In the Matter of the Tenure Hearing of

Dennis Q. Miguel
Board of Education of the Township of Mahwah
Bergen County, New Jersey

Agency Docket No.103-4/18

Opinion and Award

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE DISTRICT:

Marc H. Zitomer, *Schenck Price Smith & King, LLP*
Matthew J. Donohue, *Schenck Price Smith & King, LLP*

FOR THE RESPONDENT:

Kevin Sisco, *Ricci & Fava L.L.C.*

ISSUE

Whether the tenure charges against the respondent constitute acts of unbecoming conduct or other just cause warranting his dismissal.

BACKGROUND

The respondent, Dennis Miguel, was hired in 2006 as a teacher by the Mahwah, New Jersey Board of Education [Board Exhibit 2]. He became tenured in his position as an English language arts teacher at Mahwah High School in 2009. He was also assigned as an advisor for the Student Government Association (SGA) for the senior class.

- On March 16, 2018, he was suspended with pay from his teaching position.

- On April 5, 2018, District Superintendent Dr. C. Lauren Schoen filed twelve tenure charges, and a statement of supporting evidence [Board Exhibit 1]. The charges span April 2017 through March 2018.

- On April 25, 2018, the board certified the charges to the Commissioner of Education and suspended the respondent without pay for 120 days.

- The respondent submitted an answer, denying the charges and allegations, except for Charges Seven and Eight [Board Exhibit 34]. The matter was assigned to the undersigned arbitrator. Hearings were held on July 9, 10, 24, and August 2, 2018.[1] A transcript was taken.

- Samantha I. Price, Director of the Office of Controversies and Disputes, granted an extension of the award due date until December 3, 2018.

- The parties filed post-hearing briefs on September 25, 2018. The respondent's brief included a motion to dismiss the tenure charges. On October 19, 2018, the district filed a reply brief in opposition.

[1] At the hearing, the board asserted the respondent had not complied with N.J.S.A. 18A:6-17.1(b)(3) because his evidence disclosures to the board were late. The arbitrator overruled the board's objection [Tr. 411]. Because of the hearing schedule and the dates on which the witnesses, including the respondent, were set to testify, no harm to the board resulted from disclosures that were provided three days late. This determination ensured a fair hearing by allowing for a full presentation of testimony and evidence by both parties.

The following witnesses testified under oath or affirmation:

FOR THE DISTRICT:

Mrs. SB	Mother of JaB
JaB	Mahwah High School student, class of 2018
DL	Mahwah High School student, class of 2018
Maureen Lynch	Mahwah High School English supervisor
John Pascale	Mahwah High School principal
DD	Mahwah High School student, class of 2016
Dr. C. Lauren Schoen	Mahwah Board of Education Superintendent

FOR THE RESPONDENT:

PL	Mahwah High School student, class of 2018
JoB	Mahwah High School student, class of 2016
GK	Mahwah High School student, class of 2018
Dennis Q. Miguel	Mahwah High School teacher

Applicable Legal Standards

In New Jersey, a tenured teacher shall not be dismissed from his or her position, or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. In tenure cases in which a teacher is alleged to have committed unbecoming conduct, the board of education has the burden of establishing the allegations supporting the charges by a preponderance of the evidence. The choice of accepting or rejecting the testimony of a witness or credibility rests with the finder of facts.

Unbecoming conduct is broadly defined as "any conduct which adversely affects the morale or efficiency of the [government unit]...[or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services" [Karins v. Atlantic City, 152 N.J. 532, 554 (1998)]. The touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of one's office or position [Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957)]. 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" [Bound Brook Bd. of Education v Ciripompa, 228 N.J. 4, 19 (2017) quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)].

Respondent's Motion to Dismiss

On July 25, 2018, the board voted to withhold the respondent's salary increment. On August 8, 2018, the superintendent informed him that the board "withheld your employment and adjustment increments for the 2018-19 school year based upon your unbecoming conduct as set forth more fully in the Sworn Tenure Charges and Statement of Evidence that were filed against you on April 5, 2018" [Respondent's Brief, Exhibit B; Board's Opposition to Respondent's Motion to Dismiss Tenure Charges Based on Doctrine of Double Jeopardy, Exhibit A].

The respondent asserts the charges must be dismissed. The district has already disciplined him for the same conduct set forth in the tenure charges by withholding his pay increment on July 25, 2018. It is now precluded from imposing any additional discipline based on that conduct.[2]

The board contends it was permitted to contemporaneously withhold his salary increment after filing tenure charges to fill the gap of time until an arbitration decision resolving the tenure charges is issued.

Both parties cite, among others, the decision of Arbitrator Joseph Licata in I/M/O Tenure Charges filed by the School District of the Borough of New Milford, Bergen County, New Jersey Against Lawrence Henchey, Agency Docket No. 322-11/14 (Decision, Jan. 3, 2015) (Henchey). The arbitrator dismissed four charges based on the doctrine of double jeopardy where the board had addressed a teacher's shortcomings in 2012-13 by way of an increment withholding for 2013-14, not leading to the filing of tenure charges shortly thereafter [Henchey at 38]. However, with respect to a fifth charge, the arbitrator did not dismiss the charge. Specifically, he stated:

> I concur with the underscored portion of Arbitrator De Treaux's rationale in IMO River Dell Regional School District and Richard Graffanino, Agency Dkt. No. 223-9/13, distinguishing the doctrine based on the timing of events in the case of an increment withholding followed by the issuance of tenure charges:

[2] The respondent makes an additional double jeopardy argument with respect to Charge Seven.

