

Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

**The Tenure Hearing of Edward J.
Furhmeister**

and

**Board of Education of the City of
Pleasantville, Atlantic County**

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:
: **Docket No. 305-12/18**
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:

Decision and Award

Appearances:

**On behalf of Board of Education of the
City of Pleasantville:**

Daniel J. Gallagher, Esquire
The Carroll Law Firm, PLC
1 N. New York Rd., Suite 39
Galloway, NJ 08205

On behalf of Edward J. Furhmeister:

Keith Waldman, Esquire
Kathleen L. Kirvan, Esquire
Selikoff & Cohen, PA
700 East Gate Drive
Suite 502
Mount Laurel, NJ 08054-3923

Introduction

This matter arises from tenure charges of; (1) Chronic and Excessive Absenteeism Including Failure to Adhere to Call Out Procedures and Failure to Report to Work in a Timely Manner, (2) Incapacity and (3) Conduct Unbecoming, Unprofessional Activity and Neglect of Duty, against Edward J. Fuhrmeister, (Respondent) by the Pleasantville Board of Education, Atlantic County (the District) and a January 4, 2019 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Office of Controversies and Disputes pursuant to N.J.S.A. 18A:6-16 as amended by *P.L. 2012, c. 26* and *P.L. 2015, c.109*.

The hearing in this matter was conducted on February 12 and 14, 2019 in Pleasantville, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Edward J. Fuhrmeister was present for the entire hearing and testified on his own behalf. At the close of the hearing on February 14, 2019 the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on March 8, 2019 the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if so, what is the appropriate penalty, if any?

The Tenure Charges

The tenure charges in this matter were certified by Dr. Clarence Alston, Superintendent of Schools, of the Pleasantville School District on October 26, 2018 and provide:

CHARGE ONE

CHRONIC AND EXCESSIVE ABSENTEEISM INCLUDING FAILURE TO ADHERE TO CALL OUT PROCEDURES

And FAILURE TO REPORT TO WORK IN A TIMELY MANNER

Respondent, a teacher employed by the Pleasantville High School, failed to perform his duties in a competent manner by being chronically and excessively absent as follows:

- Present School Year (2018-19) missed 4.5 days of work (as of October 23, 2018) and has been late to work thirteen (13) times.
- School Year 2017-18 missed 27.5 days of work (plus, Respondent missed 12 weeks of school while he was out on Family Medical Leave from October through December 2017) for a total days missed equaling: **82 days**

(See attached **Exhibit A**¹, a copy of Respondent's attendance sheets/print out for school years 2017-18 and **Exhibit K**, a copy of a memo from Principal Rayna Hendricks to Respondent dated October 22, 2018).

SPECIFICATION: The regular and prompt attendance of employees is an essential element in the efficient operation of the school district.

See PBOE policy #3212- ATTENDANCE which states (a copy of which is attached as **Exhibit B**):

¹ Exhibits are not quoted herein.

The regular and prompt attendance of teaching staff members is an essential element of the efficient operation of the school district and the effective conduct of the educational program. Staff member absenteeism disrupts the educational program and the Board of Education considers attendance an important component of a staff member's job performance.

A teaching staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with board Policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to injury or illness or because the staff member has been excluded from school by the school medical authorities on account of contagious disease or of being quarantined for such a disease in the staff member's immediate household. No teaching staff member will be discouraged from the prudent, necessary use of sick leave and any other leave provided for in the collective-bargaining agreement negotiated with the members' majority representative, in an individual employment contract, or provided in the policies of the Board. In accordance with N.J.S.A. 18A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave.

The Superintendent, in consultation with administrative staff members, will review the rate of absence among the staff members. The review will include the collection and analysis of attendance data, the training of teaching staff members in their attendance responsibilities, and the counseling of teaching staff members for whom regular and prompt attendance is a problem.

See also N.J.S.A. 18A:27-4; 18A:28-5; 18A:30-1 et seq.

The collective bargaining agreement ("CBA") between the PBOE and the Pleasantville Education Association in effect at all relevant times herein, granted teachers ten (10) sick days per year, three (3) personal days and ten (10) vacation days to be earned pro rata. (See attached **Exhibit C**, a copy of the relevant portions of the CBA.)

Respondent was hired by the District as a teacher on or about November 26, 2001. (See attached **Exhibit D** – a copy of letter). Throughout his employment, Respondent was repeatedly warned and reprimanded for: excessive absences; a failure to follow call-out procedures; and a failure to report to work on time. Said documentation further indicates that attempts were made to encourage, assist or instruct Respondent in the importance of maintaining regular attendance and following school procedures.

Please see the attached documentation as follows:

- March 12, 2014 – letter reminding Respondent that he must report to work on time and implementing a 30 day attendance plan.
- April 4, 2014 – letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- May 23, 2014 – second letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- October 14, 2015 – letter reprimanding for failing to adhere to procedures for attendance and punctuality.
- December 7, 2015 – letter indicating a meeting was held to develop a plan to improve Respondent’s reporting to work in a timely manner.
- November 3, 2016 – letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- March 14, 2016 – another letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- November 28, 2017 – letter informing Respondent that to date he had been absent 39.5 days and that the PBOE was considering disciplinary action.
- May 1, 2018 – letter indicating that Respondent met with the Superintendent to develop a plan to improve Respondent’s attendance.

(See attached **Exhibit E**, a copy of the above letters.)

Additionally, more recently, Respondent’s attendance record indicates that he was absent from school as follows:

- Present school year (2018-19):

A Corrective Action plan was signed by Respondent in September 2018 (See attached **Exhibit M**, a copy of the Corrective Action Plan). Since Respondent signed the Corrective Action Plan, Respondent missed (as of October 23, 2018) 4.5 days of work (9/28/18, 10/3/18, 10/9/18 and 10/19/18). Respondent did not notify or request said absences from any of his supervisors. Additionally, two of the days Respondent was absent were personal days and he did not submit any paperwork requesting approval for the same. Finally, the Corrective Action Plan states that unless Respondent received prior approval, he must report to work on time every day. Respondent has been late to work (as of October 23, 2018) 13 days since the start of the school year. (See Exhibit K, a copy of a memo from principal Rayna K. Hendricks to Respondent dated October 22, 2018).

- School year 2017-18

Respondent missed 27.5 days of work (plus, Respondent missed 12 weeks of school while he was out on Family Medical Leave from October through December 2017) for a total days missed equaling: **82** days. (See attached **Exhibit A**, a copy of Respondent's attendance sheets/print outs).

All of the above documentation and correspondence indicated that Respondent has engaged in chronic and excessive absenteeism, including a failure to follow call out procedures and repeated tardiness, during his tenure as an employee in the District in violation of PBOE policy, New Jersey statutes, and the CBA.

In resolving whether dismissal is warranted based upon allegation of chronic absenteeism, the Court has looked at three factors: 1.) the particular circumstances of the absences and not merely the number of absences; 2.) the impact that the absences had on the continuity of instruction during the period of time the absences occurred; and 3.) whether some warning had been given to the employee that his or her supervisors were dissatisfied with the pattern of absences. See, In the Tenure hearing of Lena White, State Operated school District of Jersey City, Hudson County, 92 N.J.A.R. 2d (EDU) 157; and Kelsey v. board of Education of the City of Trenton, Mercer County, Commissioner Decision No. 127-89, May 11, 1989.

