

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF THE TENURE HEARING OF:

SCHOOL DISTRICT OF THE TOWNSHIP OF
BELLEVILLE, ESSEX COUNTY

Petitioner

AND

ALBERTO LOPEZ AND
WILLIAM JOHNS

Respondents

OPINION
AND
AWARD

AGENCY DOCKET NOS. 125-8/21 and 126-8/21

Before
Felice Busto
Arbitrator

Appearances:

For the Petitioner:

Ari D. Schneider, Esq.
The Busch Law Group, LLC

For Respondent William Johns:

Nicholas Poberezhsky, Esq.
Caruso Smith Picini, PC

For Respondent Alberto Lopez:

Ben Weathers, Esq.
Caruso Smith Picini, PC

Procedural History

This proceeding arises from two sets of tenure charges filed by the School District of the Township of Belleville [the “Petitioner” or “Board”] against Alberto Lopez and William Johns [“Respondents” “Lopez” or “Johns”], tenured employees of the Board. The tenure charges alleging misbehavior, neglect and other offenses were filed on July 29, 2021. Jt. Exs. 1 & 2. Respondent Johns and Lopez filed their respective Answers to the Charges on August 29 and August 31, 2021. Jt. Exs. 4 & 6. On September 3, 2021, in accordance with N.J.S.A. 18A:6-16, I was appointed by the Bureau of Disputes and Controversies to hear and decide these consolidated tenure cases.

A pre-hearing telephone conference was held on September 16, 2021. At that time a briefing schedule was established for Respondent Lopez’ Partial Motion to Dismiss Charge VI which was submitted on October 8, 2021. The Board filed its Opposition to the Partial Motion to Dismiss on October 14, 2021. On October 21, 2021, I denied Respondent Lopez’ Motion for Partial Dismissal.

Arbitration hearings were held on December 1-2, 2021 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey and on January 10 and 18, 2022 by videoconference pursuant to the agreement of the parties. A stenographic record was made of all proceedings.¹ At the hearings, each party argued orally, presented and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from the Board’s witnesses, Dr. Richard Tomko, Superintendent Belleville Public Schools District,

¹ References to the Transcripts will be denominated as follows: December 1, 2021 (T. 1); December 2, 2021 (T. 2), January 11, 2022 (T.3) and January 18, 2022 (T.4).

Richard Henry, Director of Facilities, and Alessandro “Alex” Percio, Head Custodian Belleville Middle School.

Diane Bruno, Middle School Secretary, Anne Hemsley, Middle School Secretary, Peter Rossi, former Middle School Custodian, and Respondents William Johns and Alberto Lopez testified for Respondents. Time extensions and requests to hear and decide this matter were timely requested and granted.

The Board and Respondents submitted post-hearing briefs and authorities on or about March 14, 2022 whereupon the record was closed.

BOARD POLICIES

4281 – INAPPROPRIATE STAFF CONDUCT

The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within the school district...the Board of Education holds all school staff to the highest level of professional responsibility.

...

School staff's conduct in completing their professional responsibilities shall be appropriate at all times.

...

... A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

P. Ex. 25.

4211 – SUPPORT STAFF ATTENDANCE

A. Reporting and Absence

A support staff member who anticipates absence from work will call their immediate supervisor before the intended absence, whenever possible.

P. Ex. 26.

4211 – ATTENDANCE

Employee attendance is an important factor in the successful operation of any school district and in the maintenance of the continuity of the educational program.

P. Ex. 27.

SPECIFICATION OF CHARGES²

All of the allegations and facts set forth in the Background Information, the accompanying Sworn Statement of Evidence and the exhibits annexed thereto and referenced therein are incorporated by reference as if fully set forth herein, in addition to the following facts.

Beginning on March 8, 2021, Mr. Lopez/Johns has engaged in a series of acts which violate both District policy and procedures and are also contravene to its expectations of how staff is expected to behave. Mr. Lopez/Johns inappropriately proceeded to leave his position approximately an hour and fifteen minutes early each evening.

Mr. Lopez/Johns was scheduled to work from 3:00 p.m. to 11:30 p.m. each day. Mr. Lopez/Johns was scheduled to work the following dates in 2021: March 8th, March 9th, March 10th, March 11th, March 12th, March 15th, March 16th, March 17th, March 18th, March 19th, March 22nd, March 23rd, March 24th, March 25th, March 26th, March 29th, March 30th, March 31st and April 1st. Other than the 4 hours of Personal Leave Mr. Lopez used on March 16th he did not put in for any time off for sick, personal, vacation, etc. for any of the above noted dates. On the above dates, Mr. Lopez/Johns proceeded to leave the District premises around approximately 10:15 p.m. each

² The charges against Respondent Johns and Lopez are nearly identical. For brevity, the charges are jointly summarized.

evening, an hour and fifteen minutes before the end of his shift at 11:30 p.m. Notwithstanding the foregoing, he collected his full pay for all of the days and to date has made no offer or effort to refund the money.

Note: The parenthetical subheadings used in each charge are intended to aid the reader and not necessarily to represent the actual, statutory charge.

CHARGE I

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Failure to Follow Procedures)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez/Mr. Johns knowingly or negligently failed to follow procedures by not notifying his immediate supervisor of his absences and/or early departures as set forth above.

