COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF THE PROCEEDING BETWEEN:

Christopher Luskey, "Respondent" or "Tenured Custodian"

- and -

Carteret Board of Education, "Petitioner" or "Board"

Agency Docket No: 169-7/17

AWARD AND OPINION

Hearings:	Sept. 25 and Sept. 26, 2017
Posthearing Briefs:	Oct. 16, 2017
Date of Award:	Oct. 24, 2017
Arbitrator:	Perry A. Zirkel

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Factual Findings[1]

On June 30, 2004, the Board appointed Christopher Luskey as custodian for the term of one year.[2] On or about June 2007, after the completion of two more one-year contracts,[3] Luskey obtained statutory tenure as a custodian.[4]

During the following seven years, as during the previous three, Luskey's work performance was below the midpoint of, but well within, the broad average range for this nonprofessional role,[5] with occasional "write ups" for deficient work[6] and less frequent documentation of praiseworthy performance.[7] This seven-year period also included two incidents of substance abuse while at work.

First, in June 2010, a group of parent volunteers at the Nathan Hale Middle School Fun Fair complained to Rosa Diaz, who was the building principal at the time, that Luskey appeared to be under the influence of drugs or alcohol and they did not want him near their children. More specifically, they reported that he was holding on to the school fence with obvious difficulty

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[1] As a matter of conventional legal style, this decision uses after the first, full reference to each individual solely his or her surname without titles or other prefixes and without any intent of discourteousness. Moreover, the exhibits are identified as "P" (for those admitted into evidence from the Respondent-Board), "R" (for those admitted into evidence from the Respondent-Tenured Custodian), and "Jt." for those submitted jointly. Finally, the footnotes use "*infra*" and "*supra*" for cross references to parts of this decision respectively below or above that footnote.

[2] R-11. Luskey had previously worked in this capacity for the Board on a substitute basis.

[3] R-12 and R-13.

[4] R-14; N.J. STAT. ANN. § 18A:17-3.

[5] See periodic evaluations R-26 (June 2015); R-8 (June 2013); R-23 (June 2011); R-22 (June 2010); R-7 (May 2009); R-10 (June 2008); R-21 (Mar. 2007); R-20 (Feb. 2007). Some of his evaluations had limited areas for "needs improvement." R-6 (May 2006); R-19 (Feb. 2006); R-18 (Nov. 2005); R-17 (Mar. 2005); R-16 (Jan. 2005); R-15 (Nov. 2004). Less frequent other evaluations noted corresponding areas that were "above average." R-25 (May 2014); R-24 (May 2012).

[6] P-1, at 32 (May 2013); P-1, at 26 (Mar, 2013); P-1, at 24 (Mar. 2009); P-1, at 38 (Feb. 2009); P-1, at 30 (May 2008); P-1, at 29 (Oct. 2006); P-1, at 23 (May 2006); P-1, at 22 (Apr. 2006); P-1, at 28 (Feb. 2006); P-1, at 33–34 (Jan. 2006). Most of these write-ups were from his the supervisor of buildings and grounds, although the most recent one was from the principal of his then-assigned middle school, who shared supervisory authority for the work in her building.

[7] P-30 (June and Sept. 2005).

walking or standing on his own and with slurred speech.[8] The principal met with him, instructed him to go to the nurse's office, and called the superintendent, Kevin Ahearn. The substance abuse coordinator left with Luskey. A few days later upon returning to the school, he informed Diaz that he had tested positive but that it was for medications prescribed by his physician. Immediately thereafter, the central administration transferred Luskey to another school.

Second, on December 9, 2014, a crossing guard at Columbus Elementary School reported to Christian Zimmer, who was then the principal at Columbus, that Luskey was acting in an erratic manner during his duties at the school.[9] The principal met with him and Drew Packard, the long-time supervisor of buildings and grounds. Observing Luskey to be flushed, sweaty, and with slurred speech, Zimmer drove him to the local MediCenter for screening. Upon being informed that Luskey had failed the drug test,[10] Zimmer drove him home and had another custodian drive his car there. Zimmer reported the matter to the superintendent's office. Soon thereafter, Luskey was granted FMLA leave.[11]

During the school year 2015–16, Luskey's performance became more problematic. On October 28, 2015, the next principal of Columbus School issued to him a written reprimand for making sarcastic comments in the presence of students and staff and for deficient cleaning of the main office's bathroom.[12] On the afternoon of November 10, 2015, Packard sent him a "second warning" about continued problems with bathroom cleaning[13]; however, Luskey left

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[8] P-1, at 10.

[9] The crossing guard reportedly commented that Luskey was leaning on a fence looking totally "out of it." P-1, at 13.

[10] P-2 (Medtox Laboratories report that Luskey tested positive for methadone and benzodiazepines).

[11] According to Luskey, at the superintendent's initiative, he first participated in outpatient drug rehabilitation and, after insufficient attendance, went to approximately three months of out-of-state residential treatment starting in early March 2015.

[12] P-1, at 35.

