

COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF THE PROCEEDING BETWEEN:

Amada Sanjuan, “Respondent” or “Tenured Assistant Principal”

- and -

School District of West New York, “Petitioner” or “District”

Agency Docket No: 218-10/20

AWARD AND OPINION

Appointment: Oct. 28, 2020

Hearings: Dec. 8 and 10, 2020

Posthearing Briefs: Jan. 6, 2021

Date of Award: Jan. 21, 2021

Arbitrator: Perry A. Zirkel

APPEARANCES:

For the West New York School District

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For Tenured A.P. Amada Sanjuan

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Factual Findings¹

On or about September 1997, the District hired Amada Sanjuan as a full-time bilingual teacher.² She served in that position at the elementary and secondary levels until 2012. From 2012 until 2015, she served as a disciplinarian at the middle school, which was a teaching position with a stipend.

In approximately March 2016,³ the District appointed her to an assistant principal's position. Her initial assignment in this position was in the system-wide early childhood education program, followed by about a year as an assistant principal at the middle school, and next as acting principal in the early childhood education program until summer 2019.

In August 2019, the District assigned Sanjuan to be one of the five assistant principals at the Memorial High School.⁴ For her entire career in the District until the incident at issue in this case, she had not received any discipline and generally had a solid reputation among staff and students.

On Wednesday, February 12, 2020, Sanjuan attended an evening student activity as part of her duties at the high school, which consists of three connected buildings. The activity was upstairs in one of the buildings, and she went to her locker to obtain her laptop computer. Asked by a teacher to provide a welcome for a parent-teacher organization meeting downstairs in the cafeteria, she walked over from the annex building to the stairway that went down to the cafeteria area. She called her adult daughter on her cellphone on the way. She stopped for a few

¹ Two prefatory clarifications about the language in this Award may be necessary. First, as is customary for arbitration awards and other adjudicative decisions, the references to witnesses' names herein, after the first identification, is via the surname only. No discourtesy is intended or should be perceived. Second, the use of "*supra*" in the footnotes is merely as cross reference to earlier (i.e., "above") parts of the decision.

² She signed her employment contract (Jt. Exhibit 1) at about that time.

³ The parties stipulated that she became assistant principal in March 2016, although Sanjuan credibly testified that her first appointment to this position was in October 2015. This limited difference is of no moment here, because there is no dispute that she had obtained tenure in this administrative position before the event at issue.

⁴ She received her salary letter (Jt. Exhibit) for the 2019–20 school year in July 2019.

seconds at the top of the stairway and, suddenly, fell down the entire flight of stairs, tumbling over and over until landing with a loud thud on the floor below. Hearing the noise, teacher Timothy Perillo, who helping with the meeting, and the custodian hurried to the location, finding Sanjuan sitting on the floor, with her purse to one side, and rubbing her thigh. After conversing with her briefly and retrieving her personal items, including keys, coat, and cellphone, from the stairs, Perillo went to summon one of the other assistant principals, Charles Krajewski. The custodian left to get a glass of water for Sanjuan.

As recorded on a nearby security camera in the hallway,⁵ Sanjuan, upon being left alone at that point, reached into her purse and took out a piece of paper. She then stood up and—without any visible impairment—ascended about half-way up the stairway, placed the paper on one of the stairs, and returned to the bottom of the stairway. Resuming her position on the floor, she continued rubbing her left thigh; checked the back of her head with her hands; briefly texted on her cellphone; and then checked her left ankle until the custodian returned with a paper cup of water.

Next, Perillo returned with Krajewski, who had an extended conversation with Sanjuan and checked the back of her head. Another co-worker brought a chair, in which they helped her up to sit. First, Sanjuan sat, then stood, then sat, rubbing and checking her left hip and thigh. After Krajewski left again temporarily and after conversing further with the custodian and Perillo, Sanjuan pointed up the stairs twice.⁶ Following her direction, the custodian ascended the stairs, found the piece of paper, and retrieved it.

⁵ 5 Jt. Exhibit 5 (surveillance video).