CHARGE II

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Theft by Deception)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez's/Mr. John's acceptance of payment for days at issue on which he knew that he did not properly and fully render the services he was required to provide constitutes theft of public monies by deception.

CHARGE III

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Unjust Enrichment)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez's/Mr. Johns acceptance of payment for days at issue on which he knew that he did not properly and fully render the services he was required to provide, constitutes unjust enrichment.

CHARGE IV

MISBEHAVIOR, NEGLIGENCE AND OTHER OFFENSE

(Breach of Contract)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez's/Mr. Johns' failure to fulfill his contractual obligations by inappropriately abandoning his assigned duties approximately an hour early each evening constitutes breach of contract.

CHARGE V

MISBEHAVIOR, NEGLIGENCE AND OTHER OFFENSE

(Endangerment)

The Board incorporates by reference all of the factual allegations set and referred to above as if fully set forth herein. On the dates on which Mr. Lopez/Mr. Johns left early, he did so in concert with the other three custodians assigned to his shift. In addition to the above noted problems emanating from Mr. Lopez's/Mr. Johns' unauthorized early departures, proper cleaning and sanitation protocols required to protect against COVID-19 infection were not regularly completed, resulting in complaints by numerous staff and the BEA. This action by Mr. Lopez/Mr. Johns, in violation of the Board's State-required and approved Plan, exposed the staff and students to a potentially dangerous situation, and exacerbated fears and anxiety among them regarding the safety of the School.

CHARGE VI

MISBEHAVIOR, NEGLIGENCE AND OTHER OFFENSE

(Pattern of Misbehavior)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez/Mr. Johns has been engaged in a protracted series of events which constitute a clear pattern of misbehavior, neglect and/or other offenses. This inappropriate course of action manifests a series of intentional, calculated actions intended to deceive the District.

BACKGROUND

Many of the relevant facts in these consolidated cases are not in dispute. Respondents Johns and Lopez have been employed by the Board for 7 and 15 years respectively. Respondent Johns has been assigned to the Belleville Middle School (“Middle School”) since 2017. Respondent Lopez has been assigned to the Middle School since 2020.

The Middle School is an older building comprised of five floors and forty classrooms. With the advent of the COVID-19 pandemic, the schedules of in school learning were changed as well as the schedules of the custodians. Although the testimony in this case addressed various time periods since 2019, the period at issue for the tenure charges involves the month of March 2021.

In March 2021, four assistant custodians were assigned to the Middle School—Respondents, Pete Rossi and new hire Edgar Lopez. The scheduled working hours for the custodians are 3:00 to 11:30 pm with an hour lunch between 6:30 and 7:30 p.m. During March 2021, the school had returned to “hybrid” instruction during which students reported to school on alternate days (Tuesday/Thursday and Monday/Wednesday) for half day instruction between 9:00 a.m. and 1:00 p.m. On Fridays, when students were not present in the building the custodians conducted a deep cleaning of the building during the day.

The duties of assistant custodians include cleaning classrooms and lockers, disinfecting bathrooms, vacuuming, floor scrubbing, trash removal and other duties. P. Ex. 2. Richard Henry, Director of Facilities, testified that the custodians

are assigned to specific areas in the school and that there is a sheet hung in the break room which contains those assignments.

Alex Percio is the Head Custodian at the Middle School. The Head Custodian is a bargaining unit member who has no authority to hire, fire or discipline the custodians. As Head Custodian, which is a stipend position, Percio's shift is from 6:00 a.m. to 3:30 pm. Percio reports to Richard Henry.

According to the testimony of Henry, Percio, Rossi and Respondents, the Head Custodian is responsible to instruct the assistant custodians if they are needed to perform special cleaning in addition to their regular duties. Henry testified that Head Custodian Percio is not a supervisor but that "he [Percio] just directs the school for me." T. I, 72.

Henry testified further that he is the immediate supervisor of Respondents and the other night custodians. He testified that in order to be absent or to leave work early Respondents were required to contact him by email or phone. He testified further testified that Percio had no authority to change the schedules of the custodians or to permit them to leave their work before 11:30 p.m. at the end of their shift.

During the pandemic, the custodians' duties were expanded to comply with new cleaning protocols designed to ameliorate the spread of the virus pursuant to the Board's Restart and Recovery Plan to Reopen School. P. Ex. 28. Henry testified that he conducted a training during the summer of 2020 during which custodians, including Respondents, were instructed on the use of a backpack sprayer. This backpack utilized a thyme-based chemical which had been found to

be effective in counteracting the aerosol spread of COVID-19 virus. The spray also resulted in the curling of teachers' papers when used. The Middle School had one backpack which was shared by the custodians for use in their respective sections.

Henry also testified that in February 2021, the building's electrician, also a bargaining unit member, complained to him about the cleanliness of the building including dirty floors, dusty lockers and chalk and marker boards not cleaned. Henry did a walk through of the building and observed that "these things weren't being done." T. I, 32. Henry also was provided with a photograph that had been sent to Superintendent Richard Tomko of a stain, at which point he directed Percio, the day custodian, to take care of it.