[13] P-1, at 27.

approximately an hour after starting his shift that day, upon injuring his shoulder lifting tables as part of his lunchroom duties. As a result of his injury, he was out for most of the ensuing six months on Worker's Compensation leave until May 2, 2016.[14] On May 18, Packard issued an official warning to him for smoking on school grounds[15] and a separate write-up for a clear violation of the sign-in policy.[16] Underlying some of these performance issues was further evidence of suspected substance abuse.[17]

These problems came to a head during summer 2016. The day before the culminating incident, on July 14 the Columbus principal reported to central administration that when his secretary went to the school social worker's office to retrieve a file, she was startled upon turning on the light to find Luskey sitting with his head down on the desk in the dark without an explanation; he was supposed to be working on another floor at the time.[18]

Then, on Friday morning, July 15, students and staff at his assigned elementary school, which housed a summer program for special education pupils who qualified for extended school year (ESY) programming, saw Luskey kneeling face down on the pavement outside the entrance

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[14] His attendance record for that year showed that the days he worked were far less than those that he was out for not only this reason but also vacation, sick, and personal days as well as family or funeral leave. R-1.

[15] P-1, at 39.

[16] P-1, at 31. The Columbus School principal reported that Luskey's failure to sign in properly had been on ongoing problem that he had reported to Packard. P-1, at 16.

[17] First were the records that Luskey released to the Board: R-27 (June 19, 2016 report from JFK Emergency Department in the wake of head laceration in an auto accident, noting that Luskey "is recovering from drug abuse" although separately reporting that he "denies drug abuse"); R-28 (May 19, 2016 report from RWJUH Rahway Emergency Department in the wake of head laceration in bat accident with brother, noting "past street drug/inhalant/medication abuse"). Second, although apparently prescribed by his physician (R-32), the 3-4 drugs that Luskey reportedly took regularly to alleviate drug-craving, stress, and sleep problems appeared to be for high amounts (P-4, including 170 prescription tablets purchased in the 32 days before July 15, 2016 and refilled during the following month). Finally, the principal at his then-assigned school (Columbus Elementary) reported to Packard and the superintendent more than once during that school year his suspicion that Luskey at times appeared, via slurred speech and staggering walking while at work, to be under the influence of drugs or alcohol.

[18] Additionally, the Columbus School principal credibly testified that other staff members had complained about Luskey's increasingly erratic behavior.

of the school. He was rubbing his face on the graveled surface apparently trying, unsuccessfully, to get back up. One of the teachers, who helping to escort approximately 20 of the students back from a field trip to a nearby creativity center, ran over to him. He told her, in a "confused" state that he had borderline sugar and was resting his head on the ground. She helped Luskey into the building and called both the police and the principal. Upon their arrival, the two police officers reported finding him sitting on a chair inside the school hallway, "dazed but … alert and aware of his surroundings" and declining medical attention.[19] The principal, who arrived soon after the police officers, heard only his jumbled and slightly slurred references to hitting his head, low blood sugar, something about his leg, and not wanting medical attention. He observed that Luskey appeared disoriented when he hurried upstairs to continue work. Upon arriving at the next floor, he proceeded down the hall, visibly disoriented, and walked directly into one of the students, aged 5 or 6.[20] An hour or so later, Luskey came to the principal's office and received permission to go home, complaining that his leg was bothering him. The principal stopped at the central administration office about 3 pm and, not finding superintendent Ahearn, reported the incident to the business manager. That evening he sent a phone-text notification to Packard, who was on vacation at the Jersey shore.

On Monday, July 18, Packard met with superintendent Ahearn, and they concluded that they had to have Luskey drug tested. However, they did not succeed in contacting him, likely because he was on vacation.

On Tuesday, July 19, Packard reached Luskey, who was still on vacation, on his cellphone at approximately 9:30 am, and summoned him to his office. Upon Luskey's prompt

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[19] R-2.

[20] The paraprofessional who was standing near the student testified credibly that his eyes were glazed and bloodshot; he said "Ooops, I didn't see her"; and, based on their respective positions in the hallway, he clearly should have seen the student. *See also* P-1, at 18–19.

arrival, Packard asked him to take an immediate drug test. Luskey replied that he was still on vacation and would do so instead the next day upon his return to work. Packard and Ahearn acquiesced, and Luskey agreed to meet Packard at the Medi-Center at 9 am on July 20 for this purpose.[21]

However, on the morning of July 20, Luskey went to Columbus School at the start of his shift at 7 am and remained there rather than showing up at 9 am at the Medi-Center. Packard, who was at the agreed-upon location at 9 am, waited there for approximately 45 minutes, and then went to superintendent Ahearn's office. Ahearn instructed him to go to Columbus School, get Luskey's keys, and tell him that he was suspended. He did so, with the principal and assistant principal in attendance. Given the opportunity to tell his side of the story, Luskey asserted that he had thought the administrators would make arrangements to transport him to the Medi-Center from Columbus School, because he was unable to do so himself.[22] Ahearn responded that this was the first time Luskey had raised this issue. Superintendent Ahearn sent Luskey a letter later that day confirming the suspension.[23]

On Friday, July 22, Luskey took the drug test at the Medi-Center and tested positive for benzodiazepines. Approximately a week later, in response to the administration's request for verification of a prescription for this substance, he submitted a July 29 prescription form from his

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[21] Packard's certification, or affidavit, specifically stated: "Luskey agreed to be at the Medi-center at 9:00 am. Superintendent Ahearn asked again, and Luskey agreed again. Luskey never asked to be taken to the drug-test, or mentioned that his license was suspended." Luskey's testimony did not provide a persuasive rebuttal.

