83-23

NEW JERSEY DEPARTMENT OF EDUCATION

Agency Docket No.: 249-12/20
Ralph H. Colflesh, Jr., Esq.
Arbitrator

IN THE MATTER OF
TENURE CHARGES BY
THE SCHOOL DISTRICT
OF THE TOWNSHIP OF UNION,
UNION COUNTY,

Petitioner,

and

COREY LOWERY,

Respondent.

Appearances
For Petitioner School District:
Lester E. Taylor, Esq.
Christopher J. Buggy, Esq.
Florio Perrucci Steinhart Capelli, Tipton & Taylor, LLC
New Providence, New Jersey
For Respondent Lowery
Omar A. Lopez, Esq.
Rabner Baumgart Ben-Asher and Nirenberg, P.C.
Mount Clair, New Jersey

DECISION AND AWARD

Certified tenure charges having been filed by Petitioner, Township of Union Board of Education, (sometimes herein "the Board") (P1), and Respondent, Corey Lowery, having timely filed an Answer to those Charges, the undersigned arbitrator was appointed to determine the truth of the Charges, and, if some or all are found true, to determine whether or not Respondent should be removed from his position or suffer some lesser penalty. Following a pre-hearing conference call with counsel on August 3, 2022, hearings were conducted on November 8 and 9, 2022 at the Petitioner's offices in Union, New Jersey and December 21, 2022 and January 25, 2023 in the offices of Petitioner's counsel in New Providence, New Jersey.

Background:

Respondent was first hired by Petitioner as Principal of the Franklin Elementary School on September 1, 2007. Respondent continued in that position without any incident of record until August 1, 2015 when he became Principal of Petitioner's Union High School (hereinafter "the High School") on August 1, 2015. At all times material herein, Respondent worked under Petitioner's policies and all laws applicable to Petitioner and Respondent.

Upon being appointed High School Principal, Respondent assumed an assertive attitude in relation to his duties and let it be known he expected nothing less than excellence from both students and staff. In particular, a few days before school opened in 2015 Respondent met with and announced to coaches and Petitioner's Athletic Director, Linda Ionta ("Ionta"), that he expected the High School's athletic teams to perform at a high level and expressed dismay in their past records. Ionta took exception to Respondent's implied or expressed criticism, and from that point forward, relations between the two were icy at best. In particular, the two clashed over who had authority to recommend, or effectively hire, coaches at the High School, a task Ionta had always performed previously but without specific authority. As indicated, her recommendations were subject to approval by the Petitioner's Superintendent of Schools and, ultimately approval by Petitioner's Board of Education, but such approval was routinely granted.

The animosity between Respondent and Ionta continued through Respondent's tenure and included his criticism of many of Ionta's favored coaching candidates as well as incumbent coaches. Throughout this time Petitioner's Superintendent, Gregory Tatum ("Tatum"), who had formally mentored Respondent in another school district and who was instrumental in bringing him to Petitioner's district and his appointment as High School Principal, urged Respondent and Ionta to work harmoniously. Unfortunately, Tatum never drew lines as to their authority over coaches and his reluctance to do so was not assuaged by any clear policy as to who had authority to recommend hires.

The conflict between Respondent and Ionta became litigious on July 21, 2017 when Ionta filed an Affirmative Action Complaint with Petitioner alleging Respondent created a hostile and/or unhealthy workplace environment due to his actions toward her and the High School coaching staff. (R 77). Among the many accusations she leveled, Ionta claimed Respondent

coerced her not to recommend a female as women's track coach because of that candidates appearance;, allegedly indicated that some coaches should be fired and replaced with coaches of color; hectored her and coaches over teams' lack of success; allowed a past member of Respondent's Board of Education to interview students;, and directed to her personnel file a form known as "Comments Related," which was both customarily associated with discipline and critical of her.[1]

Reacting to Ionta's Complaint, Petitioner hired an outside attorney, Peter B. Fallon, Esq. to investigate her accusations. On April 23, 2018 Fallon submitted conclusions criticizing Respondent for use of the "Comments Related" form (R 76); for continuing to insist Ionta get Respondent's approval before recommending coaches; for continuing behavior relative to Ionta despite Tatum's directive that he stop; and for attempting to intimidate and harass Ionta into following Respondent's instructions. In response to those findings, Respondent was placed on administrative leave with pay on or around September 13, 2018 for allegedly violating Petitioner's Workplace Harassment Policy.