⁶ While Sanjuan successively pointed up the stairs, according to Perillo's credible testimony, she said that she had slipped on a piece of paper. His perception, both in his initial conversation upon finding her after the fall and in this follow-up interaction, was that she was embarrassed but not unclear or disoriented in her statements to him. Krajewski also credibly testified that (1) she attributed her fall to slipping on a piece of paper on the stairs, and (2) based on his experience as a youth athletics coach, she did not evidence any symptoms of a head injury.

Krajewski returned with what appeared to be a wet cloth or cold compress, which Sanjuan held on the back of her head. When she insisted that she did not want an ambulance, Krajewski subsequently drove her to the hospital,⁷ where her adult daughter came and took over. At the hospital, Sanjuan received an X-ray, a CT scan, and a medical examination that included a concussion protocol. The emergency room physician sent her home with crutches and medication, authorizing her to return to work on the following Monday.

For the next two days, which were Thursday and Friday, Sanjuan remained home, with the primary problem being a severely swollen and reddened thigh. She had a bump on the back of her head that, compared to her thigh, healed relatively quickly.

In the morning of the first of these two days, the District's benefits coordinator telephoned Sanjuan to fill out the requisite illness/injury report, which is submitted to the worker's compensation carrier in cases of injury at work. Because the school nurse was not on duty the previous evening and because Sanjuan was at home as a result of the accident, the benefits coordinator read each item on the form aloud to Sanjuan on the phone and recorded her answers verbatim on the form. The specific words that Sanjuan used for what had happened were as follows: "[she] saw a piece of paper on the steps and she slipped/lost her balance. She fell down the entire set of steps and landed on her back, hitting her head on the concrete floor."⁸ Sanjuan had the opportunity to verify the contents upon subsequently signing the form.

On the same day (February 13), the high school's principal, Oscar Guerrero, viewed the video and, surprised at the segment showing Sanjuan's placement of the piece of paper, summoned assistant superintendent Scott Wohlrab to come from central office to view it.

In the meanwhile during these two days, the principal of one of the elementary schools

⁷ The specific facility was the Hackensack Meridian Health Palisades Medical Center. ⁸ Jt. Exhibit 6.

called Alan Roth, who was an administrative assistant to the superintendent and former legal counsel to the District. He reported to Roth that the video of Sanjuan's fall, including the segment with the piece of paper, was circulating among his elementary school staff. Roth viewed the video with Wohlrab and, as authorized by the superintendent and as part of his usual duties, proceeded to investigate both the video-contents and video-dissemination issues.

Because the following week was school vacation, Sanjuan did not return to the District to resume her duties until her next scheduled workday, which was Monday, February 24.

On February 25, near the end of the school day, a colleague told Sanjuan that the video of her fall was in circulation among staff members of the high school and one elementary school. Upset about this unauthorized disclosure of her fall, Sanjuan immediately went to see principal Guerrero to express her concern. He suggested that she contact Wohlrab due his responsibilities for such human resources (HR) issues. She e-mailed Wohlrab and the superintendent that evening to register her complaint about the video's circulation.

On the next day (February 26), at the superintendent's Wohlrab held an investigatory meeting with Sanjuan, her union representative, and Roth. The focus of Roth's and Wohlrab's questioning was on the fall rather than the circulation.⁸ In response, Sanjuan reported vaguely recalling a piece of paper at the top of the stairway and falling down the stairs upon bending down to pick it up. She said that she did not have a specific memory of anything else beyond being concerned about potentially injuring her head on her way down and feeling embarrassed when co-workers arrived to help her. Roth and Wohlrab responded that the statement on the illness/injury report appeared to be false based on the entire video, which they then played for

⁸ Previous to the meeting, they had already determined that three other staff members, including two administrators, had circulated the video. The result was discipline that was rather limited in comparison to dismissal. Without providing the details, they told Sanjuan that they were taking care of the circulation issue, although they had not yet ascertained its complete specifics and extent.

her. After viewing it with them, she denied having any previous knowledge or refreshed recollection of the paper-placement segment. They also asked how she found out about the circulation of the video, and she declined to identify her source(s). She explained that it would be like a student ratting out, or snitching on, a friend. At the end of the meeting, Wohlrab notified her of her placement on administrative leave pending the conclusion of the investigation.