[22] Although he did not share this information with Packard or the superintendent on or before the July 19 meeting, Luskey testified at the arbitration hearing that his brother had totaled his car and, for a separate reason, the state had revoked his license.

[23] P-1, at 31. This notification was for suspension "indefinitely without pay" and subject to a school board hearing. On September 28, after further communications between the parties, the suspension was changed to "with pay."

physician that stated that he "is prescribed Suboxin, Klonopin, and Trazodone."[24]

On June 26, 2017,[25] the Board served Luskey with notice of tenure charges. Charge #1 was for unbecoming conduct, listing (a) various write-ups during the period from 2006 to 2013, (b) the aforementioned[26] incidents in October-November 2015, and the (c) culminating acts and omissions from July 15 to July 20, 2016. Charge #2 was for insubordination, listing purportedly willful (a) failure to follow attendance policies[27] and (b) failure to follow supervisory directives.[28]

On July 19, 2017, the Board voted to suspend Luskey and determined that the tenure charges were, if true, sufficient to warrant termination.[29]

On July 28, the Board, as Petitioner, submitted the tenure charges against him to the Commissioner of Education.

On August 17, the Commissioner notified the parties of the requisite sufficiency of the charges[30] and appointed the undersigned arbitrator to hear and decide the matter.

On September 6, in response to a dismissal motion from Respondent-Luskey based on jurisdiction and after having received briefs from both parties, the arbitrator issued an interim, prehearing decision denying the motion. For the sake of a complete record, a copy of that decision is attached to this Award as an appendix.

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[24] P-32. According to publicly available sources, Klonopin is a brand name for benzodiazepines.

[25] During the interim, Diaz became the superintendent in the wake of Ahearn's resignation.

[26] *See supra* text accompanying notes 12–13.

[27] This subcategory listed an incident on 1/31/06 not in the referenced supporting material. An incident on 2/26/09 regarding call-in procedures, and the aforementioned 5/18/16 incident regarding sign-in procedures.

[28] This subcategory listed a 6/5/08 directive to all four custodians, a 7/15/16 sign-out incident not in the referenced supporting material, and the 7/19/16–7/20/16 drug test "refusal[s]."

[29] P-1, at 9. For the applicable statutory (and related regulatory) requirements, see N.J.S.A. § 18A:6-11 (in the "Applicable Statutes" section of this decision).

[30] *See infra* N.J.S.A. § 18A:6-16 (in the "Applicable Statutes" section of this decision).

Applicable Statutes[31]

N.J.S.A. § 18A:17-3:

> Every [tenured] public school janitor of a school district . . . shall not be dismissed . . . , except for neglect, misbehavior or other offense and only in the manner prescribed by . . . this title.

N.J.S.A. § 18A:6-10:

> No person shall be dismissed or reduced in compensation, . . . if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing . . . by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges . . . 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 subarticle provided.

N.J.S.A. § 18A:6-11:

> Any charge made against any employee of a board of education under tenure . . . shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. . . . [T]he board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.[32] The board of education shall forthwith notify the employee . . . . In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner . . . .

N.J.S.A. § 18A:6-16:

> If [the Commissioner] shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 18A:6-17.1.

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[31] The collective bargaining agreement (Jt. 1) does not effectively add to or narrow the applicable grounds in its broad "just cause" clause.

[32] The corollary regulation requires, inter alia, that (1) the employee have the opportunity to provide the board with a statement of his position and evidence within 15 days of receiving the tenure charges and (2) the board take this probable-cause vote within 45 days of receipt of this statement or, if not received by then, the expiration of the 15-day period. N.J. ADMIN. CODE § 6A:3-5.1(b)-(c).

N.J.S.A. § 18A-6-17.1:

(b)(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

(b)(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses. Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

(c) The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

(d) Notwithstanding the provisions of . . . any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

Discussion

The two tenure charges are addressed here in reverse order based on their relevant significance. More specifically, because it is of lesser significance, this Discussion first addresses tenure charge #2.

