174-22

NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF
TENURE CHARGES BY

NEPTUNE TOWNSHIP
BOARD OF EDUCATION,
Petitioner

and Agency Dkt #100-6/21

MICHAEL SMURRO,
Respondent

Appearances:

For Petitioner: Stephen Edelstein, Esq.
Weiner Law Group

For Respondent: Andrew Schwartz, Esq.
Schwartz Law Group

Before: Barbara C. Deinhardt
Arbitrator

Hearings: January 12, 14, 24, 25, February 3, 4, 2022

INTRODUCTION

In accordance with the TeachNJ statute, NJSA 18A:6-16, the tenure charges brought by the Neptune Township Board of Education ("the Petitioner," "the Employer," "the District" or "the Board") against

Michael Smurro ("Respondent'") were referred to me for review by the Commissioner of Education. A hearing was held on January 12, 14, 24, 25, February 3 and 4, 2022 via Zoom, during which the parties were accorded the right to examine and cross-examine witnesses, the right to present evidence, and the right to make arguments in support of their respective positions in this matter. The hearing was closed upon the receipt of post-hearing briefs on April 30, 2022 and reply briefs on May 14, 2022.

ISSUE

Has the Board proven by the preponderance of credible evidence that Respondent is guilty of conduct unbecoming a Vice Principal and/or other just cause warranting his dismissal? If not, what discipline, if any, is warranted?

BACKGROUND

The facts of the incident underlying the Tenure Charges are essentially undisputed. Respondent, Michael Smurro, is a tenured Vice Principal at Neptune Middle School who has been employed by the Neptune School District since 2006. He was appointed Vice Principal in July, 2014. His evaluations were effective to highly effective. He had no prior discipline.

On Saturday afternoon April 24, 2021, during off-duty hours, Respondent and his wife Lisa Smurro were sitting on an outside patio at a restaurant in Smithville, New Jersey (approximately one hour from Neptune Township) eating lunch and drinking beer after having attended the nearby Renaissance Fair. His wife became quite upset about the presence and conduct of a person whom she deduced to be a biological male wearing women's clothing who had been using a toilet in the women's bathroom (the record does not reflect the identity of the person or whether they/he/she was in fact a transgender woman) right before Mrs. Smurro entered the bathroom stall. According to Respondent's testimony, Mrs. Smurro recounted that the person had left urine on the seat and on the floor and this upset Mrs. Smurro who is, by her husband's description, somewhat of a neat freak and a germaphobe. When she returned to their table, Mrs. Smurro was extremely distraught. She was loudly complaining to her husband, making statements such as, "She's a man" and "It's not right. You're either a man or a woman" and "There's a man in the women's bathroom." Respondent testified that he tried to get her to stop and to calm down, but "[s]he wouldn't let it go."

Her protestations caught the attention of nearby patrons of the restaurant, who began to film the incident and make comments about and to her. Respondent testified that they were at the table for about 45 minutes; there is about 4½ minutes of videotape of the incident. According to Respondent, things would calm down and then the people or person filming would bait his wife to provoke her and her loud complaints would start up again.

On one of the videos in evidence it appeared that Respondent motioned to his wife that they should leave. (One of the narrators of the video noted that "her husband wants to leave.") As they left, his wife continued to engage with the server and with the patrons who were filming her and the patrons, in turn, continued to film her and to make comments such as, "Cut her off" and "Take your hate elsewhere."

At this point, Respondent, who had continued on toward the parking lot as his wife stopped to continue her complaints, came up from behind his wife, who was standing between the parking area and the dining area, separated from the diners by a yellow rope. He testified that the man who was filming had stood up and was starting to move toward his wife and he didn't know what would happen. Mr. Smurro is heard on one video saying to his wife as he approached, "Do you want me to fight this guy right here?"

In what he described as a misguided attempt to stop the entire incident and deflect attention away from his wife, Respondent threw the contents of his cup of beer toward the patron who was filming his wife (one clip shows the visual effect of the beer landing on the lens of the camera), saying, "Here you go, pal." There is no evidence that the beer actually landed on anyone other than the man who was filming. (There is some evidence that a child was at a neighboring table, but not that the beer landed on or near the child.) Respondent then backed up and gestured toward the camera, saying something like, "Now you can come out. I'm right here," seeming to challenge someone to a physical fight. He and his wife then left the area. There is no evidence that law

enforcement was called nor that the patron on whom the beer was thrown (or anyone else) suffered any injury.

Following the incident, the videos began to go viral on social media. The District received hundreds of emails and voicemail messages from senders who were angry about the actions of Respondent and his wife. Articles appeared in the press. Respondent was not aware of any of this before Monday morning.

On Monday morning April 26, Dr. Tami Crader, the District Superintendent, learned of the videos and watched them online. She called Respondent into her office. According to Respondent, she began by saying, "Please tell me you didn't throw a beer on a transgender woman." (Dr. Crader denies this.) Respondent said he had not, but he did throw a beer at someone. She asked what had happened. According to Dr. Crader,

> He shared with me that they had attended a social event over the weekend and had been at this restaurant Fred & Ethel's, and he and his wife were discussing her reaction to having been to the bathroom where he reported to me that she complained about a transgender individual in the bathroom. Mr. Smurro described that person as a transvestite.[1] On one occasion, he described that person as a man dressed in women's clothing.