On October 9, the District submitted tenure charges against Sanjuan to the state education department. Charge 1 was on the grounds of conduct unbecoming based on her “attempt[] to manipulate the scene” and her “false report of the incident.” Charge 2 was on the grounds of conduct unbecoming or other just cause, citing “continued lying” in addition to the aforementioned two allegations and characterizing the illness/injury report as “insurance fraud.” Charge 3 was on the grounds of insubordination based on her refusal to disclose the information about her source upon Wohlrab’s and Roth’s questioning. Charge 4 appeared to be a cumulative catchall.

The charges were subsequently processed according to the applicable statutes to the appointment of the arbitrator on October 28 upon the Commissioner’s finding of sufficiency.⁹ The arbitrator held virtual hearing sessions on December 8 and 10, 2020 and the record closed upon the submission of posthearing briefs on January 6, 2021.

⁹ During the intervening period, Sanjuan provided her answer to the charges via her legal counsel.

Applicable Statutes and Policies

The New Jersey tenure laws are extensive,¹⁰ with the relevant provisions including the following examples:

§ 18A:28-5:

- a. The services of all teaching staff members employed prior to [Sept. 1, 2012] in the positions of teacher, principal, . . . , assistant principal, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the [specified] manner . . . after employment in such district or by such board for . . . [t]hree consecutive calendar years

§ 18A:6-17.1:

- b. (1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;
- d. Notwithstanding . . . any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

§ 18A:6-17.2:

- d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.
- e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

Additionally, the District's policies include the following:

Board of Education Policy No. 3150 – Discipline:¹¹

¹⁰ *E.g.*, N.J. REV. STAT. §§ 18A:6-10 *et seq.* and §§ 18A:28-1 *et seq.* For related regulations, see, e.g., N.J. ADMIN. CODE §§ 6A:3-5.1 *et seq.*

¹¹ Jt. Exhibit 3.

The Board of Education directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and

duly promulgated administrative rules and regulations governing staff conduct. Violations of those statutes, rules, policies and regulations will be subject to discipline.

The Superintendent shall deal with disciplinary matters on a case by case basis. Discipline measures will include verbal and written warnings as appropriate and will provide, wherever possible, for progressive penalties for repeated violations. Penalties may include suspension, withholding one or more increments, and dismissal.

Board of Education Policy No. 3211 – Code of Ethics:¹²

The educator recognizes the magnitude of the responsibility inherent in the teaching process. The desire for the respect and confidence of one's colleagues, of pupils, of parent(s) or legal guardian(s), and of the members of the community provides the incentive to attain and maintain the highest possible degree of ethical conduct. The Code of Ethics of the Education Profession indicates the aspiration of all educators and provides standards by which to judge conduct.

¹² 13 Jt. Exhibit 4.

Discussion

The Respondent’s argument of fatal procedural deficiency is not effective in this case. Specifically, the Respondent claimed, for the first time in its posthearing brief,¹⁴ that this case must be dismissed for “lack of sworn statements by ... the witnesses who provided the background information [that was the basis of] the tenure charges.”¹⁵ Neither the applicable statutes nor court decisions specify this purported requirement.¹⁶ Instead, the brief relied on an arbitration award that obviously does not suffice for several reasons, including that (a) the Respondent overstated its import¹³; (b) the award provided for dismissal “without prejudice”¹⁸; and, in any event, it is not at all binding authority.¹⁴ In any event, there was no showing in this case of any prejudice to the Respondent in her receiving notice of the charges and the evidence and her opportunity to respond to them via this arbitration hearing process.

Rather, the focus of this arbitral decision is the assessment of the evidence in relation to the tenure charges and the applicable case law. The Petitioner’s tenure charges in this case, when sorted out for to avoid overlap, amount to (1) conduct unbecoming or just cause for the

¹⁴ Respondent’s motion for dismissal and opening arguments did not raise this argument.

¹⁵ Respondent’s closing brief, at 4.