Looking at three factors identified by the Court as applicable to this matter, the District respectfully asserts that Respondent's absences have impacted the District's ability to properly plan the staffing of its schools and its continuity of instruction, and Respondent has been repeatedly clearly warned that his supervisors were dissatisfied with the pattern of absences; his failure to adhere to call out procedures, and his failure to be punctual.

WHEREFORE, Respondent's actions constitute abandonment of her (sic) employment position and Respondent should be terminated for the same.

CHARGE TWO
INCAPACITY

Respondent, a teacher employed by the Pleasantville High School, was incapacitated and failed to perform his job in a professional and acceptable manner by being chronically and excessively absent, by failing to follow call out procedures and by being repeatedly late for work during his tenure of employment for the District.

SPECIFICATION: As more particularly outlined above in Count One above and incorporated herein, as a teacher, all of the above documentation and correspondence indicates that Respondent's chronic and excessive absenteeism and failure to follow procedures and failure to be punctual have rendered him incapable of doing his job pursuant to PBOE policy, New Jersey statutes, and the CBA. Therefore, Respondent was incapacitated and failed to perform his duties in a professional acceptable manner.

WHEREFOR, Respondent should be terminated for being incapacitated and failing to perform his duties in a professional and acceptable manner.

CHARGE THREE
CONDUCT UNBECOMING
UNPROFESSIONAL ACTIVITY
AND NEGLECT OF DUTY

Respondent, a teacher in the Pleasantville School District engaged in conduct unbecoming and in unprofessional activity during his tenure as an employee for the Pleasantville Board of Education which resulted in the neglect of his duties and violations of the policies of the District.

Board Policy #3280 Liability for Pupil Welfare states in relevant part: Teaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct.

Board Policy #3281 Inappropriate Staff Conduct states in relevant part: The Board of Education recognizes its responsibility to protect health, safety and welfare of all pupils within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district. In support of the Board's strong

commitment to the public's trust and confidence in 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.

(See attached **Exhibit F**, a copy of PBOE #3280 and #3281).

Respondent engaged in unprofessional conduct and conduct unbecoming a teaching staff member by failing to properly discharge his responsibility for the supervision of pupils with the highest level of care and prudent conduct which resulted in a neglect of his duties and a violation of board Policies and Regulations as well as the standards of professional conduct.

SPECIFICATION: Respondent has been employed as a teacher in the District for over seventeen (17) years. Petitioner alleges that Respondent's long term work history and more recent actions occurring in the present school year, have not achieved the high level of professional responsibility that the District demands for all school staff to protect a pupil's health, safety and welfare. Respondent's actions have violated the public's trust and confidence and has negatively impacted his ability to protect the well-being of all pupils attending the school district. Respondent's personnel file consists of the following documentation in support of the above:

1. Respondent was hired as a teacher in the district in 2001 (See attached **Exhibit D**).
2. Beginning as early as school year 2002-2003, a Professional Improvement Plan (PIP) was instituted for Respondent following observation/evaluation. A PIP was instituted every year thereafter until and including 2008/2009. (See attached **Exhibit G**, a copy of the PIP plans instituted). A recurring theme of the PIPs was the need for Respondent to incorporate inventive and varied teaching strategies for lesson plans; to submit timely lesson plans; and to actively participate in workshops/in-service trainings.
3. During the course of his tenure as a teacher in the District, Respondent accumulated the following letters of reprimand and/or warnings and/or suspensions:
 - On or about March 18, 2014, Respondent was suspended and placed on administrative leave as a result of alleged improper conduct concerning the management of OnCourse.
 - On or about April 7, 2014, Respondent failed to adhere to his work schedule.
 - On or about May 23, 2014, Respondent was accused of leaving school premises for lunch and not returning in a timely manner.

- On or about June 30, 2016, Respondent was placed on paid suspension pending an investigation into an arrest.
- On or about May 4, 2018, Respondent's increment was withheld for school year 2018-19 by the PBOE for excessive absenteeism during the 2017-18 school year.

(See Exhibit H, a copy of the above referenced letters).

4. More recently, during the present school year (2018-19), Respondent has engaged in behaviors that clearly indicate a continued intent by him to neglect his teaching duties in violation of PBOE policies and detrimentally affect students' ability to learn in a positive and supported environment. See as follows:

- By email dated September 28, 2018, Principal Rayna Hendricks notified Respondent that his lesson plans for the week had not been properly uploaded to the Oncourse. (See attached **Exhibit N**, a copy of the 8/28/18 email).
- By letter dated September 14, 2018, Superintendent Dr. Alston informed Respondent that when he and his BA Elisha Thompkins visited Respondent's classroom (A technology class) on September 13, 2018, they observed students seated at their desks with all of the computers turned off, and there was a moving (sic) playing that few students appeared to be engaged in. (See attached **Exhibit O**), a copy of the 9/14/18 letter).

In that same letter, Dr. Alston advised Respondent that Mr. Thompkins reported on September 14, 2018 that he heard a loud noise coming from Respondent's classroom. Mr. Thompkins and Dr. Alston went to Respondent's classroom and observed most of the students standing at one end of the classroom conversing and appearing to socialize. Respondent was sitting at his desk and appeared to be viewing his cell phone. Again, the computers were off and there was another, or possibly the same, movie playing from the previous day. In response to Dr. Alston's questioning about the situation, Respondent stated that he did not have "mice" for the computers. Dr. Alston responded that upon speaking to Ms. Rayna Hendricks, the principal, it was asserted that Respondent had lost all the mice for the computers last year.

- By memo dated October 2, 2018, Principal Rayna Hendricks advised Respondent of the following (See attached **Exhibit L**, a copy of the 10/2/18 memo):
 - On October 1st he was seen in the back of the building in the bus dismissal area on the way to his vehicle at

- 2:39p.m. Said departure time is in violation of Respondent's contractual duties.
- On October 2nd a video was brought to Ms. Hendricks' attention which showed two students slap boxing in Respondents classroom as he was sitting on the countertop in the classroom looking at his cell phone. On the video, Respondent can be heard telling the students to stop; however, at no point did Respondent ever attempt to intervene, call security or an administrator to have the students removed. (See attached Exhibit I, a copy of the video).
 - Respondent's previous assertion that he did not have any mice for the computers was refuted; Ms. Hendricks' (sic) stated that Respondent had a full set that were replaced last year and now were lost. The memo further stated additional activities that Respondent should be doing until the class receives new "mice."
 - Ms. Hendricks stated that there did not appear to be any improvement in Respondent's classroom since he received the letter dated September 14th from the Superintendent.
 - Finally, Ms. Hendricks reminded Respondent that he was under a Corrective Action Plan for the 2018-19 school year which directed him to:
 - Arrive to work on time and remain at work until the contractual day ends.
 - Create a classroom management plan and submit a copy of same.
 - Adjust his lesson plans and instructional activities.
- By email and memo dated October 12, 2018, Ms. Hendricks informed Respondent that it was the fourth time that Respondent had failed to submit timely lesson plans and further that Respondent had failed to submit a behavior plan for his classroom by October 1st as he was required to do under his Corrective Action Plan. (See attached Exhibit J, a copy of the 10/12/18 email).