> Although the District's tactic in withholding the salary increment and filing tenure charges is uncommon, I find that it does not constitute "double jeopardy." Double jeopardy, of course, applies only in criminal cases; but Respondent is arguing duplicative punishments, two separate disciplinary actions for the same offenses. The District's approach was not an attempt to duplicate punishment; but rather, it was an attempt to fill a gap caused by the timing of the tenure charges. In the interval before tenure charges were filed and again before an arbitration decision would issue, the District wanted to ensure that [the teacher's] salary was not increased. It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on [the teacher].
>
> Henchey at 39-40
> (quoting I/M/O Richard Graffanino,
> Agency Dkt. No 223-9/13 (DeTreux, 2013)

Arbitrator Licata added:

> Indeed, the failure to withhold an increment may be cited by a teacher as evidence that the ensuing tenure charges were not justified based on the implicit recognition that increments are not withheld in the case of satisfactory teaching performance in a given school year.
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> [Id. at 40 n. 12]

The reasoning set forth above regarding the fifth charge in Henchey is compelling. Here, the district filed tenure charges against the respondent on April 5, 2018. Shortly thereafter, on July 25, 2018, the district withheld the respondent's employment and adjustment increments for the 2018-19 school year based on his unbecoming conduct as set forth in the tenure charges. This action was not an attempt to duplicate punishment; it was an effort to ensure that the respondent's salary was not increased in the period between the earlier filing of the tenure charges and the issuance of the arbitrator's decision regarding those charges. As Arbitrator Licata noted above, if the district had failed to withhold the respondent's increment for the 2018-19 school year, that might have been cited as evidence that the existing tenure charges were not justified.[3]

Accordingly, the doctrine of double jeopardy does not apply. The respondent's motion to dismiss the charges is denied.

[3] Other cases relied on by the respondent are readily distinguishable inasmuch as they involved increment withholdings and/or discipline that occurred years before the filing of tenure charges. Thus, unlike here, they did not constitute contemporaneous discipline.

DISCUSSION AND ANALYSIS OF THE TENURE CHARGES

CHARGE ONE

> On April 7, 2017, Respondent texted a link to a sexually explicit blog that he created to his English Department Supervisor, Maureen Lynch. In the text message accompanying the link, Respondent tells Ms. Lynch, "Ok, so I feel like you won't narc on me, so I am presenting a gift to you. (Also a means to pass time.)." Ms. Lynch thanked him for sending it but, unbeknownst to her, the blog describes in graphic detail Respondent's first sexual encounter with another man in which he has anal sex. Respondent also describes the fact that after he moved his bowels the next day, there was blood all over the toilet paper and in the bowl. This commentary is significant because, as detailed in Charge 2, *infra*, Respondent also told a pupil in his charge that, after the first time that he had anal sex, his anus bled. This lends further credence to the pupil's statement.
>
> Respondent's highly inappropriate and unprofessional conduct, as set forth above, falls far below the behavior expected of a teaching staff member. This constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

Beginning in the 2016-17 school year, Ms. Lynch supervised about twenty teachers. She had "friendly, professional relationships with all of [her] teachers," including the respondent who taught digital media classes [Tr. 282, 221].

On April 7, 2017, Ms. Lynch and the respondent were texting while Ms. Lynch was waiting to board a plane to go on vacation [Tr. 222]. They had the following text message exchange:

Respondent:	Ok, so I feel like you won't narc on me, so I am presenting a gift to you. (Also a means to pass the time.) Link to sotherewasthisguy.com It's better to start at the very beginning, when I was attempting to be Sedaris.
Lynch:	Wow! Thank you! I'm impressed that you have your own blog.
Respondent:	It was a short lived dream
Lynch:	Good for you! I haven't gotten far yet b[ecause] my friend just called, but thank you...

[Board Exhibit 8]

Before this exchange, Ms. Lunch did not know that the respondent maintained a blog [Tr. 222].

Ms. Lynch credibly testified that when she clicked on the hyperlink to the blog, no warning screen appeared that indicated the blog was sexually graphic [Tr. 222]. She was "shocked" and "embarrassed" at its "explicit and graphic" nature, and felt that it was "not at all what I would expect to be sent by anyone" [Tr. 224]. It is undisputed that the blog contained explicit and graphic details of his sexual history. One of the blog entries explicitly described anal bleeding after his first sexual experience [Board Exhibit 8].

Ms. Lynch testified that she responded "thank you" to receiving the unsolicited blog because she did not know how to properly convey how uncomfortable she was to the respondent [Tr. 226]. She did not discuss the blog further with the teacher after April 7, 2017 [Tr. 226].

After Ms. Lynch returned from vacation, she discussed the blog with Assistant Principal Dennis Fare [Tr. 227]. She did not show him the blog, but said that the content was "really sexual[,]" "really graphic[,]" "very explicit[,]" and that she felt "uncomfortable" [Tr. 227-28]. Mr. Fare advised her to tell the respondent that she felt uncomfortable and that the blog was inappropriate [Tr. 228]. She did not speak with the teacher because she "was new in [her] position" and "didn't know how to address this" [Tr. 228]. She acknowledged that, "[i]n retrospect," as his supervisor she "should have talked to him face-to-face after to let him know this was inappropriate" [Tr. 263].

The blog did not come up again until March 2018 when Ms. Lynch took part in an investigation by the Division of Child Protection and Permanency regarding the respondent's alleged behavior [Tr. 229]. She testified that, during the investigation, one of the students mentioned that the teacher stated that his anus bled the first time he had sex. When Ms. Lynch heard the student's accusation, she made a connection "[a]bout the first time [the respondent] had sex that his anus bled. In the blog, it's very graphic. It's very descriptive about that" [Tr. 230].

The district asserts that these facts establish that the respondent engaged in unbecoming conduct by sending a sexually offensive, explicit blog to his supervisor. The respondent does not deny that the contents of the blog included explicit descriptions of his sexual activity or that he shared the blog with his supervisor. He contends, however, that the blog always had a warning screen, and that he and Ms. Lynch had developed a friendship that transcended their work-place affiliation.

The record does not support this assertion that the blog had a warning screen. Both Ms. Lynch and Dr. Schoen credibly testified that no such warning screen existed prior to March 2018 [Tr. 224, 448]. The respondent admitted that Ms. Lynch was a truthful person,

and could not explain why his testimony on this point differed from that of Ms. Lynch [Tr. 724], and that if the blog got out into the general domain, his career would "more or less" be jeopardized [Tr. 728].

His contention that he sent the blog to Ms. Lynch as a friend, not a supervisor, is equally unavailing. He was fully aware of the fact that she was his supervisor. His text stating he hoped she wouldn't "narc" on him reflects an acknowledgment of her supervisory status over him. The district's policy plainly states that "[sexually offensive speech and conduct are wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed" [Mahwah Board of Education Policy #3362]. Even in the absence of a policy, sharing a graphic blog with a supervisor that was completely unsolicited constitutes inappropriate behavior.

Accordingly, the district has met its burden of establishing the allegations supporting Charge One by a preponderance of the evidence.