¹⁶ *E.g.*, N.J. REV. STAT. § 18A:6-11 (requiring the district administration to present the school board with “a written statement of the evidence under oath to support the charges”); N.J. ADMIN. CODE § 6A:3-5.1(b) (clarifying that this oath requirement applies to the school administrator instituting the tenure charges); N.J. REV. STAT. § 18A:6-17.1(b)(3) (requiring the school board, upon arbitration, to provide to the teacher with “all evidence including ... statements of witnesses”). The Respondent’s brief did not cite, and I do not know of, any applicable court decisions in this jurisdiction that provide the purported requirement.

¹³ First, the Respondent characterized the most important element of the cited award as the superintendent’s lack of firsthand knowledge. Respondent’s closing brief, at 5 (quoting from that award that “most importantly . . . nothing in the record indicated [the superintendent] directly participated in the investigation”). Instead, the arbitrator in that case explicitly explained that, contrary to this restatement of the teacher’s position in the case, “the fact that [the] Superintendent ... did not have firsthand knowledge of investigation is not itself fatal to the Charges.” *Watchung Borough Bd. of Educ. and Christopher Riley*, Agency Dkt. No. 112-520 (2020) (Barron, Arb.), at 14. Second, the Respondent accurately quoted arbitrator Barron’s inferred requirement about “signed witness statements” (*id.* at 12), but (1) this inference does not square with arbitrator Barron’s previous recitation and summary of the applicable New Jersey legislation and regulations (*id.* at 11), (2) signed does not mean sworn, and (3) he ultimately relied on “multiple shortcomings” concerning the specific sources and supports of the information rather than the lack of sworn witness statements (*id.* at 12–15). ¹⁸ *Id.*

¹⁴ *E.g.*, ELKOURI & ELKOURI HOW ARBITRATION WORKS 11-28 (Kenneth May et al. eds. 2012).

February 12 incident and the Respondent's subsequent accounts of it, and (2) insubordination for refusing an authoritative request to disclose her source. Although the ultimate determination will be based on their residual combination, the analysis will separately address each of these two categories of conduct in relation to the cited grounds of New Jersey's tenure law.

Alleged Unbecoming Conduct or Just Cause - Respondent's Incident and Accounts

The Respondent's subsequent accounts after the incident, starting with the illness and injury report form and extending to the investigatory interview, included not only inconsistencies with regard to the location and role of the paper, but also and much more importantly, the conspicuous and continued omission of her placement of the paper.

The Respondent's two primary defenses do not countervail the significance of this core conduct. First, the opening statement and the posthearing brief emphatically advanced the argument that the Respondent's conduct did not constitute "insurance fraud," which the tenure charges claimed. However, this claim was only a limited part of tenure charge 2. Moreover, the arbitrator need not determine whether the conduct amounted to insurance fraud, because assuming *arguendo* that it was not fraudulent in the insurance context, the above-identified incident remained for assessment, per the analysis *infra*, as either possible conduct unbecoming or just cause.

As her second and broader defense, the Respondent claimed that she does not recall anything beyond seeing a piece of paper and falling down the stairs. The first problem with this claim is credibility. In addition to its obvious self-serving nature, especially in the face of the security video, this testimony is cumulatively countervailed by (1) the cogent testimony of her co-workers that she showed no signs of cognitive impairment¹⁵; (2) the immediate medical examination did not yield any diagnosis of a concussion or other such head injury; and (3) her

¹⁵ 20 See *supra* note 6.

various accounts of the incident, including her immediate statements to co-workers, her report for the illness/injury form the next morning, and her investigatory interview approximately two weeks later provided an additional recollection of a causally connected role of the piece of paper.

The even more critical problem with the “don’t remember” defense is that even if it were believable, it does not negate the rather shocking paper-placement and -pointing behavior. Whether she recollected it or not, the evidence is undisputed that the Respondent engaged in this behavior without any evidence that it was somehow involuntary or without consciousness.