According to Respondent, at the end of the meeting Dr. Crader told Respondent that he would be sent home on paid/administrative leave "to give this a chance to cool down and as long as this doesn't turn into anything, we'll bring you back in a couple days."

[1] Respondent testified that he told Dr. Crader that his wife had described the person as a transvestite.

Following the meeting on Monday, Dr. Crader sent Respondent an email with apology language and directed him to use the language if he were contacted by the media for a statement. The statement read, "I allowed my emotions to get in the way of my normally sound judgment and reacted in a way that was inappropriate. I do not condone violence or discrimination of any kind and should have simply walked away. I apologize to the person I threw my beer at and I wish I hadn't done so. I apologize to anyone I offended."

Over the course of the next few days, emails and voice mails continued to come into the school, many of them linking Mr. Smurro's actions to what was often described as his wife's "transphobic rant." According to Dr. Crader, the number of emails was such that the District had to temporarily modify the internal email system. In addition numerous press accounts continued to appear. The many headlines highlighted Respondent's tossing of his beer toward those filming his wife's transphobic rant.

At the Board meeting on April 28, Dr. Crader recommended that tenure charges be filed against Mr. Smurro.

Dr. Crader met with Mr. Smurro again on approximately May 5 and informed him "that [she] had come to the conclusion that he could no longer be effective in his duties as vice principal of the Neptune Middle School and [she] intended to ask for his resignation or file tenure charges."

On May 24, 2021, the District filed Sworn Tenure Charges of

Unbecoming Conduct and Other Just Cause, seeking Mr. Smurro's removal. The Board of Education voted unanimously to certify the Charges. The Charges are, in substance:

Charge One: Conduct Unbecoming. This Charge alleges that Mr. Smurro's actions of April 24, 2021 were "antithetical to his duties as a school administrator," that "[i]nstead of diffusing the situation, [he] further exacerbated the gravity of the situation and fostered a message of intolerance," that his conduct of throwing a beer on a restaurant patron and challenging him to a fight "clearly violated the implicit standard of good behavior required of a vice principal," that he exercised exceedingly poor judgment "that is repugnant to his moral and ethical duties as an educator and Middle School Vice Principal," that he is unfit to continue to care for and lead young and impressionable children and lacks the ability to effectively maintain discipline and proper administration of the school system and act as a role model for students and staff alike," and that "his misconduct damaged the reputation" of the" District. Therefore, his conduct of April 24, 2021 "constitutes conduct unbecoming a public employee warranting Smurro's termination from his tenured employment."

Charge Two: Conduct Unbecoming. This Charge alleges that "Smurro's conduct on April 24, 2021 has rendered it impossible for Smurro to continue to effectively serve as an administrative staff member." The Charge focuses on the perception of others that Mr. Smurro "was reasonably perceived by countless members of the school-community—students and staff alike, as joining with and adopting the

transphobic sentiments expressed by his wife" and that they are "outraged" and "no longer have confidence in Smurro's ability to effectively discharge his duties to protect the care the custody of students of a tender age" or to "foster [sic] an educational environment that fosters acceptance, tolerance and diversity."

Charge Three: Conduct Unbecoming. In this Charge the Superintendent states that the public outcry "does not formulate [her] basis as the Chief School Administrator for recommending that Smurro's employment be terminated." Rather, the Charge asserts that his conduct in "response to his wife's bigotry (throwing a beer at a Restaurant patron and challenging him to a fight)" sent a message "that he will stand in defense of intolerance," which is "antithetical to the efficient and effective operation of the District" and warrants his termination.

Charge Four: Conduct Unbecoming. This Charge alleges that Mr. Smurro violated Board Policy No. 1550 and the Board's Equal Employment/Anti-Discrimination Practices by "express[ing] views that discriminate towards persons on the basis of affectional or sexual orientation, gender, gender identity or expression," "condoning his wife's misconduct and assaulting (throwing a beer) at Restaurant patron in defense of his wife," thereby joining in and adopting and promoting the transphobic and non-inclusive behavior expressed by his wife.

Charge Five: Conduct Unbecoming. This Charge alleges that Mr. Smurro's conduct violated Board Policy No. 3281 and Regulation R3281

because his actions constituted inappropriate conduct by a staff member.

POSITION OF THE DISTRICT

The District contends that Respondent's conduct on April 24 was so egregious, particularly when combined with the completely foreseeable public reaction, to warrant a conclusion that he is no longer fit to discharge the duties and functions of his position. This is particularly so in light of Mr. Smurro's inability or refusal to understand that what he did on April 24 was linked to what his wife said.

The 1500 emails and 100 phones messages received by the school and many of the press articles published after the incident drew a connection between Mrs. Smurro's rant and Mr. Smurro's assault, the District notes. Dr. Crader testified that this public perception would be toxic to the Middle School environment. In addition, she was concerned that there could be serious consequences for the District in that parents could choose not to enroll their children in the school.