As complaints persisted, Henry was directed by the Superintendent to conduct further investigation and he pulled the available video from the school's cameras. When he reviewed the video for March 2021 it revealed that between March 9 and April 1, 2021 all four custodians were leaving the building as a group anywhere from 15 minutes to an hour and 15 minutes before the end of their shift. P. Ex. 1.³

After retrieving the video, Henry held individual meetings with all four custodians during which he questioned whether Respondents were taking their lunch and break and working their assigned hours, i.e., 3:00-11:30 pm. During these meetings Respondent Johns denied leaving early but Respondent Lopez admitted that he was leaving work prior to 11:30 p.m.

³ Henry testified that the camera's video is retained for 28 days.

Thereafter, all four custodians were suspended in April 2021 and the tenure charges ensued against Respondents Johns and Lopez. Rossi resigned from his position but new hire Edgar Lopez continued to be employed.⁴

Superintendent Richard Tomko testified that during school year 2020-2021, he held a series of stakeholders meetings which included teachers, principals, union representatives and others. He stated that he began to receive complaints from teachers regarding cleanliness in the building in the summer of 2020 which continued after the Middle School reopened in October 2020. He testified that, as these meetings became more contentious, he asked Henry to investigate further. Dr. Tomko testified that a teacher reported a coffee stain that was not cleaned up and another teacher reported that her papers were not curled, meaning that she was concerned the backpack sprayers were not being deployed.

Dr. Tomko also testified that Respondents' conduct was the most "egregious" conduct he had encountered in his tenure as Superintendent. He emphasized that this was especially due to the unprecedented COVID-19 pandemic. He testified that he felt like an "idiot" because he had been "running interference" and "sticking up" for the custodians when there were complaints about the cleanliness of the building. Dr. Tomko testified that he later reported Respondents' conduct to the Belleville Police Department; however no criminal charges ensued.

⁴ Superintendent Tomko testified that he believed Edgar Lopez' conduct to be less serious in nature because he did not have his boiler's license and was not permitted to remain in the building without another custodian present.

Respondent Johns testified that he was assigned to clean the third floor, teacher's lounge, kitchen and stairwells. Johns testified that the custodians' schedules were in a state of flux during the pandemic. During the summer, the custodians worked days when school was not in session. He testified that Head Custodian Percio told the four custodians that they should "leave when you're done" upon completion of their daily assignments due to the pandemic. T. II, 153. Johns also testified that because Percio issued work assignments and other cleaning duties, he considered Percio to be his direct supervisor and believed that he could be subject to discipline if he failed to follow his instructions. He also testified that since 2018 he had notified Percio when he would be late or out sick and that vacation days had to be approved by the school's principal.

Respondent Lopez testified that he was assigned to the Middle School in 2020 shortly before the pandemic. His area consisted of the second floor, basement, basement boys' bathroom and stairwells. Lopez testified that he reported to work early each day at approximately 2:00 or 2:15 p.m. Lopez testified that he became aware of a teacher's complaint about the cleanliness of Room 208 which was in his section. He testified that there was construction in the building consisting of opening the roof and walls that created dust.

Lopez testified that Percio told the custodians to go home early after they had completed their duties. He also testified that he considered Percio to be his direct supervisor and believed that he could be disciplined if he did not follow his instructions.

Lopez testified that he was able to complete his duties and still leave an hour early in March 2021 because each day teachers were in school for a half day and, as a result, half of the classrooms were not being used. Lopez testified that he was remorseful for his conduct and that he should have followed his own judgment about his work schedule instead of listening to others.

Lopez also testified with respect to personal and health issues he experienced during 2008-2009 and 2011-2014 when he received several letters of reprimand regarding attendance, sleeping on the job and other issues.

Former custodian Peter Rossi testified that Percio told the custodians to leave the building early in March 2021 and for some period prior to that time. Rossi testified:

[W]e were told that once you got your work done, due to COVID – because basically there was nobody in the building-disinfecting, cleaning doing all our extras, when you got done with your work you can go home. And that is what we did...[Percio said that] “it wasn’t fair for custodians to be in school when everybody else was home because they were -- they care about them...they don’t care about you guys. Just do your job. When you get done, go home.”

T. II,141-142.

Rossi also testified that he believed Percio had authority to permit the custodians to leave work early. He further testified that he believed he could be subject to discipline if he failed to follow an order or instruction of Percio. He testified that by issuing work assignments he considered Percio to be “my regular school supervisor, and then the big guy was Richard Henry.” T. II, 137.

Rossi testified that he and the other custodians reported to work early at 2:10 or 2:15 p.m. when teachers and students had departed the building to meet

with Percio for any special cleaning instructions toward the end of Percio's shift [which ended at 3:30 pm.]. Despite the pandemic, he testified that the custodians helped each other in the building and were able to complete their duties and leave an hour or more early daily.

Head Custodian Percio, testified on rebuttal, that he did not issue the custodians a directive to leave work prior to their 11:30 p.m. end of shift. He testified further that "[e]ven if I did told them, I'm not the manager they know that." T. IV, 23. Percio also testified that when he issues directives regarding cleaning or conveys instructions from Henry, the custodians are required to follow them.

Middle School secretaries Dianne Bruno and Anna Hemsley testified regarding Respondent Johns' work ethic, volunteer activities and his responsiveness to their cleaning requests.

