

**STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Agency Docket No.: 218-8/22**

In the Matter of the TENURE Hearing between

**The UNION TOWNSHIP BOARD OF EDUCATION, UNION COUNTY NEW JERSEY,
PETITIONER**

and

COREY LOWERY,

RESPONDENT

BEFORE: **Ira Cure, Esq.
Arbitrator**

APPEARANCES

For the Petitioner School Petitioner:
Florio Perrucci, et. al.
By: Christopher J. Buggy, Esq.

For the Respondent:
The Lopez Firm
By: Omar A. Lopez, Esq.

OPINION and AWARD

Pursuant to *N.J.S.A., 18A:6-10, et seq*, as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the Petitioner Township Board of Education, Union County ("Board" or "Petitioner") against Corey Lowery ("Lowery" or "Respondent") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on or about August 26, 2022. On September 20, 2022, in lieu of an answer, the Respondent moved to dismiss the charges.

On September 21, 2022, Jennifer Killough-Herrera, the DOE's Director of the Office of Controversies and Disputes, appointed me to hear this dispute. The Petitioner is represented by Christopher Buggy, Esq. of the firm of Florio, Perrucci, Steinhardt, Capelli, Tipton and Taylor, LLC and the Respondent is represented by Omar A. Lopez, Esq. of the Lopez Firm.

On September 22, 2022, I conducted a telephone conference with the parties to discuss the case. During the conference, the parties agreed to a briefing schedule. On January 6, 2023, I denied 1) the Respondent's motion to dismiss; 2) the Respondent's request that his suspension without pay for 120 days be lifted; and 3) the Petitioner's cross-motion for summary decision.

Hearings were held at the Petitioner's law firm, Florio, Perrucci, Steinhardt, Cappelli, Tipton and Taylor, LLC, ("Florio firm") 450 Mountain Avenue, New Providence, New Jersey, on February 2, and February 15, 2023.

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties submitted briefs and the record was closed as of April 14, 2023. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

A related case is pending before Arbitrator Ralph H. Colflesh ("Colefish"). Although related, the two proceedings were not consolidated.¹

¹ The Respondent objected to the Petitioner's request to amend the charge pending before Arbitrator Colflesh. At the time of this writing, I am unaware if arbitrator Colflesh has issued an Award in the proceeding before him.

THE ISSUE:

The issue for arbitral determination is:

Has the Petitioner established that the Respondent abandoned his position as set forth in the Tenure charges brought against the Respondent? If so, what shall be the penalty?

STATEMENT OF CHARGES

I, Dr. Scott Taylor, of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:

I am employed by the Township of Union Board of Education ("Board") as its Superintendent of Schools. The Board maintains its administrative offices at 2369 Morris Ave, Union, New Jersey 07083. I am charged with the general oversight of the school district and all employees serving therein. During all times relevant herein, Corey Lowery ("Mr. Lowery" or "Respondent") has been employed by the Board as a high school Principal. Lowery is currently tenured pursuant to N.J.S.A. 18A:28-5.

I am fully familiar with all the facts and circumstances regarding the charges against Mr. Lowery, based upon my personal knowledge and upon information and belief. I have personally reviewed the accompanying Sworn Statement of Evidence. I hereby charge Mr. Lowery with abandonment of position, violation of New Jersey statutes, violation of Board policies and/or other just cause warranting dismissal or reduction in salary, pursuant to N.J.S.A. 18A:6-10, et seq., as more particularly set forth below.

BACKGROUND COMMON TO ALL CHARGES

Respondent was hired by the Board on or about September 1, 2007, as the Principal of Franklin Elementary School, where he remained through July 31, 2015. Respondent became the Principal of Union High School on August 1, 2015, a position he still holds today.

At all relevant times herein, Respondent was subject to the terms and conditions of the Collective Bargaining Agreements between the Board and The Township of Union Association of School Administrators for September 1, 2014 through August 31, 2018, thereafter by the Agreement of the same parties for September 1, 2018 through August 31, 2021, and thereafter by the Agreement of the same parties for September 1, 2021 through June 30, 2024. Further, Respondent was obligated to perform the duties of his position in accordance with any and all Board policies and any and all applicable laws, rules, and regulations, as an employee of the Board.

On July 21, 2017, Linda Ionta ("Ms. Ionta"), the Board's Athletic Director, submitted

an Affirmative Action Complaint against Respondent. In sum, Ms. Ionta claimed that Respondent created a hostile and/or unhealthy workplace environment because of his actions toward her and the Union Township High School coaches that she oversees. Specifically, Ms. Ionta pointed to twelve (12) incidents, or actions, that contributed to Respondent's creation of a hostile work environment.