CHARGE TWO

> The factual allegations contained in the foregoing Charge are incorporated by reference as if fully set forth herein.
>
> On April 23, 2017, at the Mahwah Education Foundation's "Thunderbird 5K run", which occurred approximately two (2) weeks after Respondent sent his sexually graphic blog to Ms. Lynch, Respondent told pupil [JaB] that, "the first time he had anal sex his asshole bled" or words to that effect.
>
> Respondent's highly inappropriate and unprofessional conduct, as set forth above, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

In April 2017, the respondent and two students, JaB and PL, were setting up drones for a school event [Tr. 74-75]. JaB testified that while he was setting up the drones, PL, who "was close to Mr. Miguel," was joking with the respondent about the respondent's car being a "stereotypical gay car" [Tr. 76]. JaB testified that shortly after that comment, the respondent said to JaB and PL at "an arms-length distance" [Tr. 77], that "the first time he had sex his asshole bled" [Tr. 76]. JaB said the teacher explained to both minors that he thought he had AIDS after the first time he had sex [Tr. 78]. JaB said he did not notify his mother or school authorities after hearing these comments [Tr. 79].

In March 2018, JaB texted PL and asked him whether PL would "be willing to confirm the time he [the respondent] told us about his anus bleeding after sex" [Board Exhibit 3]. PL responded "[n]o" and "[h]e's "never said that to me" [Board Exhibit 3]. Later in the same exchange, the two students texted:

PL: Reporting him about his anus bleeding is attempting to fire him.
JaB: I mean he told us that. I just wanted to consider the evidence I had.
PL: I'm not saying you're lying, but saying that would be you going for his job.
JaB: I'm not lying I remember it distinctively.
[Board Exhibit 3]

PL testified at the hearing that he had no recollection about discussing the respondent's car at the school event [Tr. 547]. He also testified that he had no recollection as to whether or not the respondent made a statement about his anus bleeding [Tr. 549].

The teacher denied having a conversation about his car or discussing his personal sexual history with JaB and PL at the school event [Tr. 734].

Based on the demeanor of the witnesses and the text exchanges quoted above, the arbitrator finds that the respondent discussed his personal sexual history with the two students. JaB's testimony was specific, detailed and consistent with his firm statement in the text exchange. Although PL testified that he did not have a recollection of the alleged event, his text exchange with JaB was equivocal, and evinced more concern with the effect of the respondent's alleged statement on his job security than on whether the statement was made. JaB's testimony is also supported by the timing of the sexual statement about anal bleeding, shortly after the respondent sent his blog to his supervisor. The respondent's denial that he made the sexual remarks is not credible.

The district has met its burden of establishing the allegations supporting Charge Two by a preponderance of the evidence. The respondent discussed his personal sexual history with the two students at the school event.

Unsolicited sexual conversations, particularly with minors, qualify as unbecoming conduct warranting dismissal. [See, e.g., I/M/O the Certificates of Shellie Mackson, Agency Dkt. No. 1314-251, adopted with modification, State Board (November 1, 2017) ("inappropriate sexual comments to a student or discussion of the teacher's personal experiences or sexual activities can be considered conduct unbecoming. . . a pattern of inappropriate communications with a student can warrant revocation of a teaching certificate.")]

The respondent's comments to the students about his personal sexual history were clearly inappropriate and constitute unbecoming conduct.

CHARGE THREE

> The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.
>
> At the end of the 2015-16 school year, Respondent attended a graduation party for a graduating Mahwah High School Senior, [JoB]. Respondent was drinking alcohol with the Mahwah students at the party and was visibly intoxicated.
>
> Respondent's highly inappropriate and unprofessional conduct, as set forth above, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A.6-10, *et seq.* and N.J.S.A. 18A:28-5. Said conduct also violates Board Policy 3230 ("Outside Activities"), or at a minimum, the spirit and intent of this policy, which provides, among other things, that staff members should, "Avoid conduct or associations outside the class room which, if known, could have an adverse or harmful effect upon the pupils or school community." This policy is also incorporated by reference into the Mahwah High School Staff Manual which is distributed to staff at the beginning of each school year.
>
> [Board Exhibit 1]

Charge Three alleges that the respondent attended a graduation party at the end of the 2015-16 school year for a graduating senior, JoB, and that the respondent was drinking alcohol with the students at the party and was visibly intoxicated.[4]

JoB testified that the party was hosted by his family and was attended by about 70 people [Tr. 556]. The respondent was the only teacher invited to the party by JoB, and he invited him because "[h]e made the biggest impact for me in my high school career" [Tr. 559]. JoB testified that during the party the respondent was inside the house with JoB's mother and her friends, having a glass of wine in the kitchen the whole time [Tr. 560]. JoB also testified that at no point in time that evening did he see the respondent intoxicated [Tr. 560]. JoB further testified that he did not invite any underclassmen to the party, and that JaB, an underclassman, was not at the party [Tr. 561].

JaB testified that he was invited to and attended the JoB party [Tr. 82]. JaB testified that approximately 80 to 100 students were at the party, and the respondent was drinking

[4] The record contains testimony concerning other graduation parties as well. That testimony is irrelevant here, because the charge refers only to the party at JoB's house.

outside with students present [Tr. 82-83]. JaB testified that he did not interact with the respondent, but witnessed MB, one of JaB's acquaintances, approach the respondent and take a drink out of the respondent's cup [Tr. 84]. According to JaB, MB then said to the respondent "this is pretty much pure alcohol" [Tr. 84].[5] JaB testified that Mr. Miguel "looked like he was drunk[,]" his face and eyes "were red[,]" and he "was sort of slouched over" [Tr. 84]. JaB could not recall what time he left the party, but believed the respondent was still there when JaB left [Tr. 85].

DD testified that he also attended the party and saw the respondent drinking alcohol there [Tr. 421]. DD testified that no other adults other than the respondent, JoB's mother and her significant other attended the party [Tr. 422]. According to DD, the respondent was consuming alcohol with the other students outside [Tr. 422]. DD described the respondent's behavior as "maybe a little tipsy or a little drunk,...in a party mood, and just relaxing with the kids" [Tr. 422].