Insubordination

As specified above,[33] charge #2 is for insubordination. New Jersey case law has established that insubordination requires a willful refusal or disregard of supervisory authority.[34] For the various specified incidents for the relatively remote period of the Respondent's initial employment, the requisite willfulness is clearly absent. More specifically, although far from stellar, the aforementioned[35] findings for his performance for his first ten years did not come close to the opposite pole of willful refusal or disregard of supervisory instructions. As his supervisor credibly testified,[36] although some of the cited write-ups were slightly longer than for other custodians, his walk-throughs typically identified items for improvement, and if his resulting periodic evaluations had been largely unsatisfactory ratings, he would have lost half his custodial staff, presumably via termination or resignation. Moreover, Packard's certification observed: "If you instruct Luskey to do something, he will get it done but not necessarily right away."[37]

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[33] *See supra* notes 27–28 and accompanying text.

[34] In re Tenure Hearing of Zisnewski, 2012 WL 1231874 (N.J. Super. Ct. App. Div. Apr. 13, 2012) ("'Insubordination' has been found in an employee's 'willful refusal of submission to the authority of [his or] her superiors' [citing N.J. precedent] [and] a 'willful disregard of an employer's instructions ...' or an 'act of disobedience to proper authority' [citing *Black's Law Dictionary*]").

[35] *See supra* text accompanying notes 6–7.

[36] I found Packard's testimony to be quite credible with the limited exception of notable evasiveness with regard to the Respondent's familial relationship to the former school board president.

[37] P-1, at 12. However, this source provided to clarifying caveats: (1) the same item in the certification made clear that he had provided warnings to Luskey that to improve his choices and actions so as to avoid his personal life affecting his work performance; and (2) an additional item also clarified that he orally informed Luskey of any first-time performance problems, only including them in the write-ups upon repetition or continuation of the problem. *Id.*

Although the incidents of within the school year ending in June 2016 were weightier in regard to both charges,[38] they did not suffice for the requisite preponderant proof of insubordination.[39] However, the most recent cluster of incidents, during the July Columbus School extended school year program for students with disabilities, constitute a close call with regard to charge #2. Most specifically, the Respondent's failure to appear at the designated site and time for the July 20 drug test arguably constituted, in effect, a refusal, just as the superintendent's acquiescence the previous day constitute, in effect, an agreement. Moreover, it alternatively fit the definitional criterion of willful disregard, especially because (1) he apparently had the ability to arrange the requisite transportation, as he had to get to school that day and, according to his testimony,[40] from school during the morning of the triggering event; (2) if, for some reason, he was unable to make such arrangements despite the previous day's agreement, he should have contacted Packard or the superintendent before 9 am to make alternative arrangement; and (3) even if one were to accept his not sufficiently credible claim that he misunderstood the agreed-upon site,[41] it was reckless for him not to contact either of these administrators, or at least the Columbus School principal, very soon after 9 am to resolve

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[38] *See supra* text accompanying notes 12–16.

[39] In contrast, the findings for the broader intermediate period have no evidentiary bearing except, as explained below, as additional support for reasonable suspicion of possible substance abuse. *See supra* notes 8–10 and accompanying text.

[40] Specifically, he testified that he arranged for a summer helper to drive him on the morning of July 15 to the bank before his pavement incident. Regardless of the credibility of this assertion, he obviously had available ways that he arranged for to get to and from school for his work-related duties.

[41] In general, his testimony was not credible, particularly his continued pattern of not accepting responsibility for his actions, including repeatedly referring to purported misunderstandings and diverting attention to others. For example, he claimed that the Packard or other administrators implicitly agreed to arrange transportation; however, the proof was preponderant that they did not know or have reason to know of his driver license revocation and lack of other alternatives to get to the Medi-Center on his own. His reliance on the 2014 incident with principal Zimmer was similarly not reasonably credible, because Zimmer drove him based on his immediately impaired condition, which is clearly distinguishable from the July 19–20, 2016 situation.

the matter.[42]

However, the arbitrator need not definitively decide this close question, because the determination of the other charge resolves the larger issue of whether the board had the requisite basis for its decision. More specifically, New Jersey's highest court has made clear that the charge of unbecoming conduct, if sustained, suffices alone regardless of the disposition of any other charges.[43]

Unbecoming Conduct

New Jersey case law also defines "unbecoming conduct," establishing broad boundaries in terms of relevant alternatives of district efficiency and public confidence.[44] Moreover, unlike insubordination, a finding of unbecoming conduct "need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'"[45]

The evidence is preponderant that the Respondent's conduct in July 2016 adversely affected the efficiency of the school district and/or had a tendency of destroying public respect and confidence in the district's employees and operations. The primary foundation for this conclusion consists of two connecting support beams. The first one was his blatantly impaired position on the pavement in full view of students, staff, and nearby members of the public and soon thereafter, evidencing such impairment, walking into one of the young special education

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[42] Indeed, not arranging to take the ordered drug test until two days later further reflected poorly not only n the complete accuracy of the results but also his willful choices in response to the obviously high-stakes directive.

[43] E.g., Bound Brook Bd. of Educ. v. Ciripompa, 153 A.3d 931, 938 (N.J. 2017) ("the failure of a school board to prove a different offense does not preclude a finding of unbecoming conduct").

[44] E.g., *id.* at 937 (defined as "conduct 'which adversely affects the morale or efficiency of the [district] or has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services' [citations omitted]").