As a result, the Board engaged Peter B. Fallon, Esq. ("Mr. Fallon"), to complete an investigation into the allegations. Following an in-depth investigation, Mr. Fallon concluded that Respondent violated the Board's Workplace Harassment Policy for the following reasons:

1. Writing up Ms. Ionta on a District "Comments Related" form typically used to discipline a staff member when he was not her supervisor was inappropriate behavior that was intimidating, offensive and harassing.
2. Respondent's continued insistence that Ms. Ionta obtain his approval or consent before recommending coaches for appointment or reappointment was contrary to my direction and established practices and policies of the Board.
3. Respondent continued his behavior after former Superintendent Gregory Tatum directed him to refrain from doing so.
4. Respondent's continued insistence that Ms. Ionta obtain his permission prior to recommending the appointment of coaches was an attempt to intimidate and harass her into following his instructions.

Relevant to the investigation completed by Mr. Fallon, Former Board Policy 4119.3/4219.3 stated "[d]isciplinary action may be taken if the severity of the workplace harassment or bullying makes that intervention appropriate."

As a result of Ms. Ionta's complaint and Mr. Fallon's findings, Respondent was placed on paid administrative leave on or about September 13, 2018. On or about May 5, 2020, Lincoln University announced that it hired Respondent as its head men's basketball coach. Lincoln University is located in Lincoln University, Pennsylvania, approximately one hundred and thirty-five (135) miles from Union Township High School. Despite his acceptance of a full-time position which conflicted with his duties of employment with the Board, Respondent refused to resign from his Board position, as detailed in a letter from his attorney, dated May 19, 2020. In response to numerous requests, on September 22, 2020, Respondent's attorney confirmed that Respondent sold his New Jersey residence and relocated to Pennsylvania.

Throughout this timeframe, there were multiple civil lawsuits filed in connection with the aforementioned circumstances. First, on about November 13, 2018, Respondent filed a civil lawsuit captioned Lowery v. Nufrio et al., UNN-L-3887-18. Additionally, the Board instituted an action pursuant to the New Jersey First Act captioned Union Township Board of Education v. Corey Lowery, Docket No. UNN-L-3466-20, due to Respondent's failure to reside in the State of New Jersey, after having moved to Pennsylvania, as referenced above.

Throughout the course of the Lowery litigation, Respondent has consistently demanded to be reinstated as Principal of Union High School. Respondent demanded reinstatement in December 2019. At mediation in March 2021, Respondent again demanded reinstatement. As recently as May 3, 2022, Respondent continued to demand reinstatement, as well as payment of significant monies by the Board, to resolve his action against the Board.

After receiving Respondent's May 3, 2022 settlement demand, the parties requested the Court hold a settlement conference in an effort to resolve the litigation. The Court scheduled a settlement conference for June 8, 2022. Prior to attending the conference, on May 10, 2022, Respondent and I, as well as our respective counsel, conducted a meeting via Zoom regarding Respondent's return as Principal at Union High School on July 1, 2022. During this May 10, 2022 Zoom meeting, Respondent and I were able to become acquainted and I was able to communicate my expectations for the Principal role at Union High School. We also reviewed a three-page memo I prepared regarding same. At the end of the May 10, 2022 Zoom conference, the parties scheduled another Zoom conference for May 26, 2022 for further discussion of the logistics of Respondent's return to the Principal position at Union High School. This meeting was cancelled by Respondent on May 25, 2022 due to a last minute scheduling conflict.

At the June 8, 2022, the parties and their counsel attended a settlement conference before Hon. Mark P. Ciarrocca, P.J. Civ., at the Union County Courthouse in Elizabeth, New Jersey. At the settlement conference the Board was prepared to discuss settlement proposals, with the parties' understanding that Respondent would be returning as Principal at Union High School on July 1, 2022 and the monetary component of any settlement would need to be negotiated. Specifically, the Board offered Respondent full reinstatement to his position as Principal of Union High School effective July 1, 2022, along with financial considerations and other accommodations. After discussing this proposal with his counsel, Respondent advised the Court and the Board for the first time that he was not interested in returning to his position as Principal at Union High School.

After the June 8, 2022 settlement conference, the Board and Respondent exchanged various settlement proposals. On or about June 22, 2022, the Board learned through media outlets that not only was Respondent no longer interested in returning to his position as Principal at Union High School, but that he had accepted a full-time position as Assistant Coach of the Seton Hall University Men's Basketball team. Additionally, on or about June 27, 2022, Respondent's attorney not only confirmed Respondent's acceptance of the full-time position at Seton Hall University, he also advised that Respondent had moved back to New Jersey in June of 2022.

Current Board Policies 3214 and 4214 provide that no staff member of the Board of Education "shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity which is in conflict with the proper discharge of the staff member's duties." Likewise, former Board Policy 4119.21/4219.21, which states "[a]n employee of the Township of Union Board of Education shall not have any interest, financial or otherwise, direct or indirect, or engage in any business or

transaction or professional activity which is in conflict with the proper discharge of his/her duties." Similarly, former Board Policy 4119.22/4219.22, states that "[n]o member of the staff shall engage in outside employment which conflicts with proper performance of his/her duties, or which would tend to harm the teaching/learning relationship."