The District argues that Mr. Smurro has not only not admitted that his actions could be reasonably seen as adopting his wife's comments and beliefs, but also has not taken responsibility for his actions. He filed a Disorderly Persons Summons against one of the patrons at the restaurant for provoking, taunting and harassing him and his wife (referred to in the Summons as victims) by videotaping them after being asked to stop. According to the District, this shows that he has failed to

accept responsibility and instead blames others.

The District urges that Respondent's tale of man who appeared to be threatening his wife be rejected as not credible. Respondent never told Dr. Crader about such a threat to his wife, although he was given ample opportunity to tell what had happened on April 24.

The District asserts that progressive discipline was not warranted in this case because the behavior was so egregious and led Dr. Crader to no longer have confidence in Mr. Smurro's ability to be a leader at the school. Returning him to the school could lead to a renewed public outcry and possibly parents leaving the District.

The District cites the definition of "unbecoming conduct" set forth in the case of *In re Young*, 202 N.J. 50, 66 (2010) as any conduct "which adversely affects the morale or efficiency of the [department]" or "has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." (alterations in original) "As quoted in *Young*, the touchstone of the determination lies in the certificate holder's 'fitness to discharge the duties and functions of one's office or position.' *In re Grossman*, 127 N.J. Super. 13, 29; 316 A.2d 39 (App Div. 1974)."

The District argues that the multitude of emails, voice mails and social media posts makes it clear that Mr. Smurro's actions on April 24, 2021 destroyed the public respect for him and any confidence in his ability to function as an educational leader. The overriding message delivered by those who left voicemails or emails is clear that Mr. Smurro

cannot effectively perform the duties of a vice principal (or teaching staff member) or be in a position of authority over children because he is reasonable perceived as being transphobic, he defends transphobic rhetoric, he committed an unprovoked act of violence, he demonstrated an inability to appropriately handle a tense situation, and he has lost the respect and support of the community, as well as the District's children and stakeholders, the District argues.

Termination is warranted for Mr. Smurro's conduct, the District contends. "No theory of progressive discipline can save [him], despite his prior clean record." The case law makes clear that even on incident of improper conduct can support a termination, if the incident is sufficiently flagrant. Here the conduct is egregious and yet even now, Mr. Smurro does not recognize that his conduct was inappropriate. Finally, the Arbitrator should give great deference to Dr. Crader's judgment and experience and support her conclusion that Mr. Smurro is no longer fit to continue in the Neptune School District, the District argues.

POSITION OF RESPONDENT

Respondent acknowledges that Respondent's conduct was not appropriate, but asserts that it did not constitute conduct unbecoming such as to warrant dismissal. Further, Respondent contends that the conduct to be considered in analyzing whether he is fit to perform his duties is limited to his acts of throwing the beer and taunting the

restaurant patrons, not his wife's actions nor the subsequent public reaction. Respondent notes that the Superintendent was the sole witness for the District. While the Charges assert that District students and staff question his ability, no one other that Dr. Crader testified in support of this view and she did not ask any staff or students whether they had lost confidence in Mr. Smurro. On the other hand, 16 staff members who have worked with Respondent over the years testified that there was no disruption to their ability to perform their jobs in the days and weeks following April 24, that they never witnessed Respondent do anything that could be viewed as intolerant or bigoted to the LBGTQ or other minority community, that they believed the April 24 conduct was an aberrational lapse in judgment that should not negate his whole career, and that they did not believe this actions were in support of his wife's comments.

In support of the Charge that the Neptune school community had lost confidence in Mr. Smurro, the District relied on the emails and voice mail messages received by the school. Respondent observes, however, that Dr. Crader testified that she did not know if the emails and voicemails were in fact from members of the Neptune community or from elsewhere. Similarly Dr. Crader testified that the protests that occurred after April 24 reflected "community outrage," but admitted she did not know if the protesters were from the Neptune community.

Respondent notes that the Common Facts set forth in the Charges are almost all about his wife's conduct, not Respondent's, or about the viral nature of the public reaction. Respondent argues that the

connection of Respondent to his wife's comments is "[w]ithout evidence and based on pure conjecture."

Respondent argues that the Tenure Hearing Law sets up a presumption against dismissal. Here, the District has failed to demonstrate the Respondent lacks the fitness to discharge his duties while Respondent presented evidence from many witnesses about his positive contributions to the school and the students. The District has failed to demonstrate that Respondent's conduct has adversely affected the morale and efficiency of the District, while Respondent presented evidence from many witnesses that the morale in the school is actually down because Respondent is *not* there.

The District argues that Respondent's conduct caused harm to the "maintenance of discipline and the proper administration of the school," a factor mentioned in *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967). Respondent argues, however, that the District has failed to demonstrate that Respondent's conduct resulted in any disciplinary problems, while Respondent presented evidence from many witnesses that there was no increase in student disciplinary incidents or bullying following Respondent's conduct. The District claimed that there were daily protests, which disrupted the day-to-day operations of the school. The evidence shows that there was one protest with about 15-20 people soon after the incident but after that, there was one person who showed up across the street on a number of occasions. There was no evidence of ongoing disruption to the school operations because of these protests and no evidence that student activities were adversely impacted. The

District presented evidence that because of the influx of emails in the several days following the April 24 incident, modifications had to be made to the school website to prevent hacking. While the Charges and District's Answers to Interrogatories state that all District staff were inconvenienced, educational services disrupted, and email system suspended, the record evidence does not support these allegations, Respondent asserts.