Facts

Respondent's Early Employment History

Respondent has been employed by the District for approximately 18 years. He became certified as a teacher through the then-existing alternative route and began teaching eighth grade math in 2001. He received tenure in or about 2004. He taught eighth grade math for approximately 11 years, was thereafter the District's Data-Base Coordinator, a District test coordinator, worked in an elementary school assisting the third-grade team in math and eventually became the District Technology Coordinator; a position he held for approximately two years. After his first year of teaching eighth grade math (2001-2002) Respondent had Performance Improvement Plans (PIPs) for the remaining years he taught the subject through the 2009-2010 school year. Respondent offered uncontradicted testimony that he understood that such was the normal course for teachers certified through the alternative route. Respondent's post-tenure evaluations were positive and consistently rated his performance as Good.

The Illness and Death of Respondent's Wife

In July of 2014 Respondent's wife was diagnosed with cancer and died two years later, in July of 2016. At all times relevant, the controlling collective bargaining agreement has provided for ten days of sick leave per year and allows for the accumulation of unused sick leave from year to year. Prior to his wife's 2014 diagnosis, Respondent had accumulated between 80 and 90 days of sick leave. The illness, treatment and death of Respondent's wife caused significant disruption and emotional challenge to Respondent and his two pre-school age daughters. To assist his wife during

treatments, Respondent used intermittent FMLA leave; leave he was told by the District could not legally be the basis for negative employment consequences.

The District's Budget Challenge for the 2017-2018 School Year

Following the state-approval of the District's 2017-2018 budget in March 2017, the state notified the District that the approved budget would be reduced by \$832,200.00. In response, the District's State Monitor directed that the District reduce its staff accordingly and advised that the District could not hire new staff. As a result, the District cut between 40 and 50 employees and reassigned various professionals in non-classroom teacher positions (such as academic coaches) to teach in the classroom. Respondent, in the position of District Technology Coordinator was such a professional and was notified that he would be assigned a seventh-grade math classroom teaching position for the 2017-2018 school year.

Upon learning of the reassignment, Respondent expressed his concern to the District's Superintendent Dr. Clarence Alston and his belief that he was of more service to the District in his District Technology Coordinator position, particularly since the District had just recently issued students chrome books. The Superintendent informed Respondent that Respondent was required to teach.

The 2017-2018 School Year

Respondent testified that his wife's diagnosis and death was devastating; an emotional roller coaster, and that after his wife passed, he focused on acclimating to being a single parent and providing support for his two daughters. Respondent testified

that for many months after his wife's death he went into "survival mode;" not acknowledging the loss as he tried to focus upon his children. He tried to normalize his daughter's routines, deal with emotional "meltdowns" of his children, learn how to provide the day-to-day care for his children that had previously been provided by their mother and began taking his children, and himself, to weekly Gilda's Club support groups, and he began seeing a psychiatrist (weekly Gilda's Club meetings and psychiatric care that have continued). Only after he was able to realize that he could give his daughters the support they needed, Respondent testified, did he really experience the loss of his wife, and at that time, it hit him "like a ton of bricks." He became devastated and depressed.

By the 2017-2018 school year, with his loss and challenges of his family, the challenge of going into the classroom and the realization that things were all new to him as he had been out of the classroom for so long, he became overwhelmed, he was falling behind at work and struggling to keep up with his girls. Respondent testified that he needed a break from work to regroup and went out on FMLA leave on October 4, 2017. Respondent was later cleared to return to work by his psychiatrist and returned to work on January 3, 2018.

During the school year prior to his going out on FMLA he had been absent 5 and one half days. Upon his return to the District after his FMLA leave, Respondent was assigned to teach technology for the remainder of the school year. From his return on January 3, 2018 through the end of the 2017-2018 school year, Respondent was absent another 23 and a half days.

Respondent's April 30, 2018 Meeting with Superintendent Alston

Both Respondent and Superintendent Alston testified to meeting one another on April 30, 2018. According to Alston, he spoke to Respondent about the teacher's absences and performance in the classroom, and asked Respondent if he would want his children to have such a teacher, and that Respondent answered "no." According to Alston, Respondent told the Superintendent he did not want to teach.

According to Respondent, when he met with Alston, the superintendent informed Respondent that his absenteeism was excessive. Respondent testified that Alston stated the employee had been absent some 82 times during the school year; that Alston repeated the number 82 a number of times during the conversation even though Respondent pointed out that much of his absence was covered by FMLA. Respondent denied that he told Alston, or any other administrator at the District, that he did not want to return for the 2018-2019 school year or that he did not want to teach. Instead, Respondent testified, he expressed to Alston, as well as to Business Administrator Elisha Thompkins and middle school Principal Rayna Hendricks at other times, that he had disaffection for going back into the classroom versus his technical position as he would be able to do so much more for the District in the latter. Respondent believed he could make a much bigger impact in the tech position.

At the end of the April 30 meeting, Superintendent Alston requested that Respondent inform him by the end of the week as to Respondent's intentions for the 2018-2019 school year. Alston followed up the conversation with a May 1, 2018 letter to Respondent providing in relevant part:

...This confirms our discussion about your absences during the 2017-2018 school year. We agreed that you would contact me by

Friday, May 4, 2018 to let me know what your plans are for attendance and/or employment for the 2018-2019 school year...

By email of May 4, 2018 to Alston, Respondent wrote, in relevant part:

...Per our meeting on Monday morning you asked me to reach out to you by today to let you know of future plans as it pertains to the Pleasantville School District.

I am looking forward to being a productive and professional employee, and continuing my career at the district in whatever capacity is asked of me...

Later that day, Alston informed Respondent that the superintendent was recommending to the Board of Education to withhold Respondent's increment for the 2018-2019 school year.

Respondent received an overall evaluation of Ineffective for the 2017-2018 school year.

Increment Withholding

By letter to Respondent dated June 27, 2018 from the District's Human Resources Consultant, The District informed Respondent, in relevant part:

...Based on numerous factors, the district is compelled to withhold your increment for the 2018-2019 school year. The factors taken into account as it relates to you were administration recommendation due to absentism. (sic) After careful review of all relevant factors, the Superintendent determined that your increment will be withheld for the 2018-2019 school year....

At the hearing in this matter, Superintendent Alston testified that the increment withholding was due to an accumulation of various things over seven years. Alston acknowledged that leave taken pursuant to FMLA could not be used as a basis for

discipline. He further testified that based upon Respondent's 82 absences, he could have issued a warning, suspension or recommended tenure charges, but did not and decided upon the withholding of increment in the interest of progressive discipline.

The 2018-2019 School Year

For the 2018-19 school year Respondent was again assigned to teach technology in middle school.