Current Board Policies 3230 and 4230, provide that employees "shall not devote time during their work day to an outside private enterprise, business, or business organization." Under these Policies, the "Board reserves the right to determine if activities outside the [employee's] job responsibilities interfere with their performance and the discharge of the [employee's] responsibilities to this district." In that same vein, former Board Policy 4138/4238 states in pertinent part, "[s]chool employees shall not use school time or school facilities in connection with any personal activity for financial profit. Any violations of this provision may bring disciplinary action." This Policy further states, "[n]o outside work by a staff member shall prevent him/her from properly performing assigned functions during duty hours or be prejudicial to his/her work effectiveness."

Additionally, N.J.S.A. 18A:28-8 states, "Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year."

Finally, N.J.S.A. 18A:12-24 states "[n]o school official or member of his immediate family shall have an interest in a business organization or engage in any business transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest," and [n]o school official shall undertake any employment service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties."

SPECIFICATION OF CHARGES
CHARGE I
ABANDONMENT OF POSITION

The foregoing background information, and the facts alleged therein are incorporated by reference as if fully set forth herein. Respondent is guilty of abandonment of his position. In June 2022, Respondent moved back to the State of New Jersey. On June 8, 2022, after years of demanding reinstatement, and after plans had been made to reinstate Respondent effective July 1, 2022, for the first time, Respondent abruptly and unexpectedly advised the Board that he would not be returning to his position as Principal at Union High School. Further, on or about June 22, 2022, Respondent accepted a full-time position as Assistant Coach of the Seton Hall University Men's Basketball Team, resulting in his inability to perform the functions of his full-time role as an administrator. Respondent is unwilling, incapable and unable to perform his duties as Principal while simultaneously working as an assistant coach of a Division I men's basketball program. Respondent's employment as an assistant coach with Seton Hall University clearly

conflicts with the proper performance of Respondent's duties as an administrator with the Board, and illustrate Respondent no longer is willing to perform those duties. The above-referenced facts demonstrate abandonment of position and warrant Respondent's immediate dismissal from the position of Principal with the Board.

Count 1

On June 8, 2022, Respondent informed the Board that he was no longer interested in returning as Principal of Union High School, despite consistently demanding reinstatement in that position. This abrupt change in position was also contrary to the parties' understanding and plans made for Respondent's reinstatement effective July 1, 2022. Under N.J.S.A. 18A:28-8, a tenured teaching staff member must give at least sixty (60) days written notice of his intention to relinquish his position.

Count 2

On or about June 22, 2022, Respondent accepted a position as an assistant men's basketball coach at Seton Hall University, a position which he continues to hold. This is a full-time, paid position which conflicts and interferes with the proper performance and discharge of his duties as an administrator with the Board. Current Board Policies 3214 and 4214 provide that no staff member of the Board of Education "shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity which is in conflict with the proper discharge of the staff member's duties." Further, under N.J.S.A. 18A:12-24, no school official shall have an interest in a business organization or engage in any business transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

The foregoing acts and omissions by Respondent, as set forth in the above Counts, individually and cumulatively, constitute abandonment of his position, warranting dismissal.

FACTS

Prior to being employed by the Petitioner, the Respondent began his career in education as a teacher in the Hillside School District. From 1998-2000 Mr. Lowery taught fifth grade at George Washington Elementary School. From 2000-2002, Mr. Lowery taught at the Calvin Coolidge Demonstration School. Commencing in 2002, Mr. Lowery began his career as an administrator. In addition to being a reading teacher at the Walter O. Krumbiegel Middle School, from 2002-2003, Mr. Lowery became an Administrative Intern, and assisted Principal Gregory Tatum ("Tatum"). (Respondent Ex. 10).

From 2003-2007, Mr. Lowery was the Vice Principal of the Walter O. Krumbiegel Middle School. After Mr. Tatum left the Hillside School District, he was employed by the Petitioner in this proceeding as an Assistant Superintendent. Mr. Tatum then helped recruit Mr. Lowery to become the Principal of Franklin Elementary School in Union Township.

Franklin Elementary School had been designated as a School in Need of Improvement ("SINI") because it had failed to meet state benchmarks. Mr. Tatum testified that under Mr. Lowery's tenure, Franklin Elementary School emerged from the SINI designation, and was considered to be one of the better elementary schools in the State of New Jersey.

From 1998-2005, while working in Hillside, Mr. Lowery also coached the Union High School basketball team. According to Mr. Tatum, Mr. Lowery's rapport with high school students led him in 2015 to recruit Mr. Lowery to be the Principal of Union High School.