This was a single instance of poor judgment—an emotional outburst--that did not directly involve any student or other member of the Neptune community and that caused no injury to anyone. Thus it does not justify termination, Respondent argues.

OPINION AND AWARD

N.J.S.A. 18A:6-10 establishes the statutory basis for dismissal of tenured personnel employed in New jersey's public schools. Generally the District must prove "inefficiency, incapacity, unbecoming conduct, or other just cause…" The Charges in the instant case focus on unbecoming conduct.

The Common Facts section of the Charges, after reciting Respondent's employment history, sets out what happened on April 24, mostly focused on the conduct of Respondent's wife. There are two paragraphs that describe Respondent's actions of throwing the beer at a patron, yelling "here you go, pal," and seeming to challenge them/him to a physical fight by saying "I'm right here." Another paragraph

characterizes that conduct as Respondent being "complicit and supportive of [his wife's] rant by virtue of his throwing a beer on patrons that were questioning his wife's clearly transphobic view and then taunting them as he departed the scene."

The remaining 22 factual paragraphs were about the public response to the conduct of Respondent and his wife—the broadcast of the videos on various social media platforms, the number of views those postings got, the news articles that were written, a rally that was held, and the 92 voicemails and 507+ emails (some duplicates) that Petitioner received. A majority of those communications were to the same general effect, i.e. that Respondent should be terminated because he cannot effectively perform the duties of a vice principal or teacher or be in a position of authority over children because he is transphobic, he committed an unprovoked act of violence, he demonstrated an inability to appropriately handle a tense situation, and he has lost the respect and support of the community. One subset of the communications came from transgender people or their allies, stating their belief, *inter alia*, that he should not be in leadership role because transgender youth would not feel safe in the school environment.

Charge One asserts that Respondent's conduct on April 24 was inapposite and antithetical to his duties as a school administrator. He exacerbated the situation rather than diffusing it and fostered a message of intolerance. He used poor judgment. He failed to comply with the high standards expected of a certified staff member and his misconduct damaged the reputation of the school. He is therefore unfit

to continue to care for children and maintain discipline. His conduct constitutes conduct unbecoming a public employee and warrants his termination. The essential difference between Charge One and Charge Two seems to be that Charge One focuses on the conduct itself, rather than the reaction from the public.

I think there can be no question, and in fact Respondent concedes, and I find that the District is correct that Respondent's conduct on April 24 was inappropriate and unprofessional and wrong and was conduct unbecoming a teacher or vice-principal. There can be no question that he used poor judgment. He of course should not have thrown the contents of his cup of beer at the restaurant patron, regardless of what that patron was doing or saying to his wife. He should not have invited him to come out into the parking lot, apparently to fight. He exacerbated the situation rather than deescalating it. If he was concerned about his wife, he should have tried harder to persuade her to cease her tirade and to move away from the situation. There was no excuse for throwing his beer at the person filming them and inviting him to fight. No one, but especially not an educator and most especially not a school leader, should engage in such behavior, even on a Saturday afternoon far from his district.

The question is whether that conduct, in itself, without regard to the public reaction, constituted unbecoming conduct that is evidence that he is unfit to continue to perform his duties and that therefore warrants his termination. I find that it does not.

The caselaw involving charges of unbecoming conduct under

N.J.S.A. 18A:6-10 et seq serious enough to warrant removal generally establishes that the conduct must be so egregious that it requires immediate dismissal, i.e. it is conduct that cannot be corrected with warnings or progressive discipline. *In re Young* 202 N.J. 50, 66 (2010) "In making the determination that one is guilty of unbecoming conduct, the employee must be shown to lack the 'fitness to discharge the duties and functions of one's office or position.' In other words, it is "conduct 'which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services.'" Id.

In *In the Matter of Michael S. Wolff, County of Salem*, 2010 WL256020 (not a teacher case), the Court describes "unbecoming conduct" as "any conduct that adversely affects the moral or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of government services" and "may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances." It must be recognized that not all instances of bad manners or immodest behavior or poor taste or indecorous behavior or other unbecoming conduct are grounds for termination of a teacher or other public employee. The court in *Wolff* recognized the critical importance of progressive discipline unless the infraction is egregious and found termination not warranted in that case.

Respondent cites cases that stand for the proposition that "an isolated incident will generally not support unbecoming conduct

charges unless it is 'sufficiently flagrant.'" *In re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967) In that case, which involved a teacher using physical force against a student, clearly grave misconduct, the court wrote,

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education*, 130 N.J.L. 369 (*Sup. Ct.* 1943), affirmed o.b. 131 N.J.L. 326 (*E. A.*1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although 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.

Ibid. 93 NJ Super 404, 421 (App Div 1967)

The conduct in the instant case was one isolated unpremeditated incident. There is no evidence of any prior violent behavior or inability to appropriately deal with tense or difficult situations. There is no evidence of any prior discriminatory or intolerant behavior. The entire case rests on about 20 seconds on a Saturday afternoon far from school, after a beer or two, after Mr. Smurro had in fact uged his wife to calm down and guided her out of the restaurant and thought she was right behind him. When he discovered she was not, he turned back to get her, saw that a patron was continuing to film and taunt her and, according to

him, had stood up. Then, in a moment of frustration, he threw his beer to deflect attention from his wife onto him. It was wrong and deserving of punishment, but it was not an action so egregious that Respondent should lose his tenure.