The 2018-2019 CAP

In September 2018 Principal Hendricks placed Respondent on a Corrective Action Plan (CAP) for the 2018-2019 school year with three identified areas for improvement; attendance, tardiness and guidance to students on classroom focus and standards of conduct. In the "Goals and Professional Responsibilities" section of the CAP, Respondent was informed of the following responsibilities:

1. Improve attendance
 - Unless prior approval is obtained from an administrator, ensure that you come to work each day.
2. Arrive at work on time daily
 - Unless you receive prior approval for a late arrival, ensure that you arrive at work on time every day.
3. Improve management of student behavior and peer interaction to ensure students are focused on learning
 - Attend classroom management workshop provided by the district professional development office.
 - Review relevant teacher practice instrument components and discuss strategies for implementation with a coach or administrator

Under the “Supervisor Responsibilities” and corresponding “Completion Date” section of the CAP relating to the third enumerated responsibilities section quoted above, Hendricks wrote:

- Ensure Mr. Fuhrmeister has opportunity to attend the classroom management workshop. 10/02/18
- Ensure Mr. Fuhrmeister has opportunity to observe classes with exceptional classroom management. 01/31/18
- Mr. Fuhrmeister will create a behavior plan for his classes. 10/05/18

The CAP was signed by Respondent and Hendricks on September 24, 2018.

Superintendent Alston testified that Respondent failed to adhere to his CAP. In this regard, Alston testified, Respondent did not complete a behavior plan by October 5, 2018, continued to be tardy and have absences and failed to manage his classroom.

2018/2019 Attendance and Tardiness

Between the date on which Respondent’s CAP was signed (September 24, 2018) and the date of the District’s tenure charges (October 26, 2018), Respondent took three and one half days of sick leave and one personal day. Although the record does not contain evidence of the manner or means by which the District determines tardiness, the District represented that during that same period Respondent was tardy 13 times.

By memorandum dated October 22, 2018 from Principal Hendricks, Respondent was informed:

This written communication serves as documentation of concern over your attendance and tardiness.

As you are aware, you are on a Corrective Action Plan. According to the plan you are to report to work each day. It explicitly states,

”Unless prior approval is obtained from an administrator, ensure that you come to work each day.” Since your Corrective Action Plan was signed you have been absent 4.5 days (9/28/18, 10/02/18, 10/16/18, and 10/19/18). You have not reached out to me any of these days to make me aware of your absence. District Policy states that you are to submit a written request for personal days. You have taken two personal days and did not submit any paperwork.

Additionally, your Corrective Action plan states, “Unless you receive prior approval for a late arrival, ensure that you arrive at work on time every day.” You have been late 13 days since this plan.”

I continue to be deeply concerned about your willingness to come to work each day and to report to work on time. Coming to work each day and on time are part of your professional responsibilities (Danielson Framework Domain 4).

If there is any part of this letter that needs clarification or you have further questions regarding my concerns let me know immediately. **This is a formal reprimand and will be documented in your file.** (Emphasis added)

No additional 2018-2019 school year days of absence or tardiness were identified in the District’s Tenure Charges prior to the date of the District’s charges. Respondent testified that he did not contact his principal or other administrator about his absences following the date of his CAP. He testified that he now realizes that according to the CAP he was required to contact an administrator directly, but that he just continued to use the District’s electronic reporting process. Respondent submitted evidence showing that when he used that electronic reporting process on the relevant days herein, the program informed that “NO APPROVAL REQUIRED.” Respondent also offered uncontracted testimony that the District could have blocked him out of the electronic call-out system or modified the system to inform him that approval was required, but that no such changes were made.

Class Disruptions / Lack of Classroom Management

Screams and the Computer Mice

Both Superintendent Alston and School Business Administrator Elisha Thompkins testified that in or about September 2018 they heard loud noises (screaming) coming from Respondent's classroom on the floor below their offices and both went to investigate. They testified that when they went into the classroom they observed the students were not engaged in learning, were talking in groups and not paying attention to a movie playing and were not using their computers. When the administrators asked Respondent why the students were not engaged with their computers, Respondent answered that there were no "mice" available.

Respondent recalled the incident and testified that the two administrators came down to investigate what they described as screaming and that he told them there had not been any screaming in the classroom. He testified that at the time there were two maintenance workers working in the ceiling of the classroom on the air conditioning and he asked them if they had heard screams and they agreed that they had not. Respondent offered uncontracted evidence that at that time he and the administrators agreed that the noise must have come from the hallway.

Alston testified that he inquired about the computer mice situation with school principal Hendricks and that Hendricks reported that Respondent had been provided with new mice and that Respondent was responsible for their loss. Respondent testified that the school had experienced an issue with computer mice after students were issued their chrome books and that the school's other tech classroom as well as the library had experienced loss of computer mice. Assistant Principal Lapell Chapman testified that lost

computer mice had been an issue in the school in the beginning of the 2018-2019 school year including computers in the library.

“Slap Fight”

Superintendent Alston identified two videos of what he referred to as a “slap fight” between two students in Respondent’s classroom. The evidence establishes that the incident recorded on the videos occurred prior to October 2, 2018. Alston testified that the video was troubling and that the conduct of the two students could have easily escalated into something more serious, but that Respondent did not intervene and stop the conduct. According to Alston, Respondent should have called security. Alston also testified that Respondent could be seen sitting on a counter looking at his cellphone and that the most disturbing element of the video is that the conduct of the students came about during a period of time during the class when instruction should have been happening. The video is evidence of Respondent’s failure to manage his classroom; Alston testified, an issue that has been documented repeatedly in observations of Respondent’s classroom by various observers over the course of the 2017-18 and 2018-19 school years. Additionally, in his view, Alston testified, this was further evidence that Respondent did not care about the education of his students, did not want to teach, was not going to comply with the requirements of his CAP and was unwilling to address his performance issues.

Respondent testified that the District provides a cellphone app to take student attendance and that at the time of the video he was taking attendance as students were just coming into the classroom after their lunch period and the two students involved were

students Respondent knew for years and were good friends of one another. He testified that the video shows that the two students were smiling at one another as they engaged in friendly horseplay and that he can be heard on the video telling the two boys that the problem with such conduct was that it could quickly and accidentally escalate into something serious, that they should stop and sit down. Respondent testified that the two students then stopped and sat down.

Principal Hendricks testified that when she reviewed the video she reported the matter to the state of New Jersey Institutional Abuse Investigations Unit (IAIU). She testified that neither student was disciplined for the conduct, she did not seek the suspension of Respondent and she did not submit an electronic report of the incident to the state.

The undersigned's review of the videos establishes that Respondent's version of what the videos show is accurate. The two students were engaged in friendly horseplay and Respondent did what Superintendent Alston testified he should have done; told the students such conduct could unintentionally escalate and someone could get hurt and that they students should stop and sit down, and that the students did as instructed without hesitation.

The record also establishes that the IAIU initially found that its investigation of the incident resulted in a finding of "not established" and that on March 18, 2019 (entered into the record by the undersigned upon motion by Respondent after the close of the hearing in this matter) the IAIU modified its finding to "unfounded."

Completion of Workshop

The record reflects that Respondent completed the “Classroom management” workshop required on his CAP on October 2, 2018; a date after the “slap boxing” video incident.