[45] *Id.* [citations omitted].

students in the presence of one or more staff members. The second, connecting beam was his aforementioned[46] failure to show up for the drug test after being allowed to postpone it on the previous day.

Related Considerations

The analysis for the foregoing two tenure charges requires additional conclusions for the final award. These related considerations are several and sequential.

First, the determination with regard to charge #2 only intersects with one aspect of the applicable board substance abuse policy, which is the requirement to submit to a drug test upon reasonable suspicion that the employee is under the influence of a substance during work hours, with the concomitant provision that refusal will equate to a positive test.[47] Here, the conclusion is that the Petitioner, based on not only the latest incident[48] but also the previous ones,[49] had the requisite reasonable suspicion of such impairment to warrant a drug test. At that point, it was not clear whether the latest impairment-related behavior of the Respondent was attributable to the proper use of prescribed medication (which is not within the definition of "substance"[50]) or the improper use of such medication or the use of un-prescribed controlled substances (which each

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[46] *See supra* notes 21–22 and accompanying text.

[47] The specific wording is as follows:

> A support staff member shall be required to submit to an immediate medical examination to include a **substance** test if the support staff member's supervisor has reasonable suspicion to belief a support staff member is under the influence of a **substance** during work hours. Refusal of a support staff member to consent to the medical examination and **substance** test will be determined to be a positive result.

R-3 (emphasis in original).

[48] *See supra* notes 19–20 and accompanying paragraph.

[49] *See supra* text accompanying notes 8–10. For additional indications, which are surplus for this purpose, *see supra* note 17 and text accompanying note 18.

[50] The specific wording is as follows:

> For the purposes of this Policy, "**substance**" … means alcoholic beverages, any controlled dangerous **substances**, including … over-the-counter and prescription medications that are improperly used to cause intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system.

R-3 (emphasis in original).

are within this definition).[51] Moreover, the evidence in this case does not resolve that question, which is not the crux of this case. Even if he did not violate the substance abuse policy in terms of the specific refusal or specific results, the culminating combination of his publicly impaired condition and his inexcusable failure to show up for the drug test adversely affected the efficiency of the school district and/or had a tendency of destroying public respect and confidence in the its operations.

Second and similarly, the Board's discipline policy has only carefully circumscribed applicability in this case. More specifically, rather than a strict step-by-step progressive discipline system, the policy not only defines discipline broadly to include the various "write-ups" that the Respondent received,[52] but also provides that "[t]he Superintendent shall deal with disciplinary matters on a case-by-case-basis."[53] Moreover, the policy's qualified requirement for "progressive penalties" is limited to "repeated violations."[54] Here, the two critical violations were sufficiently significant for the superintendent's case-by-case consideration, but the second was not a repetition of the first. More generally, the applicable case law clarifies that "progressive discipline is not 'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.'"[55]

Third, the Respondent's posthearing brief ended with a procedural-noncompliance argument that was not raised during the hearing and that was apparently appropriate for the

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[51] Any confidentiality argument about the Respondent's participation in treatment for drug abuse appears to fail for lack of sufficient evidence that, per the policy (*id.*), he "voluntarily sought and participated" in such treatment. *See supra* note 11. In any event, none of the conclusions in the Discussion section *infra* rely on this information.

[52] The specific definition is as follows: "Discipline will include, as appropriate, verbal and written warnings." R-5.

[53] *Id.*

[54] *Id.*

[55] In re Stallworth, 26 A.3d 1059, 1067–68 (N.J. 2011) [citations omitted]..

response at the Commissioner's sufficiency step. More specifically, the Respondent argued that "Petitioner failed to establish that the Board's vote on July 19, 2017 was rendered within the 45-day period [required] by N.J.A.C. 6A:3-5.1(b)(4)." However, the applicable regulation starts the 45-day period for the board vote with the receipt of the Respondent's statement after serving him with notice of the tenure charges.[56] Although the record in this case does not reveal the date of the receipt, it is clear that the board served the Respondent with notice on June 26, 2017.[57] Thus, to whatever extent that the Respondent's final argument may have survived not only waiver but also the requisite prejudicial effect for procedural violations,[58] the board's July 19, 2017 clearly complied with the required 45-day period.

Fourth, the factual basis for the arbitrator's conclusion with regard to unbecoming conduct relies on neither hearsay nor precluded evidence. The Respondent's posthearing brief took issue with the June 2010 incident not being included in the various incidents specified in the tenure charges. However, the use of this incident is not primary here, being only a limited part of the reasonable suspicion determination, and, in any event, the Respondent did not allege, much less prove, lack of due advance notice under the statute specific to this arbitration.[59] Similarly, the other errors in the tenure charges that the posthearing brief emphatically identified, such as attributing to Packard letters that were from principals Peters and Bollinger, were red herrings; such imperfections were far from prejudicial to the Respondent. Overall, the tenure charges document was sufficient in the context of the other safeguards for notice, although certainly not optimal.