POSITIONS OF THE PARTIES

The Board

The Board argues that it has established the Respondents are guilty of neglect, misbehavior, and/or other cause warranting their dismissal. With respect to each of the charges the Board argues as follows:

CHARGES I-IV

The Board relies upon arbitral cases under TEACHNJ in which arbitrators have dismissed tenured employees for engaging in inappropriate conduct which damage the reputation of both teachers and the Board. See *IMO the Tenure Hearing of David Clune, Black Horse Pike Regional School District, Camden County*, Agency Dkt. No. 47-2/14 (Mastriani 2014) (teacher dismissed for failing to

report an arrest, improperly using the District's network and engaging in inappropriate text messaging with former students); *IMO the Tenure Hearing of Mark C. Bringhurst, School District of the City of Vineland, Cumberland County*, Agency Dkt. No. 236-8/12 (Gifford 2012) (teacher dismissed for running naked on a dare through an apartment complex outside of school hours).

The Board contends that Respondents knew (or should have known) that abandoning their shift early during a pandemic was, at worst, criminal and, at best, extremely poor judgment. The Board also references other cases in which custodians were dismissed for conduct unbecoming and/or neglect. See *IMO Marcelino Basulto, Sch Dist of West NY*, Superior Ct. NJ (App. Div.) Dkt. No. A-1493-09T11493-09T1 (2010) (custodian dismissed due to failure to properly clean classrooms and repeatedly leaving post without proper authorization); *IMO Tenure Hearing of Donald Dudley, Neptune Sch Dist*, Commissioner Decision No. 451-11 (October 24, 2011) (custodian terminated for frequently leaving early and sleeping on the job).

The Board submits that parents with children assigned to the Middle School have a right to expect that the custodial staff will do everything possible to keep the school clean and germ free, thereby limiting the spread of COVID-19. Respondents' dereliction of their duties reflects poor judgment and a disregard for the safety and wellbeing of staff and students. As a result, the Board submits that Respondents are unfit to continue as employees in the public school system. By leaving their posts one hour early on a daily basis while getting paid for their full hours, the Board contends that Respondents violated the public trust.

The Board argues that Respondents failed to follow proper procedures in departing work at least one hour early on a daily basis in March 2021. The Board emphasizes that it is uncontroverted that Respondents never sought or received permission from Superintendent Henry to leave work early every day.

Further, the Board argues that Respondents failed to establish their affirmative defense that they were directed to leave early by Head Custodian Percio. According to the Board, Percio's testimony refuted Respondents' defense which was raised for the first time at the hearing and not in their prior statements or answers.

Moreover, the Board contends that despite leaving at least one hour early ever day in March 2021, Respondents deceptively collected 8.5 hours of pay which constitutes theft of time and/or unjust enrichment.

The Board maintains that this conduct also constitutes a breach of contract because Respondents failed to work their contractually-required 8 ½ hours.

CHARGE V

The Board argues that by cutting their contractual workday short on a daily basis, Respondents were unable to complete all of their required cleaning tasks. The Board contends that the amount of cleaning increased as a result of the pandemic and Respondents needed to spend more time accomplishing their tasks and not less. The Board emphasizes that the Respondents' dereliction of duty led to several complaints of uncleanliness in the building and that their conduct endangered staff and students at the Middle School.

CHARGE VI

The Board submits that Respondents engaged in a pattern of misbehavior by leaving early every day during March 2021. This premeditated pattern of misconduct only ended when it was discovered by the administration. The Board asserts that it is likely Respondents left early for months if not the entire 2020-2021 school year.

PENALTY

The Board argues that Respondents should be dismissed from their positions due to the egregious nature of their misconduct. The Board argues that aggravating factors outweigh any mitigating factors. *See e.g., In Re Fulcomer*, 93 NJ Super. 404, 421 (App. Div. 1967) (factors to be considered in assessing the penalty include the nature and gravity of the offense under all circumstances; mitigating or aggravating factors, impact of the penalty of the employee's career; and any harm which the teacher's conduct may have had on the maintenance of discipline and proper administration of the school).

The Board maintains that Respondents have exhibited no remorse for their conduct. The Board argues that during a global pandemic when their role was paramount to ensuring the cleanliness of their building, Respondents have established no legitimate reason to mitigate their penalty. Respondents' conduct jeopardized the safety of the staff and school and the Board has no reason to believe that Respondents would not engage in similar misconduct in the future. The Board submits that Respondents' transgressions were not isolated lapses in

judgement but were plainly calculated and repetitious. According to the Board, these factors weigh heavily in favor of dismissal.

With respect to Respondent Lopez, the Board contends that he has a long record of misconduct and was repeatedly warned about poor performance including cleaning, excessive absenteeism, falling asleep on the job and appearing to be under the influence while at work. The Board emphasizes that Respondent Lopez has been given ample opportunity in the context of progressive discipline to improve his performance but has been unwilling or unable to do so.

Respondents

Respondents argue that the Board has failed to establish that they have engaged in conduct unbecoming and urge that the charges be dismissed. Respondents emphasize that the Board is not permitted to rely on hearsay evidence in support of the charges. In addition, Respondents argue as follows:

CHARGES I-V⁵

Respondents contend that the Board created the appearance that Percio had supervisory authority over the night custodians. The evidence established that Percio issued the night custodians their assignments and other tasks and that they were required to comply with his directions. Respondents also contend that Percio's denial that he authorized them to leave work early was not credible in light of the testimony by Respondents and former custodian Rossi. Respondents submit that Percio should be found to have supervisory authority over the

⁵ Respondents Johns and Lopez filed individual briefs in support of their respective positions. However, because there is substantial overlap in Respondents' arguments with respect to Charges I-V their positions are summarized here jointly.

custodians and that he authorized them to leave work early once their assignments for the night had been completed.