Respondent was on such leave in May 2020 when he was named head basketball coach at historically Black Lincoln University in southeastern Pennsylvania. Additionally, Respondent in September 2020, sold his New Jersey residence and began living in Pennsylvania. In response, Petitioner alleged Respondent's employment at Lincoln violated a policy against outside employment without Petitioner's approval. That policy prohibits outside work that would interfere with duties owed to Petitioner and allegedly contravenes NJSA 18A:12-24 forbidding employment that is either in substantial conflict with one's school role or that might prejudice one's "independence of judgment in the exercise of his [*sic*] official duties." (*Id*.)

The above referenced tenure charges were filed against Respondent on November 10, 2020. Those charges were: (1) Abandonment of Position; (2) Unbecoming Conduct/Workplace Harassment; (3) Unbecoming Conduct: Insubordination; (4) Unbecoming Conduct: Violation of New Jersey First Act requiring state residency for certain public school personnel; and, (5) Unbecoming Conduct in general.

At hearing before the undersigned, Petitioner confirmed withdrawal of Charges (1) and (4). The remaining charges accused Respondent of unbecoming conduct relative to both

[1] Respondent and Ionta eventually filed lawsuits naming each other as well as other defendants. The suits were dismissed with prejudice upon the agreement of plaintiffs. (R 75).

Respondent's dealing with Ionta and in general; and insubordination regarding Respondent's alleged disobedience of Superintendent Tatum.

Relevant Evidence of Petitioner:

Petitioner's sole witness at hearing was **Gregory Tatum**, who is now retired but served as Petitioner's Chief School Administrator (Superintendent) at all times material herein. Tatum began by recalling his hire as Superintendent in 2014, but explained he had been acquainted with Respondent whom he knew and mentored when they both worked in another district. Although he described Respondent as a hard-driving individual, Tatum affirmed that he had strongly encouraged Respondent to move from the principalship of Franklin Elementary School—where he had served from 2007 and done excellent work—to Principal of Union High School in 2015.[2] Ironically, Tatum said, Respondent's work as a basketball coach was a factor in his encouragement of Respondent to take the High School job. Tatum said he was aware of Respondent's intentions for the High School job (R 12) when the latter was interviewed and that Respondent was aware of the job description for High School Principal. (R 14).

Turning to his own responsibilities, Tatum introduced his own job description as Superintendent (R 16) and said that Respondent should have been involved in coaching positions. However, he stopped short of saying Respondent—not Ionta as Athletic Director—was to recommend coaching applicants to him for recommendation to the Board. Instead, Tatum expressed his view that *both* should have been involved in hiring coaches and that the two should have worked together. However, Tatum maintained, the final recommendation for coaching vacancies should have been Ionta's as Athletic Director.

Nevertheless, similar to the testimony of Respondent witness Dr. Guy Francis, *infra*, Tatum testified as to his statements at a Board meeting on February 16, 2016, that the High School Principal with Ionta and a small committee of students should interview coaches (R 40, p. 27) with the Principal *and* the Athletic Director making a joint recommendation to the Superintendent for Board approval. That general theme was followed, Tatum said, as shown in Board minutes for April 12, 2016 (R 41, pp. 21, 22, 23).[3] This principle was expressed, Tatum

[2] Respondent's statement of intentions for the High School upon his hiring are in evidence as R 12.
[3] Somewhat contrary to that theme, Board President Vito Nufrio is quoted in those minutes as saying the proposed formalized interview process—"if you look at it, give the building principal that sole voice after the interview to

said, after Board member Francis asked why certain coaches seemed to be appointed and re-appointed continuously. As for the Board's official policy on filling vacancies (R 39), Tatum asserted it only pertained to teaching—not coaching—vacancies.