The respondent testified that he was invited to the party by JoB and that he had one beer in the kitchen offered by JoB's mother and then walked out [Tr. 687]. He further testified that at no point was he outside with the students drinking and that he was not intoxicated, having had only one beer [Tr. 687, 713-14]. On cross-examination, he testified that he "ha[d] two drinks" and "was having the drink in the presence of parents who gave me the drinks" [Tr. 717].

District Policy #3230 – Outside Activities, cited by the district, states as follows:

3230 OUTSIDE ACTIVITIES

The Board of Education recognizes that members of the staff must enjoy private lives and may associate with others outside of school for political, economic, religious or cultural reasons. The Board and its supervisory staff, however, have a responsibility to evaluate staff members in terms of their faithfulness to, and effectiveness in discharging school duties and responsibilities. Therefore, when non-school activities threaten a staff member's effectiveness within the school system, the Board reserves the right to evaluate the impact of such activities upon a teacher's responsibilities to his or her pupils and to the Board.

The following guidelines are suggested so that staff members may avoid situations in which their personal interests, activities and associations may conflict with the interest of the district.

1. Refrain from making public utterances about private associations if such remarks are likely to violate the community standards of propriety.

[5] MB did not testify at the hearing.

2. Avoid conduct and associations outside the classroom which, if known, could have an adverse or harmful effect upon the pupils or school community.

3. Do not give school time to outside activities when there is no valid reason to be excused from professional duties.

4. Do not use school property or school time to solicit customers for private enterprises without written administrative permission. The Board does not ordinarily endorse, support nor assume liability for any staff member from this school district who conducts outside activities in which pupils and employees of this district may participate.

5. Staff members may not tutor any pupil in their classes after hours at the pupil's expense.

[Board Exhibit 28]

This policy permits teachers to associate with others outside of school for political, economic, religious or cultural reasons, within certain guidelines. Attending a graduation party with students does not fall within the permissible activities as defined by the policy. The respondent should have asked the principal for permission to attend the graduation party in question. Moreover, the respondent admitted that he had either one or two drinks at the party. Drinking with, or in the presence of, students is a slippery slope that exposes the respondent to an allegation of having too much to drink or being intoxicated. While the district has not proven by a preponderance of the evidence that the respondent was intoxicated at the party, the record shows that the respondent did not notify the principal of his intention to attend the party, nor did he have the principal's permission to attend the party. As such, this charge is sustained in part and dismissed in part.

CHARGE FOUR

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

In or about late August 2017,the SGA officers and representatives were making banners for Freshman Orientation at school. Respondent became angry with the students when they did not clean up after themselves. He referred to the students as "nerds" and then proceeded to tell them that, "he would rather have a group of "C" students that are nice than these "A" student assholes", or words to that effect.

Respondent's condescending conduct in calling the pupils in his charge "nerds" and a profane name is highly inappropriate, unprofessional and it constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

In August 2017, senior class members of the SGA were creating "Welcome Freshman" banners in an art room [Tr. 85-87]. JaB testified that after the students had not cleaned up the art room, the respondent called them into the digital media room, "yelled" at them, told them that he would "rather have polite C students than rude A students" and called them "nerds" [Tr. 87]. DL testified that, in reprimanding the students for not cleaning up, the respondent "went completely off on us, calling us a bunch of assholes, and that he would rather have C – like a group of kind students who [were] C, like average students but were kind, as opposed to us who were the A student assholes" [Tr. 195]. DL also testified that the respondent called the students "nerds," which is "kind of mean to say to someone" [Tr. 196].

GK testified that the respondent did not refer to the SGA as "nerds" or "assholes" [Tr. 585-86]. GK also testified that, in a text message on September 29, 2017 to JaB, the respondent "talked about how he would rather have C students who are like humble and caring and like willing to do the work, than A students who don't want to do the work and just, like, get away with everything" [Tr. 585, Board Exhibit 33].

The respondent did not deny that he called the students "nerds" [Tr. 666]. He denied saying to the students that they were "assholes," and testified that he said "I'd rather have a group of C students that are nice than A student assholes" to another "teacher at a restaurant during school hours" [Tr. 666].

On or about March 19, 2018, the principal, John Pascale, met with DL and his mother, Mrs. L [Tr. 320]. DL told Mr. Pascale that the respondent referred to the students as "nerds" and "assholes" [Tr. 323-24]. Mr. Pascale began a Harassment, Intimidation, and Bullying ("HIB") investigation pursuant to N.J.S.A. 18A:37-14 [Tr. 339]. In his response to the investigation, the respondent did not deny making the "nerds" comment, but said that he used it as "a non-offensive term of endearment between us, and certainly not a negative or bullying use of the term" [Board Exhibit 25]. He also stated that he only called the students "assholes" in front of another teacher during lunch on a school day, not in front of students [Tr. 740, See Board Exhibit 25].

The arbitrator finds that the record supports the allegation in this charge that the respondent called the students "nerds" and "assholes." The district has met its burden of establishing the allegations supporting Charge Four by a preponderance of the evidence.

Referring to students in derogatory or profane terms to a colleague constitutes unbecoming conduct that warrants discipline. The fact that the students acknowledged that the respondent was rightfully annoyed with them for not cleaning up the art room does not entitle him to act unprofessionally by disparaging the students. A "teacher is obliged to act with restraint and emotional control" even if a student is being disruptive, disrespectful and/or foul-mouthed toward a teacher [I/M/O Tenure Hearing of Lat Sall, Agency Dkt. No. 305-10/14 (Denenberg, 2015) (dismissal of tenured teacher appropriate for unbecoming conduct, which included verbally abusing and spitting on student)].

The respondent defends his use of the term "nerds" on the ground that he did not refer to the SGA members as nerds in a derogatory or mean-spirited way, claiming that he himself was a nerd. This defense is without merit. The students' testimony shows they were upset as having been characterized as nerds. Further, the HIB investigation corroborated this view.

Accordingly, the respondent's statements set forth in Charge Four were inappropriate from a professional standpoint and constitute conduct unbecoming.