Respondents maintain that the Board cannot genuinely argue that Percio was merely a coworker or liaison between the administration and Respondents but also argue that they were expected to comply with his instructions. Respondents maintain that the confusion created by the Board's use of Percio should negate any finding that Respondents acted willfully to defraud the Board.

Respondents also argue that by reporting to work early each day, the record established that Respondents effectively worked the 7.5 hour shifts that they were paid for and that therefore there was no theft of time or unjust enrichment. See also *In the matter of the Arbitration of the Tenure Charges Between Belvedere Board of Education and Daniel Dempsey and Andrew Poyer*, DOE Dkt. Nos. 52-3/19; 56-3/19 (January 13, 2020) (although teachers/coaches had exercised poor judgment in fundraiser solicitations, arbitrator did not find that funds were raised as a result of fraud).

Moreover, Respondents argue that the Board's charges of failure to follow procedures, theft of time, breach of conduct and unjust enrichment should be dismissed due to the affirmative defenses of waiver and consent. Respondents rely upon the decision in *IMO the Tenure Hearing of Michael Coe, School District of the City of Trenton, Mercer County*, Agency Dkt. No. 43-3/17 (November 10, 2017) (arbitrator rejected charges that Respondent had deliberately falsified his timesheets by "rounding up" because he had calculated his time in a substantially similar manner over a protracted period of time without notification by

administration that his methodology was inconsistent). Respondents argue that here, like in Coe, Respondents engaged in a practice of reporting for work early, completing their assignments and then leaving prior to 11:30 p.m. but were never advised that this conduct was inconsistent with the Board's policies and expectations.

CHARGE V

Respondents argue that the Board has also failed to meet its burden with respect to Charge V that their behavior or neglect created a "endangerment." Although this charge provides that Respondents' early departures resulted in cleaning that was not regularly completed and exposed staff and students to "a potentially dangerous situation and exacerbated fears and anxiety among them regarding the safety of the school," the Board has failed to identify a single task or assignment which Respondents failed to complete. The Board contends that because Respondents left work early the Board suspects that they failed to properly clean their designated areas but argues that such speculation cannot satisfy its burden of proof.

Moreover, Respondents submit that even if the Middle School was untidy on occasion, it was not clear who caused the mess, when it was caused or which, if any, night shift custodian was responsible. Nor was there evidence that Respondents failed to do anything that put anyone in a dangerous situation. Respondents maintain that the testimony and evidence presented by the Board is purely speculative and based on uncorroborated hearsay. Respondents credibly

testified that they completed all of their tasks and assignments prior to leaving for the evening and that they utilized the backpack sprayer as instructed.

CHARGE VI

Respondents argue that the Board has failed to meet its burden of establishing a “pattern of misbehavior.” Respondent Johns argues that he cannot be found guilty of a pattern of misbehavior because he has no disciplinary history. Respondent Johns also contends that Charge VI is vague and ambiguous and lacks any factual predicate to support it.

Respondent Lopez argues that Charge VI is ambiguous as to whether the alleged pattern of misbehavior refers to March 2021 or a pattern of misbehavior dating back to the years 2008-2014. Respondent Lopez submits that that his previous letters of reprimand are relevant only for purposes of progressive discipline which should not be applicable because the Board has failed to meet its burden with respect to the March 2021 conduct.

PENALTY

Respondent Johns argues that even if one or more of the charges are sustained, a penalty less than termination is warranted. Respondent Johns emphasizes that he had no disciplinary history in his career. There was also testimony regarding his volunteer activities at the school. In addition, Respondent points to the two school secretaries who testified regarding the quality of Johns’ work performance and attitude. Moreover, Respondent Johns expressed remorse for his actions after he learned that Director Henry and Superintendent Tomko did

not approve of his early departures and testified that he would comply with his contractually designated hours in the future.

Respondent Lopez argues that the Board failed to establish that he would be unable to continue work as a custodian. Respondent Lopez emphasizes that he has been employed by the Board for nearly 17 years. Moreover, based on the totality of circumstances, Respondent Lopez contends that the Board cannot reasonably argue that his actions were premeditated or malicious. Respondent Lopez submits that at worst he used poor judgment to assume he could leave early upon finishing his work for the evening. However, Respondent Lopez maintains that the judgment of the custodians was clouded by the false impression created by the Board that Percio was their direct supervisor and that they should follow his instructions. In addition, Respondent Lopez contends that the fluctuation of work schedules in response to the COVID-19 pandemic added to the confusion. Thus, Respondent Lopez submits that these extenuating circumstances weigh against the penalty of termination.

In addition, while Respondent Lopez concedes that he has received prior letters of reprimand, he insists that for the past 7 years he has been an exemplary employee. With respect to the letters of reprimand that were issued between 2008 and 2014, Respondent Lopez had personal stress as a result of his divorce and child custody issues. He also testified that during 2010 to 2014 he had several injuries which required additional time off and that this contributed to complaints about his attendance during those years. Respondent Lopez maintains that given

the passage of time and the lack of any direct evidence regarding his prior discipline, these letters should be afforded limited weight.