As a Principal in Union Township, Mr. Lowery's employment was in part governed

by the collective negotiations' agreement ("CNA") between the Board and the Township of Union Association of School Administrators. ("UTASA").

Throughout Mr. Lowery's employment by the Petitioner, he worked with some success as the head men's basketball coach at two junior colleges in New Jersey. From 2006-2010, Mr. Lowery was the head coach at Middlesex College in Edison, New Jersey, and from 2011 to 2017, Mr. Lowery was the head coach at Essex County College in Newark, New Jersey.

There is no evidence that Mr. Lowery's coaching duties interfered with his work as a Principal at Union High School. Mr. Tatum testified that Mr. Lowery's coaching duties did not interfere with Mr. Lowery's duties as a Principal.

On July 21, 2017, Linda Ionta ("Ionta"), the Petitioner's Athletic Director filed an Affirmative Action Complaint against Mr. Lowery. Ms. Ionta alleged that Mr. Lowery "created a hostile and/or unhealthy workplace environment towards her and the Union Township High School coaches" that Ms. Ionta supervised.²

The Board commenced an investigation, and by letter on September 14, 2018, now Superintendent Tatum placed Mr. Lowery on administrative leave. The letter states in pertinent part:

This letter is written to confirm the fact that you have been placed on an administrative leave of absence with pay effective September 13, 2018. The reason you have been placed on an administrative leave of absence with pay is due to the conclusion of the affirmative action investigator's report and pending litigation.

While you are on this leave, you are not permitted on the school grounds of any Township of Union Public School without my prior approval. In addition, you should not have

² The allegations contained in Ms. Ionta's complaint are not before me.

any contact with faculty, staff, or students of any Township of Union Public Schools.

Until Ms. Ionta's complaint was filed, there is no evidence that Mr. Lowery had been disciplined by the Board, and in fact he had received uniformly good evaluations. As a result of being placed on leave, Mr. Lowery commenced a lawsuit against the Board entitled *Lowery v. Nufrio et. al.*, UNN-L-3887-18³.

On or about May 5, 2020, while on leave Mr. Lowery accepted the position of the head men's basketball coach at Lincoln University in Pennsylvania. When the Petitioner learned of Mr. Lowery's employment by Lincoln University, the Board commenced an action against Mr. Lowery under the New Jersey First Act, which, with certain exceptions, requires New Jersey public employees to reside in New Jersey.⁴

The present Superintendent of Schools is Dr. Scott Taylor ("Taylor"). Dr. Taylor succeeded Mr. Tatum as Superintendent. In his testimony before me, and in the above stated charges and specifications, Dr. Taylor stated that he believed Mr. Lowery wanted to return to his position as Principal of Union High School. At the time that Dr. Taylor became Superintendent, Mr. Lowery was on administrative leave. As such, Dr. Taylor never supervised or observed Mr. Lowery in his role as Principal of Union High School.

Dr. Taylor described settlement discussions between himself and Mr. Lowery, and the possible return of Mr. Lowery to his position as Principal. These discussions occurred in May 2022. Although Mr. Lowery and Dr. Taylor discussed the possibility that Mr. Lowery would return to work on July 1, 2022, no firm commitment to return Mr. Lowery to service was made.

³ The allegations contained in this complaint are not before me.

⁴ The allegations contained in the complaint filed pursuant to the New Jersey First Act are not before me. However, as I understand it, they may have some bearing on the proceeding before Arbitrator Coleflesh.

On June 8, 2022, Mr. Lowery and his counsel, and counsel for the Board, appeared in Court for a settlement conference. During these ongoing discussions, the media reported that Mr. Lowery had accepted a position as the assistant men's basketball coach at Seton Hall University, a Division I program. Respondent's counsel confirmed these reports. Without discussing Mr. Lowery's decision to take the position at Seton Hall, the Petitioner concluded that Mr. Lowery was no longer interested in returning to his position as Principal of Union High School. However, there is no evidence that Mr. Lowery ever communicated an intention not to return to Union High School.

Discussions between counsel for Mr. Lowery and the Petitioner continued, and on June 15, 2022, counsel for Mr. Lowery sent a letter to counsel for the Petitioner in which he stated that Mr. Lowery would remain on administrative leave and resign as Principal of Union High School on September 30, 2023. (Respondent's Ex. 19). Counsel for the Petitioner appeared to accept the terms offered by counsel for Mr. Lowery. (Respondent's Ex. 20). Counsel for the Petitioner sent an email to Mr. Lowery's attorney which stated: "Please accept this email as my further acknowledgement that we have a deal subject to final Board approval, to resolve this matter along the terms outlined in your letter of June 15, 2022." (Respondent's Ex. 20). On June 24, 2022, counsel for the Petitioner forwarded a draft settlement agreement to counsel to the Respondent. (Respondent's Ex. 21). However, the Board did not approve the settlement terms, and on July 19, 2022, the Board appointed an Interim Principal for Union High School. (Respondent's Ex. 27).