Contrary to the District's contentions, Mr. Smurro did acknowledge that what he did was wrong and testified that it was something for which he felt remorse and regret "every minute of every day." He testified that he knows he should have left the premises and not turned back to engage with the patron who was videotaping his wife. He issued a public apology at the time, using the words supplied by Dr. Crader, but words with which he agreed.

The District claims that Respondent did not take full responsibility because he filed a Complaint against those who were videotaping him and his wife. I disagree with the District's contention that the two are mutually exclusive. I conclude that he could have charged them with taunting and harassment, but also understood that it was not appropriate to respond to their improper conduct by throwing a beer and inviting them to fight.

The District also argues that Mr. Smurro was not telling the truth when he testified that he reacted in response to the patron who was videotaping standing up and approaching his wife. According to the District, the hearing was the first time Mr. Smurro told the story of this man. He did not mention him during the meetings with Dr. Crader. The only time Mr. Smurro gave an account of April 24 was during the 10-15 minute conversation with Dr. Crader on Monday April 26. Two days

later she recommended his removal and at the beginning of their next meeting, she informed him of the decision. At the very brief April 26 meeting, he gave an account of what happened, not really appreciating the scope of the public reaction or the severity of the potential consequences. He may not have understood the difference between throwing the beer because the patron was videotaping him and throwing the beer because the patron had stood up and was starting to move towards his wife as he was videotaping.

Contrary to the District's brief, Mr. Smurro did not describe the man as a "potential attacker" nor did he say that he was justified in throwing the beer to protect his wife from the danger of this on-coming man. He said that the man was starting to approach his wife, pointing his phone. "So I wanted to end the situation. I wanted it to be finished. I wanted the people to stop abusing my wife. I wanted my wife to stop her rhetoric. And in a fit of frustration, and a momentary lapse of sound judgment and what I should have done, I tossed the contents of my cup in this gentleman's direction, and it stopped everything. It stopped him. It stopped the crowd. It stopped the situation." I find, however, that I do not need to make a determination as to whether the man who was videotaping his wife did in fact stand up and start moving towards his wife or whether he remained seated while he was videotaping. In reading the whole of the testimony and the media accounts and in viewing the videos, there is no dispute about the critical facts that there was in fact a male restaurant patron who was videotaping Mrs. Smurro and that Mr. Smurro threw his beer at this man.

Dr. Crader testified that Mr. Smurro's conduct and action, even without the public reaction, would have warranted removal because it showed that he is not able to diffuse negative situations before they escalated, because the beer throwing and the invitation to fight would have created an insurmountable challenge for a vice principal to be effective, because Dr. Crader believes that the public will not respect any decision that he makes or action that he takes, and because she believes the conduct itself reveal him to be homophobic. I do not agree that one incident of not diffusing a negative situation means he would be unable to do so in the future. The conclusions that his conduct created a challenge to his effectiveness that would be "insurmountable" or that the public will not respect any decision he makes are based solely on speculation.

The essence of the District's case is that Mr. Smurro is not fit to discharge his duties because he himself is transphobic. Reading through the various iterations of Dr. Crader's explanation for her determination, I conclude that Dr. Crader agrees with the public reaction to Mr. Smurro's conduct, i.e. that it reflected his own personal transphobia. In responding to a question as to whether she formed her own impression as to the relationship between Mr. Smurro's actions and Mrs. Smurro's words, Dr. Crader responded, "I did. I felt that his—after watching the video many, many times I felt that his body language, his throwing of the beer, his not--his lack of success at leaving the area without making comments actually aligned himself with his wife's words. He did not denounce the words. He did not apologize. He did not walk away. He instead escalated the situation. And the perception that I had after I

watched the video several times was that he then subscribed to that same homophobic philosophy."[2] (T. 85) In other testimony she stated that his conduct of failing to disengage and instead becoming violent, gesturing and calling the patron out to fight "made him complicit in his wife's transphobic rant and that rendered him homophobic himself." (T.285)

I cannot accept Dr. Crader's analytical leap from Mr. Smurro defending his wife to a conclusion that he was defending her comments. There is no dispute that all of the comments were made by Mrs. Smurro. Mr. Smurro testified that he tried to get her to calm down and stop her tirade. He persuaded her to leave. He was the one who walked out of the restaurant and went on toward the parking lot, only coming back when he realized that she was not with him and then throwing his beer when he saw that the patron was continuing to film and, in his words, "verbally abuse" his wife. He is heard asking her if she wanted him to fight the guy who was filming her. While this conduct may well constitute an immature, misguided and certainly unprofessional attempt at chivalry, I do not find anything in this conduct that reflected any transphobic beliefs held by Mr. Smurro rather than his wife.