Leaving Early

In partial support of its Tenure Charge Three the District asserted that Respondent was observed outside, in the back of the school at 2:39 p.m. on October 1, 2018; a time prior to his contractual departure time.

Respondent admitted to being outside of the building as reported, and explained that his students had been dismissed for the day and that because he had an appointment to make he hoped to leave the parking lot prior to the busses blocking the lot.

By Memorandum dated Tuesday, October 2, 2018, from Principal Hendricks, Respondent received a formal reprimand relating to his leaving early on October 1, 2018, the slap boxing incident brought to the principal’s attention in a video she received on October 2, 2018, his failure to assign students alternative activities in that absence of computer mice in his class room, and his failure to improve his classroom management. He was also reminded of the requirement of his CAP.

Observations

The District submitted two 2017-2018 school year classroom observations and an overall annual evaluation of Respondent in which Respondent was rated “Partially Effective,” “Partially Effective,” and “Ineffective” respectively. The major recurring

issue noted in the observations and evaluation was Respondent's lack of classroom management.

At the hearing, Respondent acknowledged that he was having difficulty with classroom management and that he did not question the soundness of the requirement in his 2018-19 CAP that he attend a classroom management seminar.

Memorandum of October 12, 2018

By memorandum dated October 12, 2018 regarding "Missing Deadlines" from principal Hendricks, Respondent was informed:

This written communication serves as documentation of concern over your adherence to deadlines.

1. As you are aware, lesson plans are due each Tuesday, Staff members were notified on September 4th what day plans are to be submitted. This week marks the fourth occurrence this school year that you have failed to submit your lessons. On two of these occasions, you received written warnings via OnCourse (September 17th and October 1st) from Mr. Chapman and me.
2. You are also aware that per your Corrective Action Plan, you were to submit a behavior plan for your classroom by Friday, October 5, 2018. I have yet to receive this plan. You attended training at ETTC on October 2, 2018, for classroom management to assist you with this area.

I continue to be deeply concerned about your willingness to meet required deadlines so that you have a plan for instruction and classroom management. Lesson planning and meeting required deadlines are both components of the Danielson Framework (Domain 1: Planning and Preparation and Domain 4: Professionalism). As a result of the aforementioned areas, you are being directed to:

- Submit your lesson plans by midnight each Thursday.
- Submit your detailed classroom behavior plan by Monday, October 15, 2018.

Failure to adhere to deadlines will result in a formal written reprimand from my office and possible action by the Central

Administration. If there is any part of this letter that need clarification or you have further questions regarding my concerns, please let me know immediately.

Respondent admitted that he did not submit his behavior plan by the initial deadline established in his CAP. He testified that he initially was not sure how to do the plan, that he was unable to find tutorials or other guidance on the subject. He was able to submit the plan by the October 15 deadline established in Hendricks' memorandum of October 12.

Superintendent Alston's Reasons for Tenure Charges

Alston testified that it was clear to him that notwithstanding the many efforts made by the District to correct Respondent's performance and behavior, Respondent did not want to teach and had no intention of adhering to the District's policies. Respondent's observations reflected Respondent's poor classroom management, poor lesson planning, and lack of engagement with students; notwithstanding his reprimands, Respondent continued to fail to communicate with administration and failed to follow policy relating to tardiness and absence. Even after he signed his CAP, Respondent was absent four and a half days, Respondent left work before the end of his day, and failed to control his classroom as reflected in the slap boxing video.

Superintendent Alston testified on cross examination that the District's process of drafting Tenure Charges against Respondent began sometime in September 2018.

Respondent's Adjustments to his Home Life

At the hearing, Respondent admitted his absences were not good for the education of students and resulted in administrative challenges for the District. He admitted that he had problems with classroom management and that he agreed with the results of his observations. He also admitted that he did not meet lesson plan deadlines in September 2018 explaining that he did not have any curriculum for his classes until the end of September, and even then the curriculum he received was for his sixth grade class but not his seventh and eighth grade classes. He testified that in the early weeks of September 2018, he did not have a curriculum, did not have books, did not have computer log-in information for his students and did not have mice and he was not sure what he was to do about lesson plans; although he further admitted that it would have been better to submit some sort of generalized lesson plans. Respondent offered uncontracted testimony that once he had the curriculum for this classes he submitted lesson plans on time.

Respondent testified that during this period he submitted letters and/or emails to District administrators about his lack of curriculum, about the poor condition of his classroom, including that the air-conditioning did not work, that the classroom stunk of mold, and that the room was so humid as to make the floor slippery; a level of humidity that could harm the electronics in the room.

Respondent testified that contrary to the claims of the District's witnesses, he wants to teach. He has made changes in his personal circumstances to address the demands of his single-parent status and the obligations of his position with the District. In this regard, he has sold his home and moved his family in with his mother and brother

and is confident that his mother and brother will be able to meet the transpiration and care needs of Respondent's children when he is working.

Position of the School District

The District asserts that the evidence supports its tenure charges. The District has shown that Respondent's excessive absenteeism constituted incapacity, unbecoming conduct and just cause sufficient to warrant dismissal. As required by case law, the District has shown it considered the number of days Respondent was absent, the impact of the absences on the District and provided Respondent the appropriate warning. Respondent missed 29.5 days in the 2017-2018 school year plus FMLA leave resulting in his being absent for a total of 82 days. In the 2018-2019 school year he continued his failure to meet his obligations relating to attendance missing 14 days from September 10 through November 5, 2018. It is recognized that repeated absences of a teacher from his classroom, however, legitimate, has a negative impact upon instruction and compromises the District's ability to meet its most fundamental obligation. Here, the District has additionally shown that there is a likelihood that Respondent will continue his conduct in the future as notwithstanding his having an increment withheld due to his absenteeism during the 2017-2018 school year, Respondent continued his conduct into the 2018-2019 school year.

Respondent's conduct amounted to unbecoming conduct. As a teacher, Respondent holds the public's trust and is subject to the highest standards of conduct. His inability to maintain classroom discipline and inability to be present on a consistent basis fails such standards. His unbecoming conduct resulted in his students believing it was

okay to slap box one another during class and have another student videotape the incident. Respondent was derelict in his duty and consistently breached the public's trust as reflected in his consistent partially effective evaluations. He failed to submit lesson plans four weeks in a row at the start of the 2018-2019 school year, failed to submit a classroom management plan as required by this CAP, failed to adhere to his schedule and failed to provide and obtain adequate materials, including computer mice, for his classroom. Respondent showed that he did not want to teach and his refusal to accept his teaching assignment should not be tolerated.

Respondent made it clear to the District's administrators that he did not want to teach. His testimony to the contrary is inconsistent with the testimony of administrators and his own conduct. Respondent's claim that he now wants to teach should be discredited; his conduct shows a pervasive pattern of a teacher that either cannot or will not conform his conduct to the legitimate and reasonable expectations of the District.

Respondent was adequately warned, his conduct was fully investigated and considering his attitude and the recurring nature of his failures, dismissal is a reasonable and proportionate response by the District. The tenure charges should be sustained.