CHARGE FIVE

> The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.
>
> In or about November 2017, pupil D.L. and Respondent completed making the afternoon announcements at the high school. As they were exiting the school, a visiting soccer team and their coach from another school asked them for directions to the gym, which D.L. and Respondent provided to them. After they walked away, Respondent laughed and told D.L. that he "slept with that coach once" or words to that effect.
>
> Respondent's highly inappropriate and unprofessional conduct in discussing his sex life with a pupil in his charge constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

DL testified that in or about November 2017, he was working with the respondent on a video segment for the school announcements [Tr. 198]. After the two completed the project, they left the school and were approached by a visiting school's soccer team [Tr. 199]. The team asked for directions to the gym, and DL gave the team directions [Tr. 199]. After the visiting team left, DL noticed the respondent had "this very odd look on his face and almost – I think he was chuckling" [Tr. 199]. DL testified that he asked the respondent

"what was up," and the respondent replied that he "previously slept with the coach of that team" [Tr. 200]. DL was "kind of taken aback" and "didn't really know how to respond, because it made m[e] feel uncomfortable" [Tr. 200].

On direct examination, the respondent testified that he remembered walking out of school with DL that day and "a coach or another individual from another town or team approach[ed]" the respondent and DL for directions to the gym [Tr. 677]. He denied saying to DL that "I slept with that coach once" and said that he "would not talk to a student about [his] sex life" [Tr. 676]. On cross-examination, the respondent denied seeing a coach from the other team that day, and also denied that he told DL that "he slept with that coach once" [Tr. 741].

DL's testimony is credible on this matter. The district has met its burden of establishing the allegations supporting Charge Five by a preponderance of the evidence. The superintendent, Dr. Schoen, testified this interaction was a violation of the district's "inappropriate staff conduct" policy [Tr. 458]. Dr. Schoen clarified that she has "no problem if a teacher has a sex life, zero problem with it at all. However, it does not belong in a conversation with students" [Tr. 459].

In sum, this statement from a teacher to a student is inappropriate and constitutes unbecoming conduct.

CHARGE SIX

> During the 2016-2017 [2017-2018, corrected at the hearing on August 2, 2018] school year, Respondent often made inappropriate comments about male genitalia to the SGA officers. Specifically, Respondent would refer to the "Student Officer [Activity] Council- S.O.C. [S.A.C., corrected at the hearing on August 2, 2018]" as the "Sack" and would joke about "holding the sack". He would also refer to the Class Officer Council—C.O.C. as the "cock". Respondent's highly inappropriate, immature and unprofessional conduct in using sexual metaphors and innuendos with the students in his charge constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

JaB and DL testified that throughout the 2017-18 school year, the respondent made inappropriate jokes in reference to male genitalia about the abbreviations for Class Officers Council ("COC") and the Student Activities' Council ("SAC") [Tr. 92, 202]. GK, the respondent's witness, initially testified that the respondent did not make any inappropriate

comments [Tr. 593-94], but subsequently testified that the teacher referred to "holding the SAC" and "grabbing the COC" and everybody laughing about that [Tr. 604].

The respondent alleged in his testimony that DL would be the first one to make the inappropriate comments, and the respondent would "mock them mocking the acronyms" [Tr. 679]. The teacher did not deny making comments like "holding the SAC" or "grabbing the COC" [Tr. 679], but contends that he was merely mimicking the students' jokes while trying to get them to settle down [Tr. 742-45].

While the respondent's defense as to his use of the terms might apply to one or two isolated situations, the students credibly testified that his use of the terms occurred throughout the year. Such consistent usage of inappropriate comments referencing male genitalia by a teacher to students violates the district's policy concerning appropriate staff conduct. It demonstrates the respondent's failure or inability to recognize appropriate boundaries between a teacher and his students. The district has met its burden of establishing the allegations supporting Charge Six by a preponderance of the evidence. These allegations constitute conduct unbecoming.

CHARGE SEVEN

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

During the 2017-18 school year Respondent has demonstrated a pattern of chronic dilatory arrivals and unexplained absences, often without a phone call or explanation prior to the contractual work day start time. This has had a negative impact on the pupils in his charge. Supervisor Maureen Lynch issued Respondent a Level 1 Notification of Concern on December 18, 2017. In that memorandum, she expressed her concerns with Respondent's seven (7) tardies/unexplained absences. This included, but was not limited to, Respondent not showing up for his planned observation on December 8, 2017 and Respondent not being present for the departure of his scheduled Broadcast Journalism field trip to NYC on December 15, 2017 which resulted in a delayed departure and another chaperone having to attend in his place.

Ms. Lynch explained that this pattern "cannot continue and will not be tolerated." Ms. Lynch also states, "As a result, I am deeply concerned about the effect your tardy arrivals is having on the instructional program for your students." Ms. Lynch concludes her memorandum by strongly articulating her expectation that Respondent develop strategies to "remedy this unacceptable pattern of behavior."

Notwithstanding Ms. Lynch's stern and unequivocal warning to Respondent, his pattern of tardiness continued in January and February 2018. Ms. Lynch documented her concerns in a February 5, 2018,

> Level 2 Notification of Concern where she notes that he was late to school on January 23, 2018, January 31, 2018 and February 1, 2018. On February 1, in particular, Respondent called the Principal at 8:13 a.m. to tell him that he had overslept and would be late. However, Respondent's tardiness and late notification that day resulted in his first block class being unattended for the first thirty-three (33) minutes of class. Ms. Lynch informed Respondent that" [h]aving your students unsupervised due to your tardiness is a grave safety concern that cannot be repeated and, ultimately, is a dereliction of your duty as a classroom teacher."
>
> Respondent's deplorable record of tardiness during the 2017-18 school year violates the District's "Attendance" Policy, #3212 which provides, in pertinent part, that "[t]he regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program." This policy is also incorporated by reference into the Mahwah High School Staff Manual which is distributed to staff at the beginning of each school year.
>
> Respondent's unprofessional conduct, as set forth above, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

The record demonstrates, and the respondent does not deny, that during the 2017-18 school year there were numerous occasions on which he was late to work, often without notice to the district before the start of the school day [Board Exhibits 10 and 11]. The teacher's chronic lateness concerned Ms. Lynch because students were being left unattended and missing instructional time [Tr. 242]. Consequently, Ms. Lynch issued him a Notification of Concern – Level 1 on December 18, 2017 [Board Exhibit 10]. That notification discussed the respondent's documented pattern of late attendance to school and stated, in part:

