing and recorded by the court reporter.

While Principal Ervin is well meaning, she is not an investigator; there was nothing introduced to show that she is a trained investigator and, more importantly, she still remembers A.H. as a very nice, non-aggressive fourth grade student. Unfortunately, we are dealing with a seventh grade situation where, based on the October 2013 incident, he was aggressive. She admonished him about his aggressiveness and warned him about the potential consequences of his continued aggressive behavior. It is apparent that while he believed he was paying attention to Principal Ervin's admonitions, what happened on March 27, 2014, clearly establishes he ignored what she told him might occur if he continues with his errant behavior. Nevertheless, A.H. testified *"that he was disruptive in class and did get into a lot of fights in the classroom."*²⁸

Petitioner Exhibit 8, introduced as D-8, which is a November 21, 2013, memo from Principal Ervin to the Respondent. The Respondent was assaulted by a student and, yet, no legal action was taken against the student. The record is devoid of the Respondent filing a grievance or a police report about the incident. The record is also devoid as to any legal action Principal Ervin took against A.H. Nevertheless, another situation occurred of a physical nature approximately five (5) months after the memo from Principal Ervin to the Respondent. I have a difficult time accepting the Respondent's argument that his action in the instant matter was nothing more than self-defense. He is the responsible adult, the teacher in charge of that class. Even though the record

²⁸ TR 1, 29:1-4

clearly and unequivocally establishes that the intercom was not working, he could have used his cell phone, he could have asked for assistance from the Child Study Team members whose office was next to his classroom, or he could have sent a student to the office to request assistance in the room. Even though it is probably unpopular and not a good idea to have a student walking through the corridors, in that existing emergent situation, that was a viable option, but Mr. Ajayi did not take advantage of any options other than of a physical nature. If Mr. Ajayi was so concerned about the safety of other students and about how difficult A.H. was in his classroom, there is nothing in the record to establish that he had A.H. removed or recommended for assistance by the Child Study Team, or recommended that A.H. have counseling. If that did occur, it is not in the record, and most importantly, it should be in the record.

Referencing the October 23, 2013, incident, the Respondent had an obligation to pursue the matter because he was assaulted by a student. The record is unclear and, in fact, there is no record as to why he did not pursue any legal action against A.H. or request of the Principal for legal action to be taken against A.H. That has to be on Mr. Ajayi. Mr. Ajayi had an opportunity back in October of 2013 to begin to address the aggressiveness of A.H. and he failed to do so. That failure escalated into the March 27, 2014, incident.

The testimony of the students in the record is varied at best and, in fact, there is no clear, consistent testimony as to what actually occurred in Mr. Ajayi's Science classroom in Cleveland Elementary School on March 27, 2014, except the physical altercation between Mr. Ajayi and A.H.

A review of the testimony in the record shows the following:

A.H. testified that he asked another student in the class to throw him a piece of candy which the student did and that candy ultimately hit Mr. Ajayi and landed at his foot. He went to pick it up and that is when the altercation with Mr. Ajayi occurred. *"Mr. Ajayi came over to my seat and said that I threw it. I said I didn't throw it." He put his arms like this, his hand on my arm and flung me on my chair. That is when I went back to my seat to get my stuff so I could go downstairs and tell them he just did this.* ²⁹ He also testified that a Child Study Team member came in and took him to the Principal's office.³⁰

H.A. testified that there was a juice box thrown at Mr. Ajayi, but it did not hit him.³¹ *"Mr. Ajayi thought it was A.H. who threw a juice box and told A.H. to get out of the class. A.H. said no because he did not throw the juice box. Mr. Ajayi got really impatient and grabbed A.H. by his left arm and tried to take A.H. out of the classroom."*³² Additionally she stated that *"A.H. was standing at our table and he grabbed him by his left arm and kept pushing him towards the door."*³³ She also testified that the security guard came into the room to see what had been occurring and escorted A.H. out of the room.³⁴

L.S. testified that a piece of candy had been thrown and hit Mr. Ajayi in his head.³⁵ *"He thought A.H. had thrown the candy and he kind of got mad at A.H. and grabbed his shirt and like lifted him up and stuff. Then A.H. tried to get*

²⁹ TR 1, 14:5-12

³⁰ TR 1, 14:1-21

³¹ TR.2, 110:3-6

³² TR 2, 110:14-24

³³ TR 2, 111-23-25

³⁴ TR.2, 119:12-19

³⁵ TR.2, 122:13-20

away. He grabbed his wrist and then A.H. tried to get away again and he twisted here.”³⁶ Furthermore, she testified that A.H. slammed the door when he left and she guessed he was going to the office.³⁷