Respondent

Respondent maintained that the District has failed to support its tenure charges. The basis of the charge relating to absenteeism – Respondent's use of FMLA – is impermissible. Notwithstanding the District's counsel and Superintendent Alston representing that the FMLA taken by Respondent is not a basis of the Charge, the Charge itself highlights Respondent's 82 days of absence during the 2017-2018 school

year, the large majority of which were FMLA, and Alston repeatedly referenced the 82 days in his April 30, 2018 conversation with Respondent as well as during his testimony at the hearing.

Additionally, in regard to absenteeism, the evidence establishes that Respondent's absenteeism in the 2017-2018 and 2018-2019 was an aberration caused by the illness and passing of his wife and the effects of such on Respondent and his children. In this regard, Respondent has worked for the District for 18 years and prior to his wife's diagnosis, Respondent had accumulated almost 90 days of sick leave. Respondent is not a serial abuser of sick-leave. The evidence also showed that the underlying cause of Respondent's absences has now abated. Respondent's family has undergone difficult adjustments to their lives to compensate for the absence of Respondent's wife and the children's mother and they are now in a circumstance that will assure that Respondent will be able to meet the obligations of his family as well as his position with the District. Moreover, as to Respondent's absences prior to the 2018-2019 school year, Respondent has already received the harsh discipline of an increment withholding relating to them and it is unfair to then punish him a second time for the very same conduct.

The District's claim that the content of a student's video of what the District characterizes as a "slap fight" in Respondent's class shows unprofessional conduct, conduct unbecoming and neglect of duty is shown to be an empty claim by the video itself. Contrary to the District's claims, the video show two students engage in a 30 second horseplay event that was effectively stopped by Respondent as he was taking roll at the beginning of his class.

The District's claim that Respondent failed to comply with his 2018-2019 CAP is also not supported by the evidence. In this regard, Superintendent Alston admitted at the hearing that he was actively in the process of framing and drafting tenure charges against Respondent in September 2018. Considering the CAP was signed September 24 2018, it is likely that the District was drafting tenure charges against Respondent even before his CAP began. Although the CAP was to extend for the full school year, the District brought Tenure Charges against Respondent just over a month after his CAP was signed. Respondent was not given a meaningful opportunity to comply with his CAP. Moreover, the District did not give Respondent the tools and resources to comply with his CAP. Although he was to submit lesson plans, the evidence shows that Respondent was not given a curriculum for his classes until after four weeks into the school year. Once he received the curriculum, Respondent submitted his plans as requested. Similarly, Respondent was understandably confused about the CAP requirement that he gain administrative approval for his absences when the District's call off system informed him that his absences did not need approval.

The District also claimed that its Charges are supported by the alleged fact that Respondent told administrators that he did not want to teach. The evidence shows that Respondent expressed his strong preference to remain in his technology administrative position. But the evidence does not show that he did not want to teach.

Finally, as to the Charge of Incapacity, it too should be dismissed as the District failed to show that Respondent had a mental or physical condition that incapacitated Respondent from working. To the contrary, the evidence shows that upon the conclusion

of his FMLA leave in 2018, Respondent was cleared to return to work by his mental health provider and the District permitted him to return to work.

Discussion

The District bears the burden of supporting its Tenure Charges. Based upon careful consideration of the record as a whole, including all testimony and other admitted evidence and the arguments of the parties, I find that the District has failed to establish the truth of its Tenure Charges against Respondent.

Charge One - Attendance

At the end of the 2017-2018 school year Respondent was notified that he would be subject to the significant discipline of the withholding of his increment. His written notice from the District concerning the reasons for the discipline references attendance issues. Superintendent Alston testified that he could have issued a warning or a suspension, or recommended tenure charges. He explained that in his deliberations on what to do, he considered all of Respondent's conduct prior to and during the 2017-2018 school year and came to the decision to withhold the teacher's increment.

Notwithstanding that Respondent's pre-2018/2019 school year conduct was already subject to the significant discipline of increment withholding, in its Charge One the District cites Respondent's pre-2018 counseling letters and reprimands and particularly focuses upon the 82 days Respondent was absent during the 2017-2018 school year, the majority of which were covered by FMLA. The parties devoted significant energy and effort in arguing the bona fides of the District citing FMLA leave taken by Respondent during the 2017-2018 school year to support its tenure charges.

Although the record arguably (and even forcefully) supports a finding that the District's withholding of Respondent's increment was based upon inappropriate consideration of Grievant's use of FMLA, I find that consideration of the details of Grievant's 2017-2018 absence record is not appropriate here. In this regard, Respondent's increment was withheld and there is no evidence that Respondent appealed or otherwise challenged that action by the District. As a consequence of such, whether or not the withholding of Respondent's increment by the District was tainted by a reliance on FMLA leave taken or would have otherwise been supported by the employee's non-FMLA related absences during the 2017-2018 school year is not an issue presented here.

**The Attendance Issue Here is Limited to
the 2018-2019 School Year**

Based upon such considerations, I find that the determinative issue presented by the District's Tenure Charge One is whether or not, and within the context of considerations of progressive discipline, Respondent's attendance-related conduct during the 2018-2019 school year establishes as alleged by Charge One that "Respondent's actions constitute abandonment" of his position and warrants his termination. Considering the limited conduct of Respondent during the 2018-2019 school year relied upon by the District as described in its Tenure Charge One, and the fact that the District already chose to issue lesser discipline for the conduct, I find that the answer to such a determinative inquiry is plainly "no."

As admitted by the District and cited in its October 26, 2018 Tenure Charge, Respondent missed 4.5 days during the period at issue and was tardy 13 times. Importantly, those very same 4.5 days of absence and 13 incidents of tardiness were the subject of an October 22, 2018 written "formal Reprimand" issued Respondent by

Principal Hendricks. There is no additional conduct evidenced in the record between Respondent's October 22 reprimand and the October 26 Tenure Charge. The District's Tenure Charge One relies upon the very same conduct that had already been the subject of a formal reprimand as a basis for its decision to discharge the employee.

If the District believed Respondent's 4.5 absences and tardiness, together with Respondent's prior attendance-related discipline warranted his dismissal, it should have notified him of tenure charges – particularly where, as here, it had already begun the process of formulating its tenure charges in September 2018. Instead, the District notified Respondent that he was receiving a “formal reprimand.” I find that such conduct by the District amounts to an admission that the conduct cited warranted a reprimand not dismissal; an admission that is consistent with progressive discipline.

**Respondent's Absences Have Not Been Chronic,
They Have Been Situational**

In addition, I find the evidence does not support a finding that Respondent's absence was chronic. Respondent has been an employee of the District for approximately 18 years. Respondent's absences have not been chronic as alleged by the District, they have been situational, and the underlying realities of such situation have now changed significantly. In this regard, the evidence established that Respondent earned ten days of sick leave a year and accumulated an amount of sick leave that would take approximately nine years without absence to bank. He only began his use of significant leave due to a tragic loss and adjustment to its aftermath. I am persuaded by the record that the adjustments made by Respondent to his home-life to provide for his children and the continuation of professional mental health support for himself and his children have established that the causes of his attendance challenges have abated. Within such

circumstances the District has failed to show that Respondent has abandoned his position or is unlikely to comply with the attendance requirements of his position in the future.