Dr. Taylor testified that he was unaware of the settlement discussions held between counsel for the Board and Mr. Lowery's counsel. Dr. Taylor also testified that he never discussed Mr. Lowery's duties as an assistant head coach at Seton Hall University

with Mr. Lowery.

On July 14, 2022, Dr. Taylor sent Mr. Lowery a "Rice notice" informing him that the status of his employment would be discussed at the Board's meeting set for July 19, 2022.⁵ On August 4, 2022, Dr. Taylor filed sworn tenure charges against Mr. Lowery. On August 23, 2022, the Board determined that there was probable cause to credit the evidence in support of the tenure charges, and that the tenure charges were sufficient to warrant dismissal in accordance with *N.J.S.A. 18A:6-14*.

POSITIONS OF THE PARTIES

A. The Board's Position

The Board recognizes that tenure is designed to protect statutorily designated school employees from dismissal for "unfounded, flimsy, or political reasons." However, the Board notes that a tenured Principal may be dismissed for "inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A. 18A:6-10*.

In support of its position that Mr. Lowery abandoned his position as Principal of Union High School, the Board cites to the Board's Conflict of Interest Policy No. 3214 which provides in pertinent part:

No staff member of the Board of Education shall have any interest, financial or otherwise, direct or indirect, or engage in any business transaction or professional activity which is in conflict with the proper discharge of the staff member's duties.

Although the Board concedes that Mr. Lowery is an administrator and not a teacher, the Board contends that Mr. Lowery is bound by policies that further restrict

⁵ Under New Jersey law, a Rice notice is sent to an employee whose employment status will be discussed at a closed-door meeting. The term is derived from the case of *Rice v. Union Cnty High School Bd. Of Ed*, 155 N.J. Super. 64 (App. Div. 1977).

outside activities by staff members. The Board cites Outside Activities Policy No. 3230 which provides in pertinent part: "Teaching staff members shall not devote time during their workday to outside private enterprise, business or business organization." In addition, the Board notes that it "reserves the right to determine if activities outside of the teaching staff members job responsibilities interfere with their professional performance and the discharge of the member's responsibilities to the students of this district."

The Board also maintains that Mr. Lowery violated *N.J.S.A. 18A:28-8* which requires all teaching staff to provide sixty days written notice of their intent to relinquish their position.

The Board takes the position that by accepting the position as an assistant basketball coach at Seton Hall University, Mr. Lowery created for himself an undeniable conflict of interest, and violated the statute because he never gave notice to the Board that he was relinquishing his job. In further support of its argument that Mr. Lowery could not be both the Principal of Union High School and an assistant basketball coach at a Division I school, the Board cites to the CNA between the Board and the UTASA.

The Board notes that under the CNA, administrators are required to work no less than eight hours per day including lunch. In addition, the CNA provides that:

an administrator shall be required to extend his or her daily working hours to perform his/her professional responsibilities in accordance with existing practices for the profession. This includes various workshops, professional development meetings and presentations pertaining to district initiatives, building department or academic information sessions.

(Petitioner's Ex. 19, Art. 6.01).

In addition to the professional requirements for administrators, the Board notes that the CNA also limits the amount of time off that an administrator can take during the

school year. The Board points out that while administrators are entitled to twenty-five vacation days during the school year, an administrator may not take vacation days when students are in attendance without the prior approval of the Superintendent. Dr. Taylor testified that he would not authorize Mr. Lowery's use of vacation days in order to perform his duties as an assistant basketball coach. Similarly, administrators are also entitled to six personal days per year, but no more than two personal days may be taken consecutively without the permission of the Superintendent.

The Board reasons that the position of Principal is a full-time, demanding position, and that it would be impossible for Mr. Lowery to fulfill his duties as a Principal and as a basketball coach for a Division I school. The Board cites Mr. Lowery's testimony in this proceeding, and notes that Mr. Lowery himself established that the demands of an assistant basketball coach precluded him from taking on both roles. The Board notes that as an assistant basketball coach, he was required to attend both home and away games, some of which were outside of the State of New Jersey and would require Mr. Lowery to miss school. In addition, as an assistant basketball coach, Mr. Lowery would have to attend practices, watch films resulting in a commitment of approximately forty hours per week.

While conceding that Mr. Lowery had previously coached at the Junior College level with the approval of Mr. Tatum, the Board argues that the demands of Division I basketball program far outweigh Mr. Lowery's previous coaching responsibilities.

The Board also contends that because of the settlement discussions with Mr. Lowery, it was unclear if Mr. Lowery truly intended to return to his position as Principal of Union High School, and therefore the Board concluded that it was justified in finding a

replacement for Mr. Lowery to assume the duties of Principal.

The Board also notes that tenure rights may be relinquished on a voluntary basis.