There is absolutely no evidence of any prior actions by Mr. Smurro during the course of his long teaching and administrative career that reflected any difficulty in controlling his temper or in diffusing difficult situations or any prejudice towards transgender people or any

[2] It is not clear why Dr. Crader finds that Mr. Smurro is "homophobic" rather than transphobic since there is no evidence of any comments concerning homosexuality.

other group. There is no evidence in the record--other than the inferences drawn by the Superintendent and many of the writers who sent emails to the school solely from Respondent's 20-second conduct on April 24--that Respondent is in fact prejudiced against trans people or other LGBTQ people or that LGBTQ students would not feel safe in his school. There is no evidence that he is unfit to perform his duties.

The record evidence in fact suggests the opposite. While the District did not present any direct testimony or even any hearsay testimony from any teacher or administrator other than Dr. Crader to support Dr. Crader's assumptions that Mr. Smurro is unfit to perform his duties, Respondent presented testimony from 16 witnesses in addition to Mr. Smurro, all members of the Neptune school community. While the District discounts this testimony as being merely the opinions of Mr. Smurro's friends, I note that these witnesses are colleagues of Mr. Smurro, including, significantly, the current principal of the school, the other vice-principal of the school, and the former principal of the school, as well as other teachers and guidance counselors. None of the witnesses believed that Respondent was adopting his wife's comments during the incident on April 24. In addition to testifying that they believe Mr. Smurro was an excellent vice principal who had great relationships with students and parents, the witnesses gave consistent testimony disagreeing with Dr. Crader's assessment of Mr. Smurro and the impact of his conduct, as set forth in the Charges:

Dr. Mark Alfone, who had been the principal at the Neptune Middle School from 2007 to 2016 and supervised Respondent when he

served as vice principal, testified that Mr. Smurro always treated students with respect, that he never lost his composure, that he always acted professionally, and that he was able to proactively work with students to deescalate situations. He never heard Mr. Smurro say or do anything that could be construed as anti-LGBTQ, bigoted or hostile to minority groups. He believes that Mr. Smurro would still be able to perform his job and command the respect of parents in the community. He heard from members of the Neptune LGBTQ community that they still have confidence in Mr. Smurro. He does not believe that the incident of April 24 had a negative effect on the morale or efficiency of the District or that it rendered Mr. Smurro unfit for duty.

Dr. Arlene Rogo has served as Respondent's principal for the last six years. She testified that she never saw Respondent lose his composure or act unprofessionally in his dealings with students or parents. He was effective at deescalating volatile situations. She never observed him saying or doing anything or received any complaints about him being insensitive or negative towards minority groups or anti-LGBTQ or bigoted or hostile to difference.

Significantly, Principal Rogo testified that no staff or student reached out to her to express any loss of faith in Respondent as a school leader. As principal of the school in which Mr. Smurro serves, she still has confidence in his ability to perform his duties and does not believe that this one incident involving a lapse in judgment should define him.

Thomas Decker is a co-vice principal at the Middle School with Respondent. He worked very closely with Respondent for seven years

and testified that he never saw him be unprofessional with any student or inappropriate with any staff or insensitive or intolerant to any student or staff concerns. He has not received any sort of negative responses from community members that would lead him to believe that there's a negative perception within the Neptune community. He had confidence in Mr. Smurro's ability as a school leader prior to the April 24 incident and his view has not changed. He believes Respondent could still be an effective school administrator, despite the widespread attention.

Andrea McGovern, the guidance counselor at the Middle School for the last five years, testified that she worked closely with Respondent. His interactions with students were always positive, even when he was administering discipline. He sought to deescalate situations with students and never dealt with them confrontationally. She noted that she has students within her charge who are members of the LGBTQ community, including those identifying as transgender, and none of those students ever confided in her that they have lost faith or confidence in Mr. Smurro. She never saw Mr. Smurro be unprofessional and never heard any complaint about him from any student. She stated that she believes that Respondent can still be effective and she believes her colleagues still have confidence in him, as well. Some have asked how he is doing and when he is coming back. Ms. McGovern testified that Mr. Smurro was involved in the administrative decision to switch the Middle School bathrooms to genderless ones.

Another guidance counselor, William Douma, echoed Ms.

McGovern's comments. Mr. Douma is the harassment, intimidation, and bullying (HIB) coordinator at the school. He worked with Respondent on HIB investigations and never saw him act unprofessionally or insensitively. He also worked with him to develop the "anti-bullying bill of rights." He testified that he has absolute faith and confidence in Respondent as a school leader and believes that if he had the opportunity to return, he would have the respect of students, staff, and parents.

In addition to the above witnesses, Respondent presented testimony from another eight teachers at the school, including a deaf teacher and a special education teacher, as well as an interpreter for the deaf. Their testimony was consistent with the testimony above, including emphasizing that the students loved him, the staff missed him, there was no increase in student disciplinary incidents after April 24, they continue to have confidence in him and they believe their colleagues have faith in him, and his absence has negatively affected morale.

All of the witnesses expressed their belief that if given the opportunity to return to his position, Mr. Smurro would use what had happened as a teachable moment, showing students that you can make a mistake, accept the consequences, learn from it, and move forward.