Mr. Ajayi testified that an object was thrown and hit him, but he never identified whether it was a piece of candy or a juice box. He did testify that he asked A.H. if he threw the object and A.H. said no. He then asked him three times to give him the object and A.H. refused to do so.³⁸ Furthermore, Mr. Ajayi testified that two (2) Child Study Team members came into the room when they heard the commotion and they took A.H. out of the classroom to the Principal's office.³⁹

Clearly, the above record shows that while there is no consistency as to the genesis of what had occurred that led to the physical altercation between the Respondent and A.H., the common denominator is that the Respondent put his hands on A.H. and began to push him towards the door. However, whether it was a juice box or a piece of candy, an object was thrown and it hit the Respondent. Mr. Ajayi asked A.H. if he threw it, and the response was “no, I did not.” He asked A.H. for the object and A.H. refused to give it to him. At that point in time, A.H. was being uncooperative and was challenging the Respondent's authority. He pursued the matter by refusing to give the object, whether it was a juice box or a piece of candy to the Respondent. The Respondent, as previously indicated, had options but chose not to utilize those

³⁶ TR 2, 121:18-24

³⁷ TR.2, 123:7-13

³⁸ TR.3, 11:1-15

³⁹ TR.3, 36:12-23

options, and the next thing the record establishes is that a physical confrontation occurred. The record establishes from A.H., L.S. and H.A. that there was a physical confrontation and none of them could corroborate the Respondent's testimony that he fell back as he testified to. The Respondent testified that the aggressor in this entire matter was A.H. but the student testimony belies that comment.

A.H. testified that Mr. Ajayi never asked him for the object that had been thrown.⁴⁰ None of the other students testified as to whether or not Mr. Ajayi asked A.H. for the object that was thrown (we are addressing a piece of candy and in A.H.'s version it was a Reese's Peanut Butter Cup), but they do recall Mr. Ajayi asking A.H. if he threw the object. The person who threw the piece of candy, who has been identified as A.A. was not a witness at the arbitration hearing. That person was also a student in Mr. Ajayi's seventh grade Science class at Cleveland Elementary School.

We have in the record varied testimony as to how the altercation occurred. Mr. Ajayi testified that A.H. was the aggressor, and students testified that Mr. Ajayi became mad and upset that something had been thrown at him and he wanted A.H. out of his classroom. The alleged verbalization between A.H. and the Respondent was not clearly identified by the students who testified. Therefore, the students were not aware if Mr. Ajayi asked A.H. for the piece of candy on three separate occasions and if that led to Mr. Ajayi asking A.H. to leave the class.

⁴⁰ TR.1, 34:13-16

A.H. testified that he wanted to leave the class, but he wanted to get his stuff and Mr. Ajayi would not let him get his stuff. That contradicts his statement when Mr. Ajayi asked him to leave the class. We do have in the record that Mr. Ajayi was reprimanded and admonished by Principal Ervin for touching students. That is clear, that is concise, and that is not refuted. The November 21, 2013, (see RVA 18/D8) memo from Principal Ervin to Mr. Ajayi was never challenged by Mr. Ajayi. He accepted at face value all of the words in that document which include, *"Twice in the last three days, we have met to discuss complaints from students."* Those complaints dealt with Mr. Ajayi grabbing a student and twisting her arm, and another student telling the Principal that he yoked him up when he refused to give him his basketball that another student was bouncing. That definitely shows the Arbitrator that Mr. Ajayi has a temper and that temper has to be controlled.

Moreover, the Respondent's argument that because the two (2) students, R.H. and T.E., did not testify all references to them cannot be utilized by the arbitrator. However, the legal argument of voir dire is now a component of the matter at bar. The November 21, 2013, (see RVA-18/D-8) memorandum from Principal Ervin to the Respondent was never challenged by Mr. Ajayi. The only logical conclusion to be drawn from his lack of action is that he accepted and agreed upon all of the words in that exhibit including the admonition from Ms. Ervin. Accordingly, the Respondent's argument about R.H. and T.E is set aside.

However, there are some documents in the record that establish that Mr. Ajayi had training on how to deal with these specific instances, but apparently he forgot what was addressed in the training sessions.

RVA-157 is part of the Respondent's documents, and it is a professional development document which indicates that on April 21, 2004, Mr. Ajayi attended a program entitled Non-Violent Crisis Intervention Training. The purpose of this workshop is to provide techniques and methods to diffuse explosive behavior and handle threatening or challenging situations. Mr. Ajayi was trained in how to deal with the situation on October 23, 2013, and March 27, 2014, and he failed in both instances. He resorted to physical confrontation. With this program, it is probably designed not to allow that to occur.