The Board points to *N.J.S.A. 18A:28-8* which provides:

Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days of written notice of his intention, unless the board shall approve of release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

The Board contends that when a tenured employee refuses to accept a full-time position offered to them, that employee has surrendered his right to tenure. (Board's brief at 17, citing, *O'Toole v. Forestal*, 211 N.J. Super. (App. Div. 1986).

The Board maintains that during settlement discussions Mr. Lowery refused to accept the full-time position offered to him, and thereby relinquished his tenure rights. The Board asserts that Mr. Lowery put the Board in an untenable position because Mr. Lowery knew that the Board had to have a Principal in place for the 2022-2023 school year. The Board asserts that Mr. Lowery never intended to return to Union High School as evidenced by his employment as assistant basketball coach at Seton Hall University. The Board reasons that by his actions, Mr. Lowery demonstrated that he intended to abandon his position at Union High School. The Board contends that Mr. Lowery ignored his obligations to the students at Union High School.

The Board also analyzes Mr. Lowery's role as an Assistant Coach at Seton Hall University and contends that his position as coach presents a substantial conflict with his duties as a Principal at Union High School. The Board contends that by assuming his duties at Seton Hall University, Mr. Lowery will be running afoul of Board policies and

N.J.S.A. 18A:12-24 which prohibit school employees from having a business interest that conflicts with their obligations to their school. The Board maintains that, as an assistant basketball coach, Mr. Lowery would have to sacrifice some of his obligations to Union High School if he were to continue in both jobs. The Board stated that Mr. Lowery made a choice, and he must live with the consequences.

The Board contends that Mr. Lowery abandoned his job, and that dismissal is the appropriate penalty.

B. Respondent's Position

The Respondent begins his brief by noting that the burden of proof in tenure cases is on the Petitioner, which must prove the truth of the allegations against Mr. Lowery by a preponderance of the evidence. The Respondent also notes that the tenure laws are designed to "protect competent and qualified teachers in the security of their positions during good behavior, and to protect them . . . against removal for unfounded, flimsy or political reasons." (Respondent's Brief at 13 citing, *Zimmerman v. Board of Education of Newark*, 38 N.J. 65, 71 (1962)). The Respondent maintains that the Tenure Act must be liberally construed." (Respondent's Brief at 1 citing, *Spiewak v. Bd. of Education of Rutherford*, 90 N.J. 63, 74-75 (1982)).

In discussing the first count in which Mr. Lowery purportedly indicated that he did not desire to return to Union High School, the Respondent denies that he ever communicated a desire not to return to Union High School as Principal. The Respondent also notes that in order to relinquish his tenure rights he had to make a knowing choice to surrender those rights. The Respondent relies upon the case of *Knorr v. Smeal*, 178 N.J. 169 (2003). In *Knorr* the Court stated that:

Waiver is a voluntary and intentional relinquishment of a known, right. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. The party waiving a known right must do so clearly, unequivocally and decisively.

(Respondent's Brief at 15).

The Respondent also cites other cases where the Courts and the Commissioner of Education concluded that employment held before a suspension, or without notice of the consequences of accepting another position did not constitute a knowing and voluntary waiver of tenure rights. (Respondent's Brief at 15 citing, *School District of Willingboro v. Gilbert*, 3 N.J.A.R. 206, aff'd 3 N.J.A.R. 209 (1981); *Parsells v. Bd. of Ed. of Sommerville*, Docket No. A-3084-19 (App. Div. June 6, 2022) (slip op.)).

The Respondent contends that he never resigned or intended to resign by exploring settlement options at a court-sanctioned settlement conference. The Respondent asserts that he was deciding whether he should purchase the "offeror's peace" with the Petitioner and put the litigation behind him. Thus, the Petitioner maintains that he never intended to waive his right to tenure and Charge 1 must be dismissed.

Regarding the second count, the Respondent rejects the Board's position that his work as an assistant head basketball coach at Seton Hall University would interfere with his ability to perform his duties as Principal at Union High School. The Respondent asserts that many of the policies relied upon by the Board refer to teachers and not administrators such as Mr. Lowery.

The Respondent also contends that under the provisions of the CNA he would be able to arrange his personal and vacation days in order to fulfill his obligations to both

Seton Hall University and to Union High School.

The Respondent notes that as Principal he is charged with creating a master schedule. While the Respondent recognizes that he would frequently have to attend after school events, he states that he had previously worked with other administrators to divide those responsibilities so that there is coverage at various school events, and minimal disruption to school activities.

The Respondent points to Mr. Tatum's testimony in which Mr. Tatum stated that Mr. Lowery's coaching responsibilities did not interfere with his duties as Principal. Mr. Tatum characterized Mr. Lowery as "highly professional" and in constant communication. The Respondent also notes that, since September 13, 2018, when he was placed on administrative leave, the Respondent has had no duties to perform as an employee of the Petitioner.