This may well have been a different case, more similar to the *In re Jennifer O'Brien, State-Operated School District of the City of Paterson*, 2011 WL 5429055 (N.J. Admin. 2011), aff'd by Comm'r, Agency Dkt. No. 108-5/11, aff'd 2013 WL 132508 (App.Div. 2013) and *In re Donna*

Coleman and Roselle Borough School Dist., Agency Dkt. No. 18-1/2 cases cited by the District, had it been Mr. Smurro who engaged in the transphobic rant. It was not. It was Mrs. Smurro. Her husband should not be punished for her beliefs and conduct.

Charge Two focuses on whether Mr. Smurro can continue to effectively serve as an administrator. In support of her contention that he cannot, the Superintendent, in Charge Two, relies on what she contends are the reasonable perceptions of members of the school community that he joined with and adopted the transphobic sentiments expressed by his wife. She cites "the social media postings, news articles, email and voicemails," "[t]he magnitude of the public outrage" and "the number of venomous complaints received by the District" as evidence that Respondent can no longer effectively serve as a vice principal. Yet, in Charge Three, the Superintendent clearly states that the public outcry "does not formulate [her] basis as the Chief School Administrator for recommending that Smurro's employment be terminated." This statement begs the question of whether Charge Two is therefore relevant to the decision to terminate his tenure.

I do not need to resolve this conundrum, however, as I find that the "abundant social media postings, news articles, emails, and voicemails" do not warrant his termination. The Superintendent is correct that the public outcry was loud and large. It is instructive, however, to carefully analyze the communications.

While Dr. Crader testified that there were 1500 emails sent to the District hostile to Mr. Smurro, there were 300-400 email messages

included in the Sworn Statement of Evidence in support of the Charges. (There are only a total of about 560 pages in the four exhibits referred to by Dr. Crader in her testimony as containing all the emails received. There is not more than one email message on any one page and some email communications took two or three pages. Many were duplicates or even triplicates of the same message. Many were form messages.) A handful (20-25, including some duplicates) of these were from senders who identified themselves as residents of the District. Most either did not state their location or were from other states and even other countries.

Contrary to the allegations in the Charge Two, I did not find ***any*** communications from District students or staff that provide evidence that students and staff "reasonably perceived him as joining with and adopting the transphobic sentiments expressed by his wife," are "outraged," or "no longer have confidence in Smurro's ability to effectively discharge his duties," or "question Smurro's foster [sic] an educational environment that fosters acceptance, tolerance, and diversity."

There are, however, many many emails from "stakeholders and other members of the public," expressing such beliefs. Some of the email messages reflected a misunderstanding of what had occurred on April 24. One writer was incensed at the "pure hate that the poor child in the video experienced." Two said Mr. Smurro threw a drink at workers. Several others stated that he threw a beer at a transgender person. One decried Smurro assaulting someone "simply because that person is

trans." One was angry that he had committed "a hate crime against a transgender child." One described Smurro as a "racist, homophobic bigot." One stated that "one of your employees is spewing transphobic rhetoric in the video" and another said, "your vice principal publicly berated a trans woman." One transgender writer stated, "Mrs. Smurro's proud, self-righteous display of hate was awful, but witnessing Mr. Smurro assaulting a young trans woman for the crime of existing in the same public space as he and his wife was absolutely brutal." These statements are clearly and demonstrably false. There is no evidence that a beer was thrown on a transgender person, let alone a transgender child, or that there was any racial content to any of the exchanges. These misunderstandings demonstrate the power of social media to distort and exaggerate events, similar to a vicious game of telephone.

(Interestingly, in one email exchange between Dr. Crader and Sara Palumbo, a District teacher, Dr. Crader refers to a certain set of emails as "all group think." (NEP0570))

There are similar factual misunderstandings in the 90 or so[3] voice mail messages left at the school in the days following the incident. Quite a few asserted that he threw beer at a transgender woman. One insisted that he had attacked a transgender student at the Middle School. Another confusingly stated that he had thrown something at a peaceful protester at a demonstration about trans rights after a principal had said derogatory things about trans rights. A few just ridiculed his shoes and his hat and his t-shirt.

[3] Some are duplicates. Some are from people who say they also sent email messages. A few don't refer to Mr. Smurro at all.

Similarly, one newspaper article referred to "the couple's transphobic tirade." Another stated that the video shows Mr. Smurro and his wife arguing with a waitress about a transgender woman using the woman's bathroom and that "the two" loudly made insensitive and transphobic remarks. The headline of a third article said that Smurro threw beer at a child after rant about a trans woman using women's bathroom." These statements, too, are false or at least misleading, as there is no question that it was Mrs. Smurro, not Mr. Smurro, who made disparaging comments about transgender people.

Many of the emails question the sincerity of his apology, assuming that he only apologized for not stopping once he realized he was being filmed. I note, however, that Respondent testified, and the Superintendent concedes, that the language of the statement was given to him by the Superintendent.

Most significantly, a majority of the media and social media articles and communications assumed that Mr. Smurro's actions of throwing the contents of his cup of beer and inviting the patron to join him out in the parking lot was in defense of his wife's statements when in fact, there is nothing to contradict his testimony that his conduct, while inappropriate, unprofessional, unjustified, and just wrong, was in defense of his wife, not her statements. She was being videotaped and taunted and in his words verbally abused, perhaps justifiably, and he came to her defense.