Finally, it is not clearly settled whether the arbitrator has authority to address the

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[56] *See supra* note 32.
[57] *See supra* text accompanying note 25.
[58] E.g., Carteret Bd. of Educ. v. Radwan, 790 A.2d 248, 250 (N.J. Super. Ct. App. Div. 2002).
[59] *See supra* "Applicable Statutes": N.J.S.A. § 18A-6-17.1

appropriateness of the penalty, or discipline, after sustaining the board's basis for its termination decision. Here, the parties failed to agree on a submission statement of the issues in this case, although their posthearing briefs both addressed this penalty issue. Other arbitration awards in this statutory context have reduced terminations to lesser levels of discipline in some cases that sustained charges of unbecoming conduct[60] or other applicable grounds.[61] However, neither party has identified, and I have not found, any published case law in New Jersey where a court specifically decided whether such arbitration awards are permissible under the applicable legislation.[62] In other jurisdictions, some courts have held that once an arbitrator sustains the statutory grounds for the board's termination decision, public policy precluded his or her authority to reduce the discipline.[63] Moreover, the underlying statutes in this case appear to significantly restrict the relevant discipline, not extending, for example, to suspensions.[64] In any event, the arbitrator need not definitively determine this issue because the flagrancy of the Respondent's recent conduct[65] and the lack of a mitigating long stellar record warrant his

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[60] E.g., Tenure Hearing of State Operated School District of the City of Newark, Essex County and Elizabeth Corbacho-Musngi, Agency Docket No. 314-10/14 (May 12, 2015).

[61] E.g., In the Matter of: Gilda Nicole Harris, State Operated School District of the City of Jersey, Agency Docket Nos. 324/11/14 and 379/12/14 (October 2, 2015); In re Tenure Hearing of Jill Buglovsky, Randolph Township Board of Education, Agency Docket No. 265-9/12 (December 21, 2012).

[62] Both parties cited *In re Fulcomer*, 225 A.2d 30 (N.J. Super. Ct. App. Div. 1967). However, the statutory basis for that decision was an earlier tenure statute that provided the Commissioner with the exclusive authority to render a decision, which is not necessarily the same as the present statute's delegation to the arbitrator to render a decision. Moreover, the fatal error in the 1967 case was the commissioner's remand to the local school board to determine the penalty, which was not at issue in the instant case.

[63] E.g., Manheim Cent. Educ. Ass'n v. Manheim Cent. Sch. Dist., 572 A.2d 31 (Pa. Commw. Ct. 1990); *cf.* Sch. Comm. of Chicopee v. Chicopee Educ. Ass'n, 953 N.E.2d 236, 242 (Mass. 2011) ("an arbitrator may not 'ignore the limits imposed by statute'").

[64] *See supra* "Applicable Statutes": N.J.S.A. § 18A:17-3 (dismissal); N.J.S.A. § 18A:6-10; N.J.S.A. § 18A:6-11; N.J.S.A. § 18A:6-16 (dismissal or reduction in salary).

[65] For the overall extent of severity, the accumulation of lesser performance problems during the 2015–16 year (*supra* text accompanying 12–16 and *supra* note 18 and accompanying text) played a secondary role to the major culminating conduct from July 15 to July 20 (*supra* notes 19–22 and accompanying text).

termination.[66]

Award

In sum, after careful attention to the parties' arguments, the applicable law, and the case evidence, the arbitrator concludes that the Board's tenure charge for conduct unbecoming is sustained. The termination of Christopher Luskey is upheld.

10/24/17

Perry A. Zirkel, Arbitrator — Date

[66] Moreover, although not at all a primary equitable factor, the Respondent's suspension during the long intervening period in this case was on a paid basis.

Appendix: Interim Decision re Jurisdiction

COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF THE PROCEEDING BETWEEN:

Christopher Luskey, "Respondent" or "Tenured Custodian"

- and -

Carteret Board of Education, "Petitioner" or "District"

Agency Docket No: 169-7/17

Interim, Prehearing Decision

Date of Decision: Sept. 6, 2017

Arbitrator: Perry A. Zirkel

APPEARANCES:

For the Carteret Board of Education	For Tenured Custodian Christopher Luskey
Arlene Quinones Perez, Esq. DeCotiis, Fitzpatrick, Cole & Giblin 500 Frank W. Burr Blvd. Teaneck, NJ 07666	David J. DeFillippo, Esq. Detzky, Hunter & DeFillippo, LLC 45 Court Street Freehold, NJ 07728

Facts[1]

On July 6, 2004, the School Board approved the initial employment contract for Christopher Luskey[2] as a custodian for the fixed term of one year.[3] On May 22, 2007, after he continued to work on a fixed-term contracts for the next two years,[4] the Board provided him with a contract "from July 1, 2007 … with tenure."[5] Both the 2002–05 and the 2005–08 collective bargaining agreements (CBAs) contained the following provision:

> Tenure rights shall be acquired for all employees after three (3) consecutive years of services and the commencement of the fourth year, or, the equivalent of more than three (3) years of service within a period of four (4) consecutive years.[6]

The current CBA, which covers the period July 1, 2016 to June 30, 2020, contains the identical provision along with a just cause clause and a five-step grievance procedure that culminates in submission to the New Jersey Public Employees Relations Commission (PERC) for binding arbitration.[7]

On July 19, 2017, the Board certified tenured charges against Luskey for conduct unbecoming and insubordination.[8]

On or about July 28, the Board filed the charges with the Commissioner of Education, thus becoming the Petitioner in this case. On August 3, the Respondent filed his answer to the

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[1] Per dismissal motions generally, these facts are allegations in the light most favorable to the nonmoving party. Most, perhaps, all of them appear to be effectively stipulated or at least not disputed.