Finally, Respondent Lopez submits that there is no reason to believe that he would engage in similar conduct in the future if he is reinstated to his position. Respondent Lopez testified that he was remorseful and committed to honor his contractual work schedules.

DISCUSSION

N.J.S.A 18A:6-10 provides that no tenured employees of the public school system “shall be dismissed or reduced in compensation...except for inefficiency, incapacity, unbecoming conduct, or other just cause issue. The Board bears the burden to establish that it has met this standard by a preponderance of evidence. Although conduct unbecoming a public employee has not been defined by statute, the courts have held that it is conduct “which has a tendency to destroy public respect for government employees” and “incompetence in the operation of [public] services.” *In Re Emmons*, 63 N.J. Super. 136, 140 (App. Div. 1960); *Karins v. City of Atlantic City*, 153 N.J. 532, 553 (1998).

CHARGE I

(Failure to Follow Procedures)

The Board’s attendance Policy #4221 provides that “[a] support staff member who anticipates absence from work will call their immediate supervisor before the intended absence, whenever possible.” P. Ex. 26. Respondents admitted that they left the school approximately an hour or more early on multiple days during March 2021.

The evidence established that in order to leave early, arrive late or call out sick, the Board's procedure is for Respondents to contact their direct supervisor, Richard Henry. I credit Respondents' testimony that Percio allowed them to leave early. Contrary to Respondents' assertions, however, the evidence does not support the conclusion that Percio was a supervisor. Percio is a member of the same bargaining unit as Respondents and receives a stipend for his additional duties as Head Custodian. Percio has no authority to hire, fire or discipline the assistant custodians. Percio acts as a liaison between Henry and the custodians and instructs them with respect to cleaning and other duties as needed.

Certainly the record reflects that Percio was delegated considerable authority to assign work to Respondents and the other custodians because he was in the Middle School daily and overlapped with them briefly at the end of his day shift. Although there was some blurring of the lines of Percio's authority, Respondents should have known that Henry, and not Percio, had the authority to change or alter their schedules.

Even assuming, as discussed in more detail with respect to Charge II below, that Respondents believed they had to follow instructions from Percio, granting permission to leave early is different than issuing instructions pertaining to custodial duties. Respondents, as custodians with many years of service, should have known that Percio's authority to issue instructions regarding cleaning duties did not extend to unilaterally changing their working hours in this manner.

Respondent Johns, in an effort to bolster his position that Percio is a supervisor, testified that he had been contacting Percio regarding absences since

2018 because Henry had not responded to his emails or text messages. Johns' testimony was not refuted and it may be that this process was acceptable for an occasional absence or lateness or in circumstances when Henry was unavailable. However, there is a clear distinction between contacting Percio regarding one lateness or early departure and a change of schedule consisting of daily one hour (or longer) early departures over a month long period.⁶ Respondents used poor judgment and were negligent by failing to follow procedures and not making a request to Henry to leave their shifts early in March 2021.

Respondents argue further that the Board has waived its right to discipline Respondents for their early departures because it failed to put them on notice regarding their "practice" of leaving work early. This argument, that Respondents' conduct was somehow approved by the Board, is not persuasive. Supervisor Henry did not learn of Respondents' early departures until he pulled the video footage in April 2021. At that time he informed Superintendent Tomko regarding Respondents' conduct. Dr. Tomko immediately reviewed the video footage after which Respondents were interviewed and suspended.

Accordingly, there is no basis on which to conclude that the Board had notice of Respondents conduct and/or acquiesced to it in any way.⁷ The Board did not waive its right to discipline Respondents in these circumstances.

⁶ The Board also argues that it is "likely" that Respondents left their shifts early for months during the 2020-2021 school year. However, the tenure charges are based on Respondents' conduct in March 2021 and this argument regarding uncharged conduct must be rejected.

⁷ The facts in this case are not analogous to those in *IMO the Tenure Hearing of Michael Coe, School District of the City of Trenton, Mercer County*, Agency Dkt. No. 43-3/17 (November 10, 2017), a case upon which Respondents heavily rely. In *Coe*, the arbitrator dismissed tenure charges against a teacher who had engaged in a longstanding practice of rounding up his timesheets for years; however, the administration failed to notify him that his methodology was improper.

Respondents engaged in conduct unbecoming by failing to follow established procedures for attendance and absences. Charge I is sustained.

CHARGE II
(Theft by Deception)

This charge alleges that Respondents' "acceptance of payment for days at issue on which [they] knew that [they] did not properly and fully render the services [they were] required to provide constitutes theft of public monies by deception." By its express terms, this charge necessitates a finding that Respondents engaged in intentional conduct to steal time or defraud the Board.

The determination of this issue turns on the credibility of Respondents, who testified that Head Custodian Percio instructed them to leave early upon completion of their duties and the credibility of Percio's denial of issuing the directive. It is significant that Respondents' testimony was corroborated by former assistant custodian Rossi who resigned from his position as a result of a settlement with the Board.⁸ Although Respondents have a motivation to be untruthful with their jobs on the line, Rossi is no longer employed by the Board. Rossi testified that "we were told that once you get your work done, due to COVID -because basically there was nobody in the building-disinfecting, cleaning, doing all our extras when you got done with your work you can go home." T. II, 141.