The remaining essential part of the determination is whether this clearly proven conduct amounted to “conduct unbecoming . . . or other just cause” under the tenure law.¹⁶ The state’s supreme court has clarified that conduct unbecoming is “conduct ‘which adversely affects the morale or efficiency of the [District]’ or ‘has a tendency to destroy public respect for [District] employees and confidence in the operation of [public] services.’”¹⁷ Moreover, the court clarified that “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.’”¹⁸ Although also within the broad meaning of just cause,¹⁹ the Respondent’s paper placement/attribution conduct adversely affects the morale or efficiency of the Petitioner.

This conclusion merits careful demarcation. The circulation of the video was attributable

¹⁶ See *supra* “Applicable Statutes and Policies” section.

¹⁷ Bound Brook Bd. of Educ. v. Ciripompa, 153 A.3d 931, 937 (N.J. 2017) (citing its previous decisions in 1998 and 2010).

¹⁸ *Id.* (citing its 1998 decision).

¹⁹ Indeed, even without any knowledge of why she put the paper on the stairs and of the cogent adverse testimony of her colleagues, any reasonable person viewing the video and being told that the protagonist was a school administrator would conclude that the paper placement was flagrantly unacceptable behavior.

to the District based on the unauthorized disclosure by other employees, who included at least one other administrator with access to the surveillance tapes as part of his or her duties. This fact warrants discounting the effect of the Respondent's conduct on the morale or efficiency of employees more generally or on public respect except for whatever would likely have resulted from typical rumor mills. The residual impact on the necessarily close administrative team of the relatively large urban high school is clearly sufficient for the requisite effect on the district. Although providing due respect for the Respondent's solid service in the school district, her fellow administrators—from the superintendent to the principal of her school to the assistant principal who came to her aid—credibly and understandably testified that her above-identified conduct adversely affected her reliability that was necessary for their collective efficiency. For examples, they cited the trustworthy collaboration needed for effective teacher supervision/evaluation and student safety/discipline.

Alleged Insubordination

In contrast, the alleged insubordination in this case plays a notably limited supporting role. Although the Respondent's refusal to disclose the identity of her collegial source fits within the rather broad meaning of insubordination,²⁰ its scope and severity are not particularly weighty in this case. First, the Wohlrab and Roth had already identified the primary perpetrators before questioning the Respondent. Second, the questioning was not focused directly on any additional perpetrators or on the specific recipients of the video dissemination, which were central to the investigation of this related but separable matter. Third, the severity of this insubordination

²⁰ *E.g.*, In re Tenure Hearing of Ziznewski, 2012 WL 1231874 (N.J. Super. Ct. App. Div. Apr. 13, 2012): “Insubordination” has been found in an employee's willful refusal of submission’ to the authority of [his or] her superiors.” *Laba v. Bd. of Educ.*, 23 N.J. 364, 385 (1957) . . . ; “a ‘willful disregard of an employer's instructions ...’ or an ‘act of disobedience to proper authority’” (quoting *Black's Law Dictionary* 802 (7th Ed. 1999)).

would have been clearer if the Wohlrab and Roth had changed their questioning from informal conversation to a formal directive.²⁶ Nevertheless, particularly as a school administrator, the Respondent is reasonably expected to be more forthcoming in providing such unprivileged information.²¹

Justifiable Penalty

For the over-arching concept of just cause in arbitration generally the just determination of sufficient cause is separable from a resulting just determination of the appropriate consequence, or penalty.²² In arbitration in modern New Jersey tenure cases, the mitigation of a disproportionately harsh penalty is also generally recognized. First, it appears to be judicially accepted for the tenure cases arbitrated under the alternative avenue of the New Jersey Public Employment Relations Commission.^{23,24} Second, although not yet directly addressed in court decisions concerning arbitrations under the TEACHNJ legislation, the 1967 decision of *In re Fulcomer*³⁰ required the independent determination under earlier legislation to integrally include “what penalty should justifiably be imposed.”²⁵ Courts have continued to apply the *Fulcomer*

²¹ Indeed, her analogy to students was clearly inapposite; one would expect far different behavior from a school administrator than from her students. If anything, a school administrator’s more cooperative behavior in investigations should be the model for students rather than the reverse.