[2] As a matter of conventional legal style, this decision uses after the first, full reference to each individual solely his or her surname without titles or other prefixes and without any intent of discourteousness. Moreover, the exhibits are identified as "Petitioner" (for those from the Board) and "Respondent" (for those from the tenured custodian)

[3] Petitioner exhibit B. The board had previously appointed him as a substitute on an as-needed basis on May 28, 2003, and his administrative appointment for this first full-time year was June 30, 2004. District Exhibits A and C.

[4] Petitioner exhibits D and E.

[5] Petitioner exhibit F.

[6] Respondent exhibit 8, at 18; Respondent exhibit 9, at .

[7] Petitioner exhibit H/Respondent exhibit 2, at 16; *id.* at 6-7 and 10.

[8] See, e.g., Petitioner exhibit G.

charges, including the assertion that the Department lacked jurisdiction for the dispute.

After review, the Commissioner deemed the charges for sufficient for arbitration and appointed me as the arbitrator for this case.

As the result of a prehearing conference call on August 16, the parties submitted letter briefs with regard to the dismissal motion by the agreed-upon deadline of September 1, with the understanding that I would promptly issue a written decision well in advance of the hearing scheduled for September 25–27.

On August 18, the Carteret Education Association filed a grievance on behalf of the Respondent.[9]

Discussion

In support of its dismissal motion, Respondent argued that he had tenure as a result of the CBA and, thus, that the board's action was subject to the CBA's grievance arbitration and just cause clauses[10] rather than the Commissioner's arbitral authority under New Jersey statutes.[11]

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[9] Respondent exhibit 3. This filing is the second step in the aforementioned five-step procedure.

[10] *See supra* note 7 and accompanying text.

[11] N.J. STAT. ANN. § 18A:6-9:

> The Commissioner shall have jurisdiction to hear and determine … all controversies and disputes under the school laws …. Notwithstanding the provisions of this section to the contrary, an arbitrator shall hear and make a final determination on a controversy and dispute arising under [N.J. STAT. ANN. 18A:6:10].

N.J. STAT. ANN. 18A:6:10:

> No person shall be dismissed … if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state … except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, 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 subarticle provided….

Put simply, this subject matter jurisdictional argument is that the Respondent's tenure is contractual, not statutory, and is subject to the contractual, not the statutory, arbitration mechanism.

The Petitioner counter-argued that Luskey's tenure was instead statutory as a result of the following legislation, which dates back to well before the Respondent's employment:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed . . . . except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by … this title.[12]

Resolution of this issue warrants a brief overview of tenure. More specifically, tenure in this context refers to (a) an indefinite term of employment that, rather than having a fixed ending date, continues until a supervening event, such as resignation (including retirement), reduction in force, or termination, and (b) in the event of termination, requires specified due process, often including certain reasons (e.g., insubordination) and procedures (e.g., impartial hearing). Usually but not always,[13] the status of tenure requires completion of a probationary period. For example, the probationary period for New Jersey public school teachers was three years but, as a result of the 2012 TEACHNJ legislation, changed to four consecutive years.[14]

As the aforementioned[15] provision of the parties' CBA illustrates for both janitors and teachers, statutory tenure and contractual tenure may overlap. For janitors, the applicable statute, § 18A:17-3, provides school boards with the otherwise unlimited discretion to determine the

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[12] N.J. STAT. ANN. § 18A:17-3. This act went into effect on Jan. 11, 1967. *Id.*
[13] For example, federal judges receive tenure upon appointment without any probationary period.
[14] N.J. STAT. ANN. § 18A:28-5(a)-(b).
[15] *See supra* note 6 and accompanying text.

length of the probationary period via the use of fixed term contracts.[16] However, this CBA limits the board's prerogative to the use of fixed term contracts for a total of three years, thus serving as the maximum probationary period. As a result, a custodian whom the board accorded tenure either immediately or, more likely, after fixed term contract(s) of either one year or totaling two years, that tenure would be purely statutory during the initial three-year period,[17] whereas custodians whom the district continued to employ after three years would have tenure as a result of the combination, or intersection, of the CBA and the statute, thus being in a hybrid category.[18]

Here, as the party moving for dismissal, the Respondent is effectively arguing that the parties' CBA, per their exercise of the public employment relations act (PERA), preempts the commissioner's broad authority for arbitration of tenure disputes under the school laws of New Jersey. In addressing the distinguishable and largely obverse issue of whether § 18:7-3 preempts a CBA provision that provides for their tenure after three years of employment, the New Jersey Supreme Court clearly rejected the respondent's all-or-nothing interpretation of § 18A:17-3[19] and at least indirectly supported the hybrid conclusion.[20] Specifically, the court reasoned:

> [E]ven though the statute provides mechanisms for immediate tenure and complete denial of tenure, these are not the only alternatives contemplated by the statute. By using the word *unless* to modify the

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[16] *See supra* note 12 and accompanying text. Absent an intersecting CBA provision, the discretion is so unlimited that a district may avoid tenure for a custodian by continuing his or her employment solely via consecutive fixed term contracts.