> Essentially, it is your job responsibility to be on time to work so that the supervision of your students in your charge is properly secured. As a result, I am deeply concerned about the effect your tardy arrivals is having on the instructional program for our students. This conduct does not represent the district's expectations for teachers and reflects poorly upon you.
>
> Moving forward, it is my expectation that you will fulfill your contractual obligation of arriving to school on time. I am confident that you will develop strategies in order to remedy this unacceptable pattern of behavior. We discussed being proactive by consulting your physician or a sleep-study specialist in order to see if there is an underlying medical condition causing this behavior.
>
> [Board Exhibit 10]

The pattern of late arrivals continued, resulting in Ms. Lynch issuing a Notification of Concern - Level 2 to the respondent on February 5, 2018 [Board Exhibit 11]. This second notification stated, in part:

> Although we were hopeful that your tardiness would improve starting with the new year, you have now had three incidents in the last 11 days in which you were not on time to school. . . . [S]hould this [pattern of tardiness] continue, we will be forced to take appropriate disciplinary action.
>
> Essentially, as explained to you in previous meetings, it is your job responsibility to be on time to work so that the supervision of your students in your charge is properly secured. As a result, I am deeply concerned about the effect your tardy arrivals is having on the instructional program for our students. This conduct does not represent the district's expectations for teachers and reflects poorly upon you.
>
> Going forward, you are required, instead of signing in at the attendance office, to sign-in at the greeter's desk so that we can ensure your prompt arrival on an everyday basis.
>
> While I recognize your acknowledgment of accountability for your lateness to work, as well as your sincerity in response to supervision of this professional responsibility, it is also important to underscore that being on time to deliver instruction demonstrates diligence and dependability to your colleagues, administrators, and, most importantly, your students. Consequently, being on time indicates a preparedness that is so critical in fostering a classroom foundation that is rooted in a culture for learning and in fulfilling your duty to teach content that is carefully crafted and organized to meet the needs of all students in your classroom.
>
> [Board Exhibit 11]

The respondent's continual lateness violated District Policy #3212, which is referenced in the staff manual that was given to the respondent [Board Exhibits 12 and 13; Tr. 248-49]. That policy provides that "[t]he regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program" [Board Exhibit 12].

Here, the respondent does not dispute that he was repeatedly late as charged by the district. Rather, he contends only that the two notifications he received constituted discipline, and he may not be disciplined further under the doctrine of double jeopardy. This contention is without merit. This is not a case of double jeopardy because the two notifications did not impose discipline on the respondent. They do not contain a reprimand or discipline, but rather serve as notice that future excessive or unexplained tardiness may result in discipline [See Board Exhibits 10 and 11]. However, there was no trigger warranting discipline, as the testimony of the superintendent made clear:

> Q: . . . there was no continued pattern of tardiness and absenteeism that you are aware of subsequent to the level two notification; is that correct?
>
> A: The answer to that is correct, however, the opportunity for subsequent tardiness was pretty much removed when Mr. Miguel was suspended on March 14.
>
> Q: Understood.

A: So there was a short period of time between his level two on February 5 and his suspension on the 14th.
Q: Okay. Now, and I agree with you when you say that. Thank you. . . .
[Tr. 498]

Because there was no continued pattern of infractions after the two notifications, there was no "new" lateness to discipline, which would suggest that the notice itself was corrective in the short-term.

Although the testimony and evidence support the district's factual allegations, and the respondent does not contest those factual allegations, the record demonstrates that the district has not met its burden of proving the charge.

CHARGE EIGHT

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

On February 2, 2018 at 11:22 a.m., during the school day, Respondent took a photo of pupils D.L. and his then girlfriend C.L. sitting at a table in the SGA office without their knowledge or consent. Respondent then inserted a caption over the photo which read, "Why do birds suddenly appear every time you are near?" Respondent also inserted a graphic of two lovebirds over the pupils' heads and texted the photo to approximately five other students in the group chat named "SGA Fam Senior" which was comprised of the SGA officers.

This highly inappropriate and unprofessional conduct by Respondent, which had the effect of greatly upsetting D.L. and which was also a violation of the District's Electronic Communications Policy 3283, *infra*, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
[Board Exhibit 1]

The respondent does not dispute the factual allegations set forth in this Charge. On February 8, 2018, DL and his girlfriend, CS, were eating lunch in the SGA office [Tr. 203]. The teacher was also eating his lunch there, and was sitting across from the two students [Tr. 206]. During the lunch period, he took a picture of them without their knowledge or consent [Tr. 206]. He edited the picture to include the words "Why do birds suddenly appear every time you are near?" and sent the picture to the SGA group chat [Board Exhibit 14].

DL testified that he did not know that the respondent was taking his photo at the time [Tr. 206]. On leaving the SGA office, DL saw the edited photo in the SGA group chat and felt "weirded out" and "uncomfortable" [Tr. 206]. DL felt the respondent was "mocking him" and "mak[ing] fun of [him] for talking to a girl" [Tr. 201–02].

The respondent admits that he took the photo of DL and his girlfriend, attached illustrations to the photo, and posted it on the SGA's group chat. At the hearing, the respondent admitted that he knew pupil confidentiality laws prohibit school officials from taking photos of students without parental consent, and that he had violated that law [Tr. 746]. However, he contends there was nothing inherently mean-spirited or hurtful from what he posted, and did not subject DL to any external ridicule or mocking, and his actions do not rise to the level of unbecoming conduct.

The respondent's contention is without merit. The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232g, affords parents of students, and students 18 years of age or older, rights of privacy regarding the maintenance and disclosure of "educational records," which includes photographs of students. As the respondent properly acknowledges, he violated FERPA when he shared a picture of DL and CS without the appropriate consent. Taking pictures of students without their knowledge or consent is inappropriate and unprofessional in a school environment.

The respondent's claim that he was making a joke, and did not realize he upset anyone, is of no import. Demeaning students is not appropriate conduct for a teacher. In short, the respondent showed a lack of sensitivity for students' feelings and a lack of understanding of societal norms and boundaries, especially for a professional educator who interacts with minors.

CHARGE NINE

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

On February 8, 2018 at 9:53a.m., during Period 1, Respondent inexplicably transmitted a provocative and sexually suggestive picture of [a] man lying down with his shirt off, and his lower half covered with a blanket, by text message to approximately five other students to the group chat named "SGA Fam Senior" which was comprised of the SGA officers.