²² *E.g.*, DISCIPLINE AND DISCHARGE IN ARBITRATION 31-35 & 85-89 (Norman Brand ed. 1998); FAIRWEATHER’S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 316-18 (Ray Schoonhaver ed. 1999); MARVIN HILL & ANTHONY SINICROPI, MANAGEMENT RIGHTS 98 (1986) (recognizing that just cause includes not only whether the employer had cause but also whether the employee’s discipline was just).

²³ *E.g.*, *Linden Bd. of Educ. v. Linden Educ. Ass’n ex rel. Mizichko*, 997 A.2d 185, 280 (N.J. Super. Ct. App. Div. 2010).

²⁴ A.2d 30 (N.J. Super. Ct. App. Div. 1967).

²⁵ *Id.* at 38. More specifically, in this tenure case based on alleged unbecoming conduct, the court concluded that “[a]lthough such conduct certainly warrants disciplinary action, the forfeiture of the teacher’s rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. . . . [Additionally,] consideration should be given to the impact of the penalty on appellant’s teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his [pension] rights.” *Id.* at 40.

²⁶ Neither of these two witnesses was particularly cogent, but they did make clear that their style was to conduct investigatory meetings as informal conversations.

principle and factors in the tenure context.³² Indeed, in apparent agreement with the various recent arbitration awards that the Respondent's brief cited and that applied *Fulcomer* to mitigate the penalty of termination,²⁶ the Petitioner's brief concluded that "it is within the right of the arbitrator to fashion discipline that is less than the dismissal of a tenured school employee."²⁷

Yet, the Petitioner's attempt to draw a line at the Respondent's administrative position, which would limit the arbitrator to mitigating the dismissal to a suspension, is without sufficiently solid support. Neither of the two cases that Petitioner cited was at the judicial level. Moreover, the first decision is more akin to the present situation, because the teacher at issue was in a supervisory position. In that case, Commissioner's ultimate decision was to remove tenure as a supervisor but continued it as a teacher.²⁸ In the other case, the arbitrator's *ultra vires* statement was merely dicta, because his ultimate determination was that "the mitigating evidence that was adduced regarding several charges was neither deemed sufficient to dismiss any specific charge nor to reduce the penalty of termination."²⁹

If, instead, said arbitrator had carefully considered the import of the cited "dismissal or

²⁶ *E.g.*, Rene Chakmakian and Sch. Dist. of Englewood Cliffs, Agency Dkt. No. 238-9/19 (2020) (Brown, Arb.); Monroe Twp. Sch. Dist. and Ronald Becker, Agency Dkt. No. 211-8/19 (2020) (Gerber, Arb); S. Hackensack Bd. of Educ. and Christopher Masullo, Agency Dkt. No. 1-1/17 (2018) (Cure, Arb.) (all mitigating termination to suspension).

²⁷ Respondent's closing brief, at 6 n.1.

²⁸ Hunterdon Sch. Dist. Bd. of Educ. v. McCormick, 1 N.J.A.R. 231 (OAL Jan. 4, 1980) (aff'd by the Commissioner of Education March 3, 1980). Respondent's brief tried in vain to distinguish the case based on the nature of the charges. However, insubordination was common to both cases, and the Petitioner's arguments about the impact of the Respondent's conduct in this case were specific to the particular high standards for administrators and the impact on the administrative team.

²⁹ David Petrella and Hackensack Bd. of Educ., Agency Dkt. No. 162-2/19 (Simmelkjaer, Arb) (2019) (June 19 clarification of award). Moreover, the general language in the statute about "dismissal or reduction in salary" (N.J. REV. STAT. § 18A:6-16) was as a threshold to proceed to arbitration, not as a limit to the arbitrator's remedial authority. Indeed, if it were, if it were a remedial limit, it is not at all clear how the prevailing mitigation to suspensions (*supra* note 33), unlike withholding of an increment, specifically fits as the intended meaning of a reduction in salary.