I find the District failed to meet its burden of proving the truth of its allegations in Tenure Charge One.

Charge Two - Incapacity

The District has failed to show that Respondent is incapacitated. The record establishes that he was cleared to return to work by his healthcare professional, and there is no evidence in the record to support a finding that Respondent is not physically or mentally fit. As for the District's reliance upon allegations relating to Respondent's attendance and performance as encompassed by Charges One and Three, I find for the reasons explained in my discussions about those Charges that such is not established by the evidence.

Charge Three – Unbecoming Conduct, Unprofessional Conduct and Neglect of Duty

Here the District alleges Respondent was not competent in his work, put students at risk as a result of his poor classroom management, did not want to teach and consequently neglected his duty, and failed and refused to comply with his CAP requirements.

PIPs

In its charge the District cited Respondent's work history and his receiving PIPs between 2003 and 2009. In this regard, the record establishes that Respondent received

PIPs in the ordinary course as an alternative route teacher and that he was rated as Good (the second highest rating in a four-level scale) in his annual evaluations during that period. Contrary to the assertions of the District, I find that Respondent's PIPs do not support the Tenure Charges. The Charge also cites discipline of Respondent in 2014 and 2016 that I find bears no relevance to Charge Three.

Not Wanting to Teach

A major element of the District's theory in support of its Third Charge – and all of its Charges against Respondent – is that Respondent told at least three administrators that he did not want to teach, and that his conduct thereafter was consistent with his declaration and establishes that he was refusing to teach. As a consequence, the District asserted Respondent has engaged in unbecoming and unprofessional conduct and has neglected his duty.

Not wanting to do something and refusing to do something are very different things. A teacher may not want to be in the classroom but may nevertheless be a good teacher, and so too a teacher may want to be in the classroom and yet be a poor teacher. I find that the record establishes that Respondent expressed to District administrators that he preferred to stay in his administration position over returning to the classroom. In that sense of preference, Respondent may not have "wanted" to return to the classroom. However, I do not find sufficient evidence upon which to base a finding that Respondent in any way refused to teach. In contrast to such, the record establishes that in late April / early May of 2018 when asked in writing by the Superintendent what his intentions were for the 2018-2019 school year, an inquiry that came after the conversation in which Superintendent Alston testified Respondent stated that he did not want to teach,

Respondent replied in writing that he wanted to continue with the District "...in whatever capacity is asked of me..."

As for the events during the 2018-2019 school year relied upon by the District to show Respondent's alleged refusal to teach, such as the lack of computer mice, the loud noises coming from his classroom, the slap fight video and Respondent's compliance with his CAP, I find the District's evidence is insufficient to support a finding that Respondent refused to teach or otherwise abandoned his position

The September 14 Loud Noise and Respondent's Lack of Mice

To support its charges of incompetence and inability to manage his classroom, the District offered evidence relating to allegations of screaming coming from his classroom and what administrators observed when they investigated the screams. I find that the evidence is insufficient to establish that the loud noise/scream heard from the administrative offices on September 14, 2018 came from Respondent's classroom. In this regard, neither Superintendent Alston nor administrator Thompkins were present in the classroom at the time of the alleged scream. In contrast, Respondent was in the classroom and testified that the noise did not come from the room. Respondent's testimony was consistent with his statement to the administrators at the time of the incident.

Additionally, although the statements reported by Respondent made by maintenance personnel at the time – that the noise did not come from the classroom – is inadmissible hearsay, Respondent's testimony that Respondent had complained about the lack of air conditioning in the room, that maintenance personnel were working on the air conditioning in the classroom ceiling at the time the administrators came down to investigate the noise, and that he and the two administrators agreed that the noise must

have come from the hallway is admissible, and are collectively contrary to the allegation of the District or a finding that Respondent was responsible for the noise.

The evidence supports the reports by Superintendent Alston and administrator Thompkins that at the time they visited Respondent's classroom to investigate the noise, a movie was playing, the students did not appear to be engaged and when they asked Respondent why the student were not on computers, Respondent reported that there were no computer mice in the classroom. The District blamed the lack of computer mice and therefore the lack of engagement of the students on Respondent, asserting that he caused the loss of computer mice the year earlier.

I find the evidence fails to show that Grievant was responsible for the loss of mice. He testified that the mice had been lost the year earlier and that the school was experiencing a loss of mice overall, including in the technology rooms and the library. Respondent's testimony in this regard was supported by testimony of Assistant Principal Chapman who confirmed that there was an issue with missing computer mice at the school at the beginning of the year, that the missing mice were also an issue in the school library.

Respondent also testified that in September 2018, not only did the classroom not have computer mice, he did not begin the year with logins for students to use the computers in the classroom (testimony again confirmed by the assistant principal) and did not have a curriculum for any of the three grades he was teaching. I credit Respondent's testimony concerning the lack of mice, logins and curriculum.

Considering the evidence in this regard, I find the District has failed to show that Respondent was responsible for screaming coming from his classroom, the lack of mice

for the room's computers, the lack of logins for students or the confusion that would predictably occur in the absence of a curriculum in the classes assigned to Respondent. I find the District has failed to establish the truth of its tenure charges in such regards.

The "Slap Fight"

In support of its charge that Respondent's lack of competence or neglect of duty put students at risk, the District offered evidence of an incident of "slap boxing" or a "slap fight" in Respondent's classroom. When offering the video of the alleged "slap fight" incident into evidence, Superintendent Alton testified that the conduct of the students could have easily escalated into harmful conduct and that Respondent was not paying proper attention as he was sitting on the counter and looking at his cellphone. When asked at the hearing what Respondent should have done, Superintendent Alton testified that Respondent should have stopped the fight immediately and had the students sit down. Consistently with the conduct recommended by the superintendent, the video captures the two students smiling and engaged with one another and Respondent stating that the problem with what they were doing was that it could easily escalate into something more serious and that the students should stop and sit down. The video shows the students then stopping and sitting down. As for Respondent using the cellphone, the record establishes that the District offers a cellphone app for teachers to take attendance, and Respondent offered uncontracted testimony that he was taking attendance on his phone at the time as students came into the classroom.

The District characterizes the 30 seconds of horseplay captured on video by a student in Respondent's classroom as evidence of a "slap fight" or "slap boxing" between students that warranted intervention by Respondent and the calling of security, and that

the incident occurred when Respondent was on his cellphone and not paying attention. I find such an exaggerated characterization by the District is evidence of the District's predisposition to terminate Respondent. The video does not show a fight or a dangerous absence of control of the classroom by Respondent. Instead, it shows two apparent friends engaging in horseplay that was stopped by the teacher in a timely manner. The facts that the students were not disciplined by the school and that the principal's referral of the incident to the IAIU resulted in a finding of "unfounded" support my finding herein. I find that the District has failed to establish the truth of its allegation that the slap boxing incident shows neglect of duty or otherwise supports the termination of Respondent.

Formal Reprimand of October 2, 2018

By memorandum dated October 2, 2018, the day Respondent was attending a classroom management seminar, Respondent was formally reprimanded for leaving work early on October 1, allowing a slap fight in his classroom as evidenced by a video reviewed by the principal on October 2, 2018, failing to provide his class computer mice and failing to improve his classroom management skills. Respondent was reminded of the requirements of his CAP, signed the week earlier.