[17] Although so unlikely to be theoretical, the board could at the extreme of this purely statutory category grant tenure immediately. The Respondent's interpretation that §18A:17-3 only applies to janitors who are granted tenure immediately upon commencement of employment neither squares with the general application of tenure to school employees. Custodians do not fit with the exceptional circumstances of federal judges.

[18] As an accompanying illustration of the overlap as a result of this intersecting CBA provision for all employees, teachers hired after the 2012 TEACH NJ legislation whose employment continues after three years have contractual tenure for the fourth year, but they have hybrid, or combined, contractual and statutory tenure after successful completion of the fourth year. *See supra* text accompanying notes 6 and 14.

[19] *See supra* note 17.

[20] *See supra* note 18 and accompanying text.

> word *shall*, the legislature has signaled its intention to leave employing boards with some flexibility. Accordingly, boards may, without contravening the terms of the statute, permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians. [The CBA provision] that grants tenure after three years of employment, is but one example of a clause that falls between N.J.S.A. 18A:17-3's outer limits without derogating the statute's intent.[21]

Although not specifically addressing the instant issue, New Jersey's highest court subsequently provided additional indirect support for the overlap by recognizing the sweeping authority of the Commissioner's authority except where the dispute arises exclusively outside the school laws.[22] Similarly supporting this interpretation from the converse side, New Jersey's PERA authorizes binding arbitration via CBAs with the express exception that it "may not replace or be inconsistent with any alternate statutory appeal procedure."[23] The respondent's theory would, contrary to this overriding exception, replace the alternate statutory appeal procedure, which in this case is the Commissioner's legislatively specified broad authority.[24]

Limited to deciding the Respondent's dismissal motion, this interim or interlocutory arbitration decision does not extend to the issue of the choice between the two arbitration mechanisms in this overlapping area. That issue is not before me and is better addressed as a

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[21] Wright v. Bd. of Educ. of E. Orange, 491 A.2d 644, 647 (N.J. 1985). In affirming the appellate division's ruling that § 18A:17-3 does not foreclose the disputed CBA provision, the holding was limited to the negotiability of this provision, specifically that "[this] subject is a proper topic for collective negotiations." *Id.* at 649. Thus, other than its cited reasoning, the *Wright* decision did not address the jurisdictional issue of this dismissal. The other decision upon which the respondent relied was a scope, or negotiability, ruling, and it was at the administrative agency, not judicial, level. Elizabeth Bd. of Educ. v. Elizabeth Educ. Ass'n, 1996 NJ PERC LEXIS 229; 22 NJPER ¶ 27221 (1996). It was one of a long line of PERC decisions that refused to restrain grievance arbitration of nonrenewals and terminations of classified school personnel, including custodians in the hybrid category. Even if these agency determinations were binding here, they do not address the opposite situation, which is the respondent's attempt to restrain statutory arbitration based on the convergence or intersection of the CBA.

[22] See, e.g., Bd. of Educ. of E. Brunswick Twp. v. Twp. Council of E. Brunswick Twp., 223 A.2d 481, 485 (N.J. 1996).

[23] N.J. STAT. ANN. § 34:13A-5.3.

[24] *See supra* note 11.

policy matter by the legislature[25] or perhaps the two administrative agencies (i.e., the N.J. Department of Education and the N.J. PERC).[26] Moreover, in this case it is undisputed that my appointment preceded the level 2 grievance, which may or may not reach the fifth level of the CBA's multi-step process; thus the effect of this proceeding on contractual arbitration and vice versa are merely speculative at this point.

In conclusion, the Respondent's motion is denied. The CBA does not preempt or the undersigned arbitrator's subject matter jurisdiction of this dispute.

Perry A. Zirkel, Arbitrator

9/06/17
Date

[25] For example, in the Pennsylvania legislation for tenured professional staff members, the employee has the initial choice of CBA arbitration, if exercised within 10 days, with the statutory hearing mechanism otherwise being preemptive. 24 PA. STAT. § 11-1133.

[26] For example, using the *Collyer* doctrine as a partial analogy, one possible alternative is for PERC to adopt a deferral posture, effectively restraining CBA arbitration where the matter is undergoing a hearing under the statutory arbitration mechanism. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971) (abstaining from unfair labor practice proceedings for refusal to bargain where the issue is subject to arbitration).