This highly inappropriate and unprofessional conduct by Respondent, which also violated the Districts...Electronic Communications Policy 3283, *infra*, constitutes conduct unbecoming a teaching

> staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

The district asserts, and the respondent does not dispute, that on February 8, 2018, the respondent sent the picture described in the charge [Board Exhibit 4] to five students during the school day.

JaB's mother brought this photo to the district's attention on or about March 19, 2018 [Board Brief 25]. She described it as "look[ing] like a naked man in a sexual position with a blanket over his penis [Tr. 62]." The respondent admitted to texting this picture to the SGA group chat [Tr. 747]. The respondent did not inform the administration that he had texted this picture to the students because he "spoke to the students directly, and they said, 'okay' as if it did not matter to them" [Tr. 748]. However, no student confirmed that the respondent either spoke to them or apologized [Tr. 16-19; 747].

The respondent asserts that he mistakenly forwarded the photo to the SGA's group chat, and that although this action was contrary to district policy on texting, it does not rise to the level of unbecoming conduct.

Unbecoming conduct has been found where a teacher showed his students a sexually suggestive video of the teacher covered by a cloth with his torso exposed [I/M/O Richard Graffanino and River Dell Regional School District, Agency Dkt. No. 223-9/13 (De Treux, 2014)]. Arbitrator De Treux found the teacher's actions in regards to the video constituted unprofessional and unbecoming conduct.

Similarly, in this case the respondent's actions were inappropriate and unacceptable. Even assuming that the photo was sent in error, he did not notify the district administration that he sent the picture to the students during the school day. He admitted he should have informed the principal of his actions, but did not because the students appeared to be "okay" [Tr. 748]. This response is inconsistent with the concept of professional behavior.

The respondent's actions breached the public trust and cast doubt on his ability to perform the responsibilities of a teacher in light of the high standard of morality and self-restraint expected of teachers. His refusal to alert the administration compounds his poor judgment. The respondent's actions constitute unbecoming conduct.

CHARGE TEN

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

In or about early March 2018, High School Principal John Pascale and class advisors, including Respondent, met with the SGA and class officers to discuss their plans for the national school walkout on March 14, 2018. The walkout was established to honor the lives of the seventeen (17) students and staff killed at Marjory [Stoneman] Douglas High School in Parkland, Florida and to urge lawmakers to pass stricter gun control laws.

The Principal granted the students permission to leave their classes for seventeen (17) minutes to participate in the walkout, but for safety and security reasons, he forbade them from leaving the building. Rather, the students were granted permission to use the high school auditorium and gymnasium as the walkout venue. In fact, on March 12, 2018, the Principal sent a letter to parents/guardians informing them that, "Students who elect to leave school without permission will be subject to school discipline, just as they would if they chose to leave school without permission on any other day."

Despite the Principal's directive for the students not to leave the building, Respondent texted [JaB], the SGA [Vice-]President, in order to goad him and his classmates to leave the building in clear violation of the rules and the Principal's directive. Part of the text exchange between Respondent ("DM") and J.B. [JaB], is as follows:

JB: Ppl are pissed we aren't going outside
DM: Who is stopping them?
JB: Rules
DM: LOL

It means so much to you, you're going to let rules and the unknown stop you...

JB: What I wanted was to be outside but pascal vehemently denied that. There's not much more I can do after that point....

DM: So you're only protesting if MHS and Cornell say it's ok. I see clearly now.

JB: I told you I'm not going outside. I tried to make that happen in meetings, but pascal said no way.

DM: He isn't chaining you down. Do not blame him for your inaction.

JB: Look I have anxiety and if I were to get in trouble it would flare up and I would have panic attacks about Cornell punishing me. I'm supposed to be someone with his own opinion but I'm also representative of the school.

I am conflicted and you will yell at me no matter which way I go.

DM: Then seriously? THAT is what's stopping you. Not Mr. Pascale and not the school rules. Recognize that before you push entities under the bus.

JB: Why did you call

Please don't tell Pascale I said I was upset at the administration I deleted my comments as soon as I realized I was in the wrong.

DM: Haha

JB: Just tell me what you mean instead of being passive aggressive

DM: If you really cared so much about this cause you would walk out regardless of consequence. But you are afraid of that but choose to blame administration or whoever before admitting to that. On top to that you will tell other you tried. Speaking of, besides me, who in administration did you fight with that you got swatted down and denied.

JB: I talked with my mom and told her I wanted to walkout and she said to remain silent

DM: Deleting things does mean it didn't happen.

JB: Please don't hold me ...

Vendetta against me

DM: Again, not taking any blame. I can't help

Please stop texting.

JB: Can you talk then

I don't want to leave the situation like this

And would leaving the building be going against the administration too

Please answer

Not talking to me won't solve anything

Count I

Respondent's actions in coaxing [JaB] and his classmates to leave the school building on March 14, 2018, (which they ultimately did) in violation of the administrative directive and despite the student's stated anxiety and fear of jeopardizing his admission to Cornell University, falls far below the behavior expected of a teaching staff member. Respondent's actions are unprofessional, insubordinate, had the potential to negatively impact student safety, building security and the orderly operation of the school, and constitute conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

Count II

> Mahwah Board of Education Policy 3283 entitled "Electronic Communications Between Teaching Staff Members and Students", which is reviewed with staff at the beginning of every school year, provides in pertinent part that, "text messaging communications between a teaching staff member and an individual student are prohibited." The only exception to this rule is if the teaching staff member obtains the Principal's permission and the need to text is directly related to the teacher's professional responsibilities with a class or co-curricular activity. Respondent never obtained Principal Pascale's permission to text with pupil J.B. This conduct by Respondent, as set forth herein, fails to comply with the requirements contained in District policy and constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

Count I

The parties do not dispute the contents of the text message exchange between JaB and the respondent on March 13, 2018. That exchange related to the planned nationwide walk-out that was being held the following day to honor the victims of the shooting at Marjory Stoneman Douglas High School in Parkland, Florida, that killed seventeen students.

Count I of Charge 10 asserts that the respondent's actions in coaxing JaB and his classmates to leave the school building on March 14, 2018, in violation of the district's administrative directive and despite the student's stated anxiety and fear of jeopardizing his admission to Cornell University, falls far below the behavior expected of a teaching staff member.