I have found that the District has failed to meet its burden of showing that discipline of Respondent was warranted relating to the "slap fight" or the District's lack of providing its students computer mice.

The CAP

CAPs are typically seen in cases involving Charges of Inefficiency under the Act. Inefficiency is not alleged here. The District offered evidence relating to the 2018-2019

CAP to show that Respondent's failure to comply with the CAP is evidence of his refusal to teach.

The evidence establishes that the CAP was created at the same time that the District was contemplating tenure charges against Respondent; circumstances that place the good faith of the District's collaborative effort to improve Respondent's performance through the CAP into question. The District alleges that in addition to his being absent and tardy (discussed above relating to Charge One) Respondent failed to comply with the requirements of his CAP relating to timely submission of lesson plans, creation of a classroom management plan and gaining the appropriate authorization from administration prior to his being absent or tardy.

In regard to gaining approval for absences, the CAP itself provides; "Unless prior approval is obtained from an administrator, ensure that you come to work each day," and in regard to tardiness; "Unless you receive prior approval for a late arrival, ensure that you arrive at work on time every day." It is undisputed that Respondent did not receive the prior approval required by the CAP. In regard to the approval for absences, Respondent testified that he used the District's electronic attendance system – a system that informed him each time he used it that no approval was required. Considering the circumstances and the ambiguity created by the District's own attendance system, I find that the record does not establish that Respondent's failure to receive in-person approval for his absences and tardiness was an intentional or wanton refusal to comply with the CAP, or otherwise support the allegations of the tenure charge three.

The District also cites Respondent's failure to submit a classroom management plan by October 5, 2018. The requirement for the creation of the plan actually comes

under the section of the CAP listing “Supervisor Responsibilities.” There is no dispute that Respondent did not complete the plan by the October 5 date. However, the evidence establishes that he did complete the plan by October 15, 2018, a date established by an October 12, 2018 memorandum to Respondent from Principal Hendricks.

In addition to his failing to submit a management plan by October 5, Hendricks’ October 12 memorandum also discussed Respondent’s failure to submit lesson plans on Tuesdays as required of staff for four weeks in a row. Hendricks expressed her concern and directed Respondent to “Submit your lesson plans by midnight each Thursday.” And to Submit your detailed classroom behavior plan by Monday, October 15, 2018.”

Respondent offered un-contradicted evidence that he submitted his management plan prior to the October 15 deadline and having received curriculum for his classes, thereafter submitted his lesson plans as directed.

Importantly, the October 12 memorandum from Principal Hendricks concludes by providing:

Failure to adhere to deadlines will result in a formal written reprimand from my office and possible action by the Central Administration. If there is any part of this letter that need clarification or you have further questions regarding my concerns, please let me know immediately.

(Emphasis added)

The record establishes that Respondent met the deadlines contained in the principal’s October 12, 2018 memorandum. Yet, Respondent’s pre-October 12 conduct is included in the District’s support for its Tenure Charges. I find that the CAP should be considered within its own context; it is meant to be a school-year-long collaborative effort between the administrators and teacher to improve performance. It is not unusual for parties to experience bumps in the road in the early stages of such an effort. Within

such a context, I do not find that Respondent's initial struggles to comply with his CAP establish the unbecoming or unprofessional conduct or neglect of duty alleged in the tenure charges.

The Corrective Nature of Discipline/Notions of Fairness and Due Process

It is widely recognized that in all but the most egregious cases, discipline in the employment context is primarily intended to be corrective in nature; discipline is an effort by an employer to correct questionable conduct or poor performance by employees. Only when efforts to correct have failed through reasonable efforts under the circumstances, is discipline justly used to terminate the employment relationship. The TEACHNJ Act recognizes such a corrective-focused paradigm when, for example, it provides that a school district shall not dismiss or reduce the compensation of a tenured teachers except for "inefficiency, incapacity, or conduct unbecoming ...or other just cause," (emphasis added) or where the statute requires that school districts provide teachers who have received wanting annual evaluations the opportunity to correct their performance through the collaborative process of implementing a Corrective Action Plan (CAP) (emphasis added).

Necessary to any effort to correct conduct is the understanding that once the employee has received corrective discipline the employee actually be given the opportunity to correct his or her conduct. It is fundamentally contrary to any concept of justice in the workplace for an employee to receive further discipline for conduct before the employee has had a fair opportunity to reform his or her conduct. Similarly, it is fundamentally unfair for an employee: (1) to be placed within a set of circumstances by

the employer where the employee does not have the method or means of reforming the conduct at issue; (2) to be warned that further conduct could result in a less severe category of discipline such as a formal reprimand, only to then be terminated for the conduct subject to the warning; (3) be informed that his or her conduct has resulted in a formal written reprimand and thereafter - where no further similar conduct occurs – be subject to termination based upon the very same conduct subject to that reprimand; or (4) to be disciplined for the same conduct more than once.

Here, the District has engaged in each such unfairness toward Respondent. Thus; (1) the District required Respondent to teach 6th, 7th and 8th Grade tech without curricula, logins or computer mice; (2) Respondent was informed that if he did not meet deadlines established in an October 12 memorandum he would be discipline, but notwithstanding that he met such deadlines and remedied the conduct as directed by his principal, the then-remedied conduct was used as a basis for Tenure charges; (3) although Respondent engaged in no further conduct of the nature addressed in his October 22 formal reprimand the District's tenure charges thereafter subjected him to termination based upon the very conduct for which he had already been disciplined; and (4) a substantial portion of the District case was based upon conduct already the subject of Respondent's increment withholding.

Considering the record as a whole, including all documentary and testimonial evidence, and my observations of the demeanor of all witnesses presented, I am persuaded that in September 2018, soon after the start of the 2018-2019 school year, the District had already formed an intention to file tenure charges against Respondent largely based upon Respondent's absences during the 2017-2018 school year, and that the

charges it eventually filed on October 26, 2018 were primarily motivated by those absences.

Respondent's 2017-2018 absences had already been the motivation for the District's withholding of Respondent's increment and the District's rush to judgment to terminate Respondent in the early weeks of the 2018-2019 school year because of his absences in the prior school year is insufficient basis to support the District's Tenure Charges. The Tenure Charges relating to the 2018-2019 school year are largely without substance, and even considering Respondent's disciplinary record and principles of progressive discipline, have not been shown by the District to support termination.

Conclusion

The District has failed to establish the truth of its conduct unbecoming charge against Respondent. The Tenure Charges shall be dismissed.

Award

The subject tenure charges against Respondent Edward J Fuhmeister are dismissed.

The District is ordered to:

1. Promptly offer Respondent reinstatement to his former position.
2. Make Respondent whole for any and all losses of pay, seniority and other benefits he may have suffered as a result of his suspension from the date of his suspension to the date of her reinstatement by the District.

Dated: March 28, 2019



Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket Case No. 305-12/18 relating to tenure charges against Edward J. Fuhmeister on Thursday, March 28, 2019.



Timothy J Brown