The Respondent rejects the idea that his employment at Seton Hall University would "prejudice his independence of judgment in the exercise of his official duties." The Respondent asserts that he has always acted in a professional manner as a Principal with sincerity and dedication.

The Respondent contends that the Petitioner is speculating when it asserts that the Respondent is unable to perform the tasks of an assistant basketball coach and Union High School Principal. The Respondent notes that Dr. Taylor never supervised Mr. Lowery. The Respondent further contends that the Petitioner has no factual basis for insisting that the Respondent relinquish his tenure rights based upon the fact that he is a coach at Seton Hall University.

The Respondent maintains that the Petitioner has not proven Count 2. The

Respondent asks me to dismiss the charges against the Petitioner, that his suspension be reversed, and that his pay be reinstated with all backpay benefits and emoluments due to him. In addition, the Respondent demands all back pension contributions in order to restore Respondent's pension credit to the Teacher's Pension and Annuity Fund.

DISCUSSION

A. The Legal Standard

The Education Tenure Act governing teacher tenure provides in pertinent part:

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub article, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

N.J.S.A. 18a:6-10.

Tenure is a "statutory right that may not be forfeited or waived." *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 77 (1982). Tenure is designed to protect employees from dismissal "for unfounded, flimsy or political reasons." *Wright v. Bd. of Educ. Of E. Orange*, 99 N.J. 112, 118 quoting *Zimmerman v. Newark Bd. of Educ.*, 38 N.J. 65, 72 (1962).

In order to find that an employee engaged in conduct which merits removal, that employee is "entitled to an evaluation of the conduct in terms of its relationship to the

nature of the office itself, and in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question.” *Sch. Dist. Of Parsippany-Troy Hills v. Hess*, 97 N.J.A.R. 2D (EDU) 34, 45 (citations omitted).

The Board has asserted two Charges against Mr. Lowery each of which it contends merits Mr. Lowery’s termination. The Board has the burden of proof in this proceeding. The two Counts though related will be discussed separately.

A. Count 1

On June 8, 2022, Respondent informed the Board that he was no longer interested in returning as Principal of Union High School, despite consistently demanding reinstatement in that position. This abrupt change in position was also contrary to the parties’ understanding and plans made for Respondent’s reinstatement effective July 1, 2022. Under N.J.S.A. 18A:28-8, a tenured teaching staff member must give at least sixty (60) days written notice of his intention to relinquish his position.

Count 1 arises from the conversations that Mr. Lowery had with Dr. Taylor, and settlement discussions held in Court to resolve pending litigation. In order to prove this charge, the burden is on the Petitioner to establish that Mr. Lowery knowingly relinquished his position and waived his tenure rights.

There is no evidence that establishes that Mr. Lowery ever agreed to relinquish his position and waive his tenure rights. The evidence shows that throughout May of 2022, Mr. Lowery was in contact with Dr. Taylor and the two were discussing Mr. Lowery’s reinstatement to his position as Principal as of July 1, 2022. The evidence also establishes, that on a separate track, counsel for the Board and counsel for Mr. Lowery were in Court discussing a resolution of pending litigation. The proposed settlement would have kept Mr. Lowery on Administrative leave through September 30, 2023. That is under the terms of the settlement agreement, Mr. Lowery would not have to perform any duties

as a Principal and would have been permitted to retire in September of 2023.

After the announcement that Mr. Lowery had taken the position at Seton Hall University, the Board decided not to finalize the settlement that had been under discussion.

Dr. Taylor was unaware of the settlement discussions between the Board and Mr. Lowery. The settlement discussions and the possibility of Mr. Lowery's reinstatement to full-time duty at Union High School were independent of each other.

At no point did Mr. Lowery specifically relinquish or waive his tenure rights. Even if I were to credit the position of the Board, that by engaging in settlement discussions, Mr. Lowery had communicated that he was no longer interested in being Principal of Union High School, that settlement required the Board to provide significant consideration to Mr. Lowery. The only conclusion that could be drawn from the fact that settlement discussions occurred, is that Mr. Lowery was willing to consider the offeror's peace, but without that consideration contained in the settlement proposal he was still interested in maintaining his position as Principal of Union High School.

Accordingly, I find that the Petitioner has not proven Count 1.