Additionally, RVA-162 is another professional development training certificate that Mr. Ajayi received for a training program, dealing with challenging behavior in young children, understanding and preventing and responding effectively. The purpose of that program was to identify challenging behaviors in children and learn effective strategies and techniques to prevent and respond to these behaviors in the classroom. That was dated March 25, 2004. Again, Mr. Ajayi did not utilize what he learned at that training session.

Finally, RVA-167, dated November 17, 2003, was another training program which was to deal with the implementation of the IEP maintaining a balanced curriculum. The purpose of that was to enhance the ability to create positive educational environments that are effective for teaching and learning in

the classroom. What happened on the October 2013 and March 2014 incidents clearly was violative of this program.

While an argument can be made that no IEP was presented in the documentation with this case, it is important to review the testimony of Principal Ervin about the Samuel Berliner School. *“The Samuel Berliner School is a special needs school that addresses behavioral problems of children. Students are evaluated and classified based upon academic and/or behavioral needs. That is a school where students whose behavior has exceeded what can be handled in a general education school. They are placed in Samuel Berliner for multiple disruptions, and it is the next step before we do an out-of-district placement or anything like that. It is a school for children who are consistently disruptive, consistently physical and consistently keeping other kids from learning.”*⁴¹

Mr. Ajayi’s previous assignment was a school dealing with disruptive children, and Principal Ervin interviewed Mr. Ajayi for the position at Cleveland Elementary School and she accepted him to be a member of her teaching staff knowing full well what his background was and apparently wanted that type of a background in her classroom. There is nothing in the record to suggest that she did not want that type of academic background and/or school environment for one of her teachers.

She also testified that part of her responsibilities were to observe on a daily basis the educational program that was occurring in each classroom and when she would go into Mr. Ajayi’s classroom, she observed students calling out,

⁴¹ TR.2, 102:1-25

walking around, not participating in class, instruction that did not pull the students into the lesson. Generally, a disruptive classroom.⁴² The record establishes that Mr. Ajayi was having a difficult time addressing the needs of A.H. within that classroom and in fact had a difficult time addressing the needs of a student on January 27, 2014, (see RVA-170) who could not control herself when she came into the classroom and ultimately ended up by pulling the intercom ear piece and receiver causing them to snap. That resulted in the intercom being inoperable, and the record also reflects on February 7 and 24, 2014, Mr. Ajayi did make a request for the intercom to be repaired and that did not occur.

As required by statute, Principal Ervin referred the March 27, 2014, incident to the Department of Children and Families (DCF). They conducted an investigation and on May 7, 2014 submitted their findings. They determined that no adjudicated findings have been made. The DCF Institution Abuse Investigation Unit review herein is solely investigative. They also indicated "*[T]he appropriate licensing or supervising authority may take additional action as a result of this investigation.*" As a result of that investigation, the Newark Public Schools Talent Office/Employee Services Division conducted an internal investigation of the March 27, 2014, incident. In the report dated April 27, 2014, and signed by Michelle Takyi, Manager of Compliance and Tenure, it was determined that even though the matter had been referred to DCF and they returned a finding of not established, the internal investigation conducted by Mr. Takyi showed that Mr. Ajayi did not follow school policy and that based upon the March 27, 2014, incident, tenure charges should be pursued against Mr. Ajayi.

⁴² TR.2, 26:6-25

A state agency made the investigation as required by statute and determined that based upon the evidence in the record, the students *"are not abused children as defined by statute. Therefore, the charges against Mr. Ajayi were determined not to be established."* The definition of not established from the Department of Children and Families (see Exh. RVA-21) states, *"There is not a preponderance of the evidence that the child is an abused or neglected child by definition, but evidence indicates that the child was harmed or placed in harm."* That alone was the basis for the District to pursue the tenure charges because they believe that A.H. was harmed.

The documentation in the record establishes that there is no clear concise testimony to determine who was the aggressor in the March 27, 2014, incident. However, the record is clear that Mr. Ajayi has had a problem with students in the past while he was at Cleveland Elementary School. There is nothing in the record to substantiate that he was in violation of District policies or that there was any inappropriate physical contact with students while he was at the Samuel Berliner School. Nevertheless, at Cleveland Elementary School there were at least three incidents of him inappropriately touching students and being physical with students. Even after receiving an admonition in November of 2013, he continued with his errant ways as evidenced by the March 27, 2014, incident. Corporal punishment is not allowed in the State of New Jersey and in accordance with N.J.S.A. 18A:6-1, Mr. Ajayi may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary: (1) to quell disturbance, threatening physical injury to others; (2) to

obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil; (3) for the purpose of self-defense; (4) for the protection of persons or property.