³² Specifically, for the alternative of ALJ decisions under the Commissioner’s ultimate authority, courts have recognized the applicability of the *Fulcomer* mitigation factors to tenure cases. *E.g.*, *In re Geiger*, 2015 WL 7261458 (N.J. Super. Ct. App. Div. Nov. 18, 2015); *In re Eisenhower*, 2014 WL 2742414 (N.J. Super. Ct. App. Div. June 18, 2014); *In re Roth*, 2013 WL 3284128 (N.J. Super. Ct. App. Div. July 1, 2013).

reduction in salary” language of the cited tenure statute,³⁰ the conclusion would be the opposite for two alternative reasons. First, this language is a threshold for the tenure charge(s) moving to the arbitration step rather than being dissolved for insufficiency; it is not necessarily a limit on the arbitrator’s subsequent remedial authority. Second, even if there were a showing that the legislature intended it to serve as a remedial limit, said “reduction” obviously is not attached to the narrow meaning of “salary.”³¹ If it were, the only lesser discipline that would seem to fit within its scope would be withholding of the annual increment. Indeed such a narrow interpretation would not only negate the parties’ aforementioned³² agreement about the arbitrator’s remedial authority under this legislation to modify termination to a suspension without pay, but also exclude demotion of a tenured employee, which by definition includes a reduction in pay,³³ from the prescribed protections of this legislation. As an additional consideration, under the New Jersey statutory framework, tenure—like certification—is separable rather than necessarily coterminous for teachers and principals. Consequently, the intended scope of the cited language provides for the application of the procedural protections of the act, including the decisional and remedial authority of the arbitrator, to extend to the various disciplinary employment actions within the broad meaning of reduction in salary.

³⁰ N.J. REV. STAT. § 18A:6-16 (requiring the Commissioner to refer to arbitration tenure charges upon threshold determination that they are “sufficient to warrant dismissal or reduction in salary”).

³¹ This narrow meaning would amount to a rate of pay for the agreed upon period, which is typically a year. Thus, for example, if a school board “docked” a professional school employee for any days exceeding the allowable limit sick or personal leave, it would not be understood as a reduction in salary.

³² *See supra* notes 33–34 and accompanying text.

³³ *E.g.*, *Williams v. Bd. of Educ. of Plainfield*, 422 A.2d 461 (N.J. Super. Ct. App. Div. 1980).

Finally, both the *Fulcomer* factors that apply to Petitioner and the equitable authority that attaches to the arbitrator converge on discipline that is tailored to fit the particular circumstances of this case. Although the Respondent's conduct justifies the loss of her administrative

position, the justifiable impact did not extend to a complete cessation of her employment.³⁴ The limited scope of the Respondent's incident and accounts in light of her long and solid record of service, predominantly as a teacher,³⁵ and the effect on her public school career warrant equitable mitigation.³⁶ More specifically, rather than justifying the loss of her entire career, the Respondent's conduct in question warrants retention of her tenured teaching role in the District.

The final tailoring includes consideration of back pay. The Respondent's failure to be take ownership and be literally accountable for her paper placement/pointing behavior, particularly after viewing the video, warrants that her reinstatement, provided that it is sufficiently prompt, be without backpay. For clarity as to the meaning of "prompt" in the circumstances of this case, the Petitioner shall re-start the pay and benefits of the Respondent within 60 days of receipt of this Award.

³⁴ As explained *supra*, the wider effect beyond the high school's small but close-knit administrative staff was the fault of one or more of her fellow administrators, certainly not the Respondent. The Petitioner did not show that the impact had reached students to whom she could be assigned as a teacher, much less whether it would have done so in the absence of the unwarranted dissemination.

³⁵ As recited more specifically in the "Factual Findings" section, 19 of the Respondent's 23 years of effective service in the District were as a teacher rather than as an administrator. *Supra* notes 2–3 and accompanying text.

³⁶ See *Fulcomer* factors, *supra* note 31.

Award

In sum, after careful attention to the parties' arguments, the applicable law, and the case evidence, the arbitrator concludes that the Respondent's conduct justified a substantial penalty less severe than termination. The Petitioner shall reinstate her to a teaching position, with her pay and benefits as a teacher with tenure commencing within 60 days of the dates of this Award.



1/21/21

Perry A. Zirkel, Arbitrator

Date