⁸ Rossi had previously held the position of Head Custodian in another school.

I found the testimony of former custodian Rossi to be straightforward and highly credible. Percio, on the other hand, was defensive throughout his testimony. The testimony of Respondents and Rossi lead me to conclude that Percio told the custodians that they could leave the building prior to 11:30 p.m. upon completion of their duties in order to limit their exposure to the virus.

The Board's assertion that Respondents' testimony regarding Percio is not credible because this defense was not raised until the hearing is contradicted by the record. Both Respondents referenced their reliance on the instructions by Percio in their Answers to the tenure charges which were submitted shortly after the tenure charges were filed. See P. Exs. 4 & 6.

Respondents and Rossi also testified that they believed that they were expected to follow the instructions of Percio. Henry also testified that the custodians were expected to comply with the directions of Percio. After all, unlike Henry, Percio as the Head Custodian, was the person that they interacted with on a daily basis in the building during the 3-3:30 p.m. period when Percio's shift ended and the night custodians' shifts began.

Moreover, Respondents reported to work approximately 45 minutes early when the building was empty in order to overlap with Percio and receive any special cleaning assignments. Respondents' willingness to do so is not consistent with the Board's contention that they were stealing time or attempting to deceive the Board. At the same time it is consistent with the testimony that the custodians' 8 ½ hour shifts put them at more risk for exposure to the virus than other employees who were working half day schedules in the building.

As previously discussed, Respondents should have known that Percio lacked the authority to alter their work schedules. However, the evidence falls short of establishing that Respondents engaged in theft of services. The Board has not met its burden to establish Charge II and it is dismissed.

CHARGE III
Unjust Enrichment

The discussion in Charges I-II is incorporated by reference here. Respondents received pay for hours that were not worked during March 2021.⁹ Although there were extenuating circumstances regarding interactions and instructions by Percio as described above, the fact remains that Respondents received their full pay despite working less than 8 ½ hours in March 2021.

Respondents' argument, that there should be an "offset" with respect to their pay because they reported to work 45 minutes early and therefore worked equivalent hours, is lacking in merit. Respondents were not required to report to work early and they were not free to make their own schedules without approval by Henry. While reporting early for work demonstrates a commitment to carrying out the duties of their positions, it does not qualify as an offset for the pay that they received for their scheduled 8 and 1/2 hours that were not worked.

Charge III is sustained.

⁹ Both Respondents offered to refund monies to the Board for the time at issue. However, their offers were rejected by the Board.

CHARGE IV
(Breach of Contract)

The discussion in Charges I-III is incorporated by reference here. Respondents emphasize that the Board did not proffer the contract setting forth the hours of the custodians. Nonetheless, it was not disputed that Respondents' contractual hours were from 3:00 p.m. until 11:30 p.m., including an hour for lunch.

There was evidence that the Board did not enforce Respondents' contractual schedules during the pandemic. Respondent Johns testified that the custodians' work schedules were changed a dozen times between March 2020 - March 2021. His testimony was not rebutted by Dr. Tomko, Henry or Percio. In the summer, Respondents worked during the day. There were also periods when Respondents worked three days on and two days off.

In March 2021, Respondents worked evenings Monday through Thursday. Henry testified that on Fridays, when students were not present, the custodians worked during the day to perform a deep cleaning in the school. Further, Respondents credibly testified that they did not leave the building until they completed their duties each day in March 2021. The Board's charge that Respondents "failed to fulfill their obligations by abandoning their assigned duties" is not supported by the record.

Charge IV is dismissed.

CHARGE V
(Endangerment)

The Charge that Respondents' conduct endangered staff and/or students at the Middle School is not supported by the record. The fact that there were complaints by teachers regarding conditions in the Middle School cannot suffice to support this allegation. Although hearsay is admissible in arbitration, it cannot serve as the evidentiary basis for this charge.

Moreover, the charge that Respondents "exposed staff and students to a "potentially dangerous situation, and exacerbated fears and anxiety" regarding safety in the school is vague and ambiguous. This Charge is based on the speculation that because Respondents left their shift approximately one hour early that they 1) did not complete their duties and 2) created a danger to the welfare of the staff and students. Such an inference cannot be supplied. The Board has not established one act or omission by Respondents that created a "potentially dangerous situation."

The only direct testimony regarding cleanliness was that Henry, on one day, observed dust on lockers and marker boards not being cleaned. Dr. Tomko testified that he observed a coffee spill after receiving a teacher's complaint. Both Henry and Dr. Tomko were in the school during the day when teachers, students and others were also present in the building. There was no evidence to establish when these uncleaned or messy items were observed or which of the four custodians would have been responsible for the area.

Nor has the Board established, as set forth in this Charge, that "proper cleaning and sanitation protocols to protect against COVID-19 infection were

regularly not completed.” Respondents credibly testified that they completed their duties on a daily basis including using the backpack antiviral sprayer.

Finally, the Board also argues that because there was more antiviral spray on hand in the Middle School than in other buildings that they were not fulfilling their cleaning responsibilities. This argument is speculative, at best, and cannot be sustained. Charge V is dismissed.