A review of the undisputed text message exchange leaves no doubt that the respondent encouraged JaB to leave the school building during the walkout, in violation of the clear directive established by the school administration for safety and security concerns and communicated to all relevant individuals. In this regard, JaB testified he felt like the respondent was "baiting me to go against the rules," "attacking [JaB's] character," and that the respondent's text messages were "condescending," "upsetting," "insulting," and "stressful" [Tr. 107].

The text message exchange between the respondent and JaB on March 13, 2018 was inappropriate and unprofessional. JaB went to the respondent as an advisor for advice about a moral dilemma he was facing. Instead of advising JaB to follow the principal's directive, the respondent encouraged JaB to violate that directive [Board Exhibit 5]. Both Principal Pascale and Dr. Schoen quite reasonably interpreted the respondent's text

messages as undermining the principal's authority [Tr. 313, 479]. The respondent's texts belittled the student and encouraged him to violate the principal's directive, possibly jeopardizing his college career.

The respondent argues that Count I should be dismissed because the respondent did not cause JaB's actions at the walkout. This argument misses the mark. The efficacy of the respondent's urgings in the text message exchange is not the issue. The relevant point is that, in direct contravention of the district's clear policy, the respondent encouraged JaB to disregard the district's instructions. As a faculty member, the respondent's action was inconsistent with his professional obligation, insubordinate, and constituted conduct unbecoming. His argument to the contrary—that he was being the type of educator that guided rather than directed, and that his advice came from a good and caring place, neither hurtful nor insubordinate [Tr. 757-59]—is unsupported by the plain words of the text message exchange.

Advising students to circumvent or disobey administrative directives is inappropriate and constitutes unbecoming conduct. The respondent's actions on March 13, 2018, constituted unbecoming conduct by encouraging a student to violate an administrative directive.

Count II

Policy 3283, entitled "Electronic Communications Between Teaching Staff Members and Students," prohibits text-messaging communications between a teaching staff member and an individual student. The only exception to this rule is if the teaching staff member obtains the principal's permission, and the need to text is directly related to the teacher's professional responsibilities with a class or co-curricular activity. There is no doubt that the respondent never obtained the principal's permission to text with JaB.

The respondent acknowledges that he engaged in text communications with JaB and other students and that such action is contrary to the district's policy. Further, the respondent states that, although he did not intend to cause any harm or distress to the students with whom he was communicating, he accepts responsibility for this policy violation. Nonetheless, he contends that this violation of policy is insufficient to sustain a tenure filing and as such should be dismissed.

Despite knowing that texting with students was improper, the respondent repeatedly violated the district's electronic communications policy. This conduct constitutes conduct unbecoming.

CHARGE ELEVEN

Respondent's conduct as set forth in the foregoing charges, collectively and individually, constitutes a violation of Board Policy 3281, which is also incorporated by reference into the Mahwah High School Staff Manual. The pertinent provisions of that policy provide:

In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. **Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district**.... (emphasis supplied [in charge]).

School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils. School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities....

Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display. A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils.

By violating Board Policy 3281, Respondent has engaged in conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

CHARGE TWELVE

Even if any of the foregoing charges individually does not warrant dismissal from Respondents tenured position, all the foregoing charges considered as a whole constitutes a pattern of unbecoming conduct, and/or other just cause for termination pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

The district asserts that the respondent committed conduct unbecoming a teaching staff member by engaging in all of the actions alleged by the board in the tenure charges. According to the district, his inappropriate behavior falls far short of the high standard required of a teaching staff member and violates the implicit standard of good behavior for teachers. Any one action in this regard, taken independently, would constitute unbecoming conduct; all of them, considered together, mandate such a finding.

The respondent contends that these are cumulative charges based on all of the previous charges and do not have any factual allegations set forth therein. The respondent denies that his actions constitute unbecoming conduct. The respondent asserts that he has had an unblemished record with the district until this past school year and that the district's request for his removal from his position as a school teacher for the district should be denied. In lieu thereof, any discipline should be progressive in nature, taking into consideration the respondent's exemplary time with the district.

As set forth above, the district has met its burden of proving the factual allegations of Charges One through Ten, with the exception of Charge Seven.[6] The sustained charges in their totality warrant a finding that the respondent engaged in conduct unbecoming and support a determination that there is just cause for his dismissal.

As this arbitrator has previously stated, "outrageously inappropriate behavior, combined with lack of remorse or contrition and a likelihood of repeating the behavior are factors that may be taken into account in assessing a penalty" [I/M/O Lesley Etheridge and Passaic County Vocational School District, Agency Dkt. No. 120-6/15 (Denenberg, 2016)]. In this instance, the respondent admitted to several of the tenure charges, but offered no apology for repeated and numerous instances of inappropriate behavior or other misconduct.

The respondent's documented instances of inappropriate and unprofessional conduct warrant his termination from his position. The record is replete with examples of the respondent failing to recognize appropriate teacher-student boundaries, lacking sensitivity to students' feelings and concerns, and failing to comply with applicable laws, regulations, and school policies. While some of the individual charges would each independently warrant termination, there is no need to make that determination because it is abundantly clear that, taken as a group, the charges demonstrate conduct unbecoming under the applicable legal standards and just cause for the respondent's dismissal.[7]

[6] The allegations of Charge Three were sustained in part and dismissed in part.

[7] In his post-hearing brief, counsel for the respondent states that he "ha[s] to believe that the Respondent's sexual orientation played a role in this [case]" [Respondent's Brief at 24]. There is no record support for this contention.

For the reasons discussed above, and after considering all arguments and the entire record, the arbitrator concludes that the tenure charges against the respondent constitute acts of unbecoming conduct or other just cause warranting his dismissal.

Tia Schneider Denenberg
Arbitrator

In the Matter of the Tenure Hearing of

Dennis Q. Miguel
Board of Education of the Township of Mahwah
Bergen County, New Jersey

Agency Docket No. 103-4/18

Award of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, awards as follows:

The tenure charges against the respondent constitute acts of unbecoming conduct or other just cause warranting his dismissal.

Tia Schneider Denenberg
Arbitrator

DATED: November 16, 2018

State of New York
County of Columbia

On this 16 day of November, 2018, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Kristy Lee Brailey
Notary Public State of New York
No. 01BR6326865
Qualified in Columbia County
Commission Expires June 29, 2019