I don't find that any of those above-mentioned standards have been met by Mr. Ajayi. I can't reach the conclusion that it was self-defense based upon the testimony of the student eye witnesses. The Respondent was annoyed that he had been hit by an object, which by the testimony of A.H., H.A., and L.S. was not deliberately thrown at Mr. Ajayi. Think of the enormity of that incident.

Mr. Ajayi, the responsible adult entrusted with the care of children, lost his temper was irate and became physical with A.H. There was no threatening physical injury to others; there was no possession of a need to obtain a weapon or other dangerous object, and the protection of persons or property because he was in a Science lab is far-fetched. The entire case that Mr. Ajayi presents is circumstantial at best. What the Respondent does not address is that once he touched A.H., the student resorted to self-defense.

Therefore, it is appropriate to review the charges to determine if Mr. Ajayi was in violation of what is expected of a classroom teacher and if he was in violation of conduct unbecoming or other just cause.

Charge Number One: Mr. Ajayi is accused of failing to exercise self-restraint and controlled behavior and using unnecessary and inappropriate physical contact in dealing with a student. Mr. Ajayi is accused of conduct unbecoming or other just cause warranting his dismissal.

Mr. Ajayi did not exercise self-restraint. The question is should that require his termination or is there another appropriate remedy? The District has met its burden of proof in Charge Number One, and it is sustained.

Charge Number Two: Mr. Ajayi is accused of inflicting corporal punishment upon A.H. The Petitioner is accusing Mr. Ajayi of inappropriate and unprofessional conduct, and they were sufficiently flagrant and egregious to warrant termination.

The District has met its burden of proof in Charge Number Two, and it is sustained.

Charge Number Three: Mr. Ajayi is accused of committing an assault and battery upon A.H. and he is accused of inappropriate and unprofessional conduct and placed A.H. at risk of physical and emotional harm, and he is accused of egregious conduct that warrants his termination.

The District has met its burden of proof in Charge Number Three and it is sustained.

Charge Number Four: Mr. Ajayi is accused of acts of misconduct described above, jointly and severable, which demonstrates a series of infractions, constituting a pattern of conduct unbecoming and/or just cause warranting Mr. Ajayi's dismissal and reduction in salary.

The District has met its burden of proof in Charge Number Four, and it is sustained.

Charge Number Five: Mr. Ajayi is accused of violating N.J.S.A. 18A:6-1.

The Board repeats what they have previously indicated on the other charges.

The District has met its burden of proof in Charge Number Five, and it is sustained.

There is no question that Mr. Ajayi has had inappropriate physical contact with students since he has been at Cleveland Elementary School. He started at Cleveland Elementary School in September 2013, and in October 2013 he was admonished by the Principal on two separate occasions of inappropriately touching students and actually grabbing a student and twisting her arm behind her back. No action was taken against Mr. Ajayi at that time. One has to wonder, why not? Why was there no action taken against Mr. Ajayi at that moment or why was that incident not sent to DCF as was the March 2014 incident.

This is not a simple matter where Mr. Ajayi states that it was self-defense. How could it be self-defense if we are dealing with a 15 year old student who was at the arbitration hearing the first day and did not appear to be a 250 pound student? I have no idea why Mr. Ajayi was saying it was self-defense. Mr. Ajayi was remembering what had occurred in October 2013 and was fearful. There is no report that he was fearful. There is no report to the Newark Police Department that he was fearful for his life or fearful for his safety or fearful for his well-being. There is nothing to that effect. We have a situation where Mr. Ajayi had been trained on how to deal with this type of incident and ignored that training.


Mr. Ajayi's pattern of conduct since October 2013 put him in harm's way. Discounting the incidents with F.K. and R.H there are still two (2) incidents of physical contact with the same student. Had the October 2013 or March 27, 2014, incidents been a stand-alone a different result would have been obtained.

For the foregoing reasons, and having duly heard the proofs and allegations of the parties, I Award:

AWARD

The District has met its burden of proof in all five charges. Mr. Vincent Ajayi is guilty of corporal punishment and conduct unbecoming a teacher and shall forfeit his teaching position in the State-Operated School District, City of Newark.

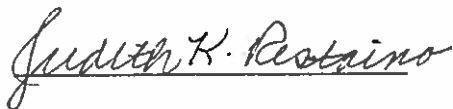
Dated: May 31, 2016


Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 31st day of May, 2016, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.



Judith K. Restaino