CHARGE VI
(Pattern of Misbehavior)

The conduct that Respondents engaged in during the month of March 2021 does not establish a “pattern of misbehavior.” Although Respondents left their shifts early during March 2021, I do not find that this establishes a pattern of misbehavior. A series of early departures is not tantamount to a pattern of misbehavior. There is no other misbehavior at issue besides the March 2021 early departures. This charge appears to be an “add on” and relies on the same facts that underlie Charges I-IV.

Further, Respondent Johns had no discipline prior to the events in March 2021 and the Board has not established that he engaged in a pattern of misbehavior.

Although the Board argues, with respect to Respondent Lopez, that there is a pattern of misbehavior due to his prior disciplinary record during 2008-2014, I do not find that the charge of a pattern of misbehavior can be sustained against him. The discipline of Respondent Lopez, which included letters of reprimand regarding attendance and other issues, dates back 7 to 13 years. There was no disciplinary action against Respondent Lopez since 2014 and, to the extent there was a pattern

it has been interrupted. Given the fact that Respondent Lopez has had no discipline for the past 7 years, the Board has not established that he engaged in a pattern of misbehavior. Charge VI is dismissed.

PENALTY

For the foregoing reasons, the Board has established that Respondents engaged in conduct unbecoming and other just cause as set forth in Charges I and III. I turn now to the issue of the penalty.

It is well-established that factors to be taken into account with respect to the penalty include the nature and circumstances of the incidents or charges, the teacher's prior record, the effect of such conduct on the maintenance of discipline among students and staff, and the likelihood of such behavior recurring. *In Re Fulcomer*, 93 N.J. Super 404 (App. Div. 1967). Upon consideration of all of the evidence, arguments and authorities, I have concluded that the dismissal of Respondents Johns and Lopez is not for just cause.

I note that many of the cases that the Board relies upon in support of termination involve abhorrent and inappropriate sexual conduct against students. Clearly, the transgressions of Respondents are not in the same category of misconduct.¹⁰

¹⁰ Even the cases relied upon by the Board in which arbitrators terminated the employment of custodians involved employees with prior discipline engaged in multiple acts of misconduct including chronic absenteeism and performance-related misconduct. See *IMO Tenure Hearing of Christopher Luskey, Carteret Board of Education*, Agency Dkt. No. 169-7/17 (Zirkel 2017); (*IMO Marcelino Basulto, Sch Dist of West NY*, Superior Ct. NJ (App. Div.) Dkt. No. A-1493-09T11493-09T1 (2010); *IMO Tenure Hearing of Donald Dudley, Neptune Sch Dist*, Commissioner Decision No. 451-11 (October 24, 2011). See also *IMO Tenure Hearing of Martin Davis*, Asbury Park School District, Dkt. No. 22-1/14 (Symonette 2014)(custodian terminated after inappropriate touching of student).

As Respondents have argued, termination would be inconsistent with the penalties imposed in cases involving custodians where more serious conduct was established. (citations omitted). As discussed above, there are extenuating factors present such as Respondents' genuine but erroneous belief that they were authorized to leave work early upon completion of their duties to avoid prolonged exposure to the virus.

It was also established that the custodians' schedules fluctuated during the pandemic as the school reopened. Respondents' schedules required them to be present in the building for a full shift of 8 1/2 hours and the reason for their early departures was to reduce their own exposure to the virus. There is simply no basis on which to conclude that Respondents were motivated by greed or dishonesty and likewise no reason to conclude that they would engage in misconduct if reinstated. Respondents also committed to abiding by their work schedules and fulfilling their custodial duties in the future.

Moreover, prior to March 2021, Respondent Johns had no discipline of record. Even though the same cannot be said for Respondent Lopez, he has 17 years of service with the Board and received no discipline in the past 7 years. He also expressed remorse for not using better judgment. Thus, given the nature of the offenses and the totality of circumstances, I find that mitigating circumstances outweigh aggravating circumstances and the penalty of termination of Respondents is excessive and harsh.

Nonetheless, both Respondents demonstrated a lack of judgment by leaving early in contravention of the Board's policies regarding attendance and absences. The Superintendent was receiving a number of complaints about the cleanliness of the building in the spring of 2021 and due to the nature of the pandemic Respondents' duties to clean and disinfect the building were expanded. As a result, Respondents' early departures not only violated the Board's policies but were also inconsistent with the Board's mandate in the Restart and Recovery Plan and its responsibilities for the safety of students in the face of this unprecedented pandemic. Although termination of their employment is unduly harsh, Respondents misbehavior was sufficiently serious to warrant a lengthy unpaid suspension.

AWARD

1. Charges I and III are sustained.
2. Charges II, IV, V and VI are dismissed.
3. The Board has established that Respondent Johns and Lopez's engaged in conduct unbecoming and other just cause. The Board has not established that Respondents misbehavior warrants their dismissal from their positions and their termination was not for just cause.
4. The Board is ordered to reinstate Respondents within a reasonable period of time without backpay. The Board shall convert Respondents' terminations to unpaid suspensions.

Dated: April 18, 2022
Ocean Grove, New Jersey


Felice Busto

State of New Jersey }
County of Monmouth } ss:

On this 18th day of April, 2022, before me personally came and appeared Felice Busto to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.