Many of the emails assume, based on the several minutes of video, that Mr. Smurro stayed silent in the face of his wife's comments and that

such silence constituted acquiescence. In fact, we don't know whether he stayed silent or not. There is testimony that the event lasted far longer than the brief snips of video that went viral and form the basis for this Charge. We see Respondent gesturing to his wife that it was time to leave. He testified that he repeatedly told his wife to stop and to calm down, but that she "just wouldn't let go." It is true that he did not publicly denounce her statements, and arguably he should have, but that does not mean that he acquiesced in her statements. The fact that many people assumed that he shared her beliefs does not make it so.

I find that the public reaction to the viral video—much of which is genuine and heartfelt and understandable, but much of which was apparently orchestrated from outside the Neptune community, some based on misinformation, and some constituting, as Dr. Crader described it, "group think"--does not establish that Respondent has discriminated or would discriminate against LGBTQ students or that he is otherwise unable to perform his duties. The answer to this question must be found elsewhere. As discussed above, I find that the evidence does not support a finding that he is transphobic or that he has or would discriminate against LGBTQ students or that he is otherwise unable to perform his duties.

I do not share Dr. Crader's belief that a public narrative based in whole or in part on an untruth should guide a personnel decision. (T.148) I recognize that such a public narrative may create a challenge for Mr. Smurro and for the rest of the administration, including Dr. Crader, to overcome in reestablishing trust, if indeed it is discovered

upon his return that trust has been jeopardized. It will be up to Mr. Smurro and the administration to rise to that challenge and find ways of making this incident an opportunity for growth and education and of assuaging any fears.

Charge Three asserts that the message sent by Respondent's conduct was "that he will stand in defense of intolerance" and as such is "antithetical to the efficient and effective operation of the District" and "cannot be tolerated." While the Charge states that Respondent's conduct sent a message "that he will stand in defense of intolerance," as discussed above, the conduct can also be seen as sending a message that he will stand in defense of his wife who was being filmed and taunted (although, again, perhaps with good reason). The substance of this Charge is similar to that of Charges One and Two and is discussed above and the Charge is therefore dismissed.

Charge Four charges Respondent with violation of Policy 1550, Equal Employment/Anti-Discrimination Practices. This Policy bars the Board from discriminating against staff on the basis of, *inter alia*, race, religion, gender or gender expression and, the section on which the District relies, contracting with a person who discriminates on such bases "either in employment practices or in the provision of benefits or services to students or employees." There is no evidence in the record that Respondent discriminates on any basis against anyone, but certainly not "in employment practices or in the provision of benefits or services to students or employees." The theory that because he defended his wife who arguably expressed intolerance for transgender

persons, he thereby discriminated in the provision of benefits or services to students is far-fetched. As discussed above, his defense of his wife who was being filmed and criticized by others does not equate to defending her comments or beliefs. Further, even assuming *arguendo* that it did so equate, the fact that he arguably could hold such beliefs does not mean that he did or would discriminate against students. Charge Four is dismissed.

Charge Five alleges a violation of Policy 3281: Inappropriate Staff Conduct. While the definition of inappropriate conduct set forth in the implementing regulation is broad ("includes but is not limited to"…"any conduct deemed by the Commissioner to be inappropriate conduct"), read as a whole, the Policy focuses on inappropriate sexual behavior by a staff member towards students. Broadly, the prohibition covers sexual harassment, inappropriate touching or comments, profanity, dating a student, and other similar conduct. There can be no question, as discussed above, that Respondent's conduct of throwing a beer at a member of the public, even if on non-school time and non-school property, was not "appropriate." I find, however, that it did not constitute inappropriate conduct within the meaning of Policy 3281. Charge Five is dismissed.

DECISION AND ORDER

As discussed above, I find Respondent Guilty of Charge One and Not Guilty of Charges Two, Three, Four and Five. However, for the

reasons discussed above, I do not find that his conduct warrants removal. Here the conduct was one isolated unpremeditated incident that did not directly involve staff or students. There is no evidence of any prior violent or even unprofessional behavior or inability to appropriately deal with tense or difficult situations. There is no evidence of any prior or currently held discriminatory or intolerant beliefs or behavior. There is no evidence that he is transphobic. While Dr. Crader's professional opinion is entitled to deference, the District still must prove by a preponderance of the evidence that Respondent's conduct in fact renders him unfit to be in a position of authority in the school and adversely affected the moral and efficiency of the District. I find that it has not met that burden.

In addition, as held by the court in *Fulcomer*, "Although 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." Taking into account the above factors and the impact his removal would have on his career, I find that a six-month unpaid suspension, essentially equivalent to one semester, would sufficiently impress on him the importance of acting as a role model for students, even on a Saturday afternoon following a Renaissance Fair. I order that he be reinstated and made whole for all loss, with the exception of a six-month disciplinary suspension.

SO ORDERED.

Barbara C. Deinhardt
Neutral Arbitrator

Dated: July 11, 2022

STATE OF NEW YORK)

: ss

COUNTY OF KINGS)

On this the 11th day of July, 2022, I, Barbara C. Deinhardt, affirm, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the forgoing as my Opinion and Award in the above matter.

Barbara C. Deinhardt