B. Count 2

On or about June 22, 2022, Respondent accepted a position as an assistant men's basketball coach at Seton Hall University, a position which he continues to hold. This is a full-time, paid position which conflicts and interferes with the proper performance and discharge of his duties as an administrator with the Board. Current Board Policies 3214 and 4214 provide that no staff member of the Board of Education "shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity which is in conflict with the proper discharge of the staff member's duties." Further, under N.J.S.A. 18A:12-24, no school official shall have an interest in a business organization or engage in any business transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

Count 2 concerns Mr. Lowery's decision to accept the position of assistant head basketball coach at Seton Hall University. The Petitioner contends that by accepting this position, the Respondent has violated Current Board Policies 3214 and 4214 and N.J.S.A. 18A:12-24, which preclude school officials from engaging in activities that have a substantial conflict with their duties. Having reviewed the record evidence, I conclude that the Petitioner has partially proven the allegations contained in Count 2. I find that Mr. Lowery, by taking the position of assistant head coach at Seton Hall University, engaged in a professional activity which was in substantial conflict with his position as Principal of Union High School. Nonetheless, under the unique circumstances of this case, I also conclude that Mr. Lowery's termination is not warranted.

Although Mr. Lowery has established to my satisfaction that he had successfully served as a Principal and as head basketball coach on the Junior College level, I am unable to conclude that Mr. Lowery would be able to adequately fulfill his duties as Principal if he were to be reinstated and continue his employment at Seton Hall University.

Mr. Lowery's own testimony establishes that coaching a Division I basketball team is more rigorous than coaching a New Jersey Junior College. Although many games are on weekends, there are also occasional games during the week that entail extensive travel, and occasionally overnight travel. In addition, if a Division I team is successful it might engage in significant post-season tournament play. I also conclude that the rigors of the schedule, the travel, and practices on non-game days would conflict with Mr. Lowery's ability to perform the duties of Principal at Union High School.

While I conclude that there is an innate conflict between the position of assistant coach and Principal, I do not believe that a significant penalty should be imposed upon

the Respondent. I make this finding because at the time Mr. Lowery accepted the position at Seton Hall University, the Board had placed Mr. Lowery on administrative leave and he was "not permitted on the school grounds of any Township of Union Public School without . . . prior approval. In addition, [he was barred from having] any contact with faculty, staff, or students of any Township of Union Public Schools."

As such, Mr. Lowery had no responsibility to the Petitioner until the Petitioner ended the administrative leave. Mr. Lowery was, therefore, free to partake in any activity he chose until the Petitioner directed Mr. Lowery to return to work.

Under these circumstances, the issue becomes what is the appropriate penalty. While I conclude that Mr. Lowery placed himself in an inherent conflict, at this juncture, I do not believe he should suffer a monetary penalty, and this award shall be deemed a warning that he no longer engages in activities that place him in a conflict with his duties as Principal of Union High School.

I direct that Mr. Lowery be reinstated to his position as Principal of Union High School with all backpay, benefits and emoluments due to him, including any pension contributions.

However, Mr. Lowery's reinstatement is contingent upon his deciding whether he prefers to be an assistant basketball coach at Seton Hall University or the Principal of Union High School. As such, within thirty days of the date of this Award, Mr. Lowery must choose if wishes to remain at Seton Hall University or to return to the position of Principal Union High School. Mr. Lowery cannot have both full-time positions. Should Mr. Lowery choose to remain at Seton Hall University at the end of the thirty days, his employment by the Petitioner will be deemed terminated.

Absent an appeal to the Commissioner, I will retain jurisdiction to resolve any dispute concerning the remedy herein.

AWARD

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A:6-16*, as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ") hereby issues and AWARDS as follows:

1. The allegations contained in Count 1 of the Charge have not been proven, and are dismissed;
2. The allegations contained in Count 2 of the Charge has been partially proven;
3. This Award shall be deemed a warning to Petitioner Corey Lowery, Petitioner Corey Lowery shall not engage in any professional activity that will be in substantial conflict with his position as Principal of Union High School;
4. Petitioner Corey Lowery shall be reinstated to his position as Principal of Union High School with all backpay, benefits and emoluments due to him, including any pension contributions;
5. Petitioner Corey Lowery's reinstatement is contingent upon his resignation from Seton Hall University within thirty days of the execution of this Award;
6. In the event Petitioner Corey Lowery fails to resign from his position as an assistant basketball coach at Seton Hall University within thirty days of the date of this award, his employment by the Petitioner shall be deemed terminated;

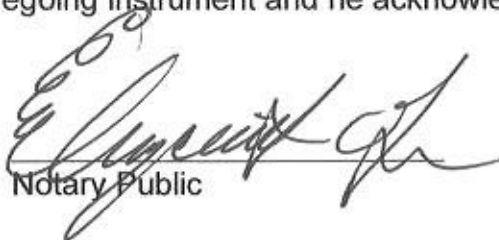
7. The undersigned shall retain jurisdiction for the limited purpose of resolving any disputes concerning the remedy herein.

Dated: April 29, 2023


Ira Cure

State Of New York)
)
County of Kings)

On this 29th day of April, 2023 before me personally came and appeared Ira Cure, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged that he executed the same.


Notary Public

ELIZABETH ORFAN
Notary Public, State of New York
No. 02OR4976601
Qualified in Kings County
Commission Expires April 23, 2024 