Asked about the April 3, 2017 Comments Related form Respondent issued to Ionta (R 76), Tatum testified it had no disciplinary effect on Ionta, although the form is usually used for that purpose and that the form never went in Ionta's personnel file nor had any disciplinary effect. He further stated that Ionta did not comply with the Petitioner's Harassment Policy (R 78) in that she did not report alleged harassment verbally the day it occurred before filing her complaint, as the Harassment Policy seems to indicate. (R 78, p. 5). Tatum said that lapse played no role in the processing of her complaint.[4] Notably, Mr. Tatum said that Ionta never raised the issue of sexual orientation playing a part in any hiring decisions, did not send her Affirmative Action complaint to him, and never advised him Respondent did or said anything directed at anyone's sexual orientation.

Addressing his own employment with Petitioner, Tatum testified that in the winter of 2018 he complained to the Board that his contract as Superintendent (R 61) was expiring June 30 of that year and he had not been advised whether he would be reappointed. (R 60). Tatum specifically referred to criticism Board President Vito Nufrio had expressed about his performance at a Board meeting. Nufrio had previously been critical of Respondent. Tatum testified he had not received a "Rice letter" as required by State law, nor was the discussion of his performance in the meeting's agenda. Tatum also accused Nufrio of having a conflict of interest, apparently referring to a relative of Nufrio employed by Petitioner. Continuing, Tatum said he had been told that a "pre-vote" had been held on his contract status and that Board members present voted not to renew his contract by one vote. However, his contract was renewed by operation of State school law because he was not officially notified of non-renewal in a timely manner. Ultimately, he stated, he was given a new contract on May 14, 2019, effective July 1, 1918 through June 30, 2021. (R 62). During the period when Tatum was

make the recommendation to the Superintendent or the [Assistant Superintendents] so we are now ensured that the principal will have the voice that he or she should have all along." (R 41, p. 21).

[4] Although the Policy directs a complainant to speak to his/her/their building principal first and Ionta's complaint was against Respondent as High School Principal, the Policy also allows complaints to be first made to "the appropriate school official." (R78, p. 5). In this case that would be Tatum as Superintendent.

lobbying for a new contract, he put Respondent on administrative leave in September 2018 and then recommended and signed tenure charges in November 2020.

Tatum also testified about a planned student walk-out that was to have taken place in March 2018 to protest gun violence. He said that at a meeting between him and Respondent with local government officials, Nufrio called-in and threatened consequences to both if the walk-out occurred. He further affirmed that Nufrio directed Petitioner Board's attorney—without approval from the Board—to send a "Rice Letter" to Respondent on March 8, 2018, notifying him his employment would be discussed by the Board at its March 13, 2018 meeting. (R 65).

Tatum further recalled that Respondent filed his own Affirmative Action complaint on March 9, 2018 against Nufrio whom Respondent accused of harassment, bullying, abuse of power, retaliation, discrimination, targeting, and unethical behavior, as well as improperly issuing the "Rice Letter" regarding Respondent solely on Nufrio's own motion. (R 67).

Turning to his own interaction with Respondent, Tatum acknowledged only that he "may have" reprimanded Respondent for his relationship with Iona but denied he ever formally or in writing criticized him even in light of the Fallon report (R 57) which found Respondent guilty of violating the District's Workplace Harassment Policy. Nevertheless, Tatum testified that he signed a letter dated September 14, 2018 (R 58) placing Respondent on administrative leave with pay, effective September 13, 2018. The letter forbade Respondent from contacting District faculty, staff, or students. Interestingly, Tatum verified that three days prior he had prepared a letter to Respondent citing Fallon's conclusions and stating that Tatum's wish for collaboration between Ionta and Respondent regarding the hiring of coaches appeared not to be possible. Accordingly, the letter directed a number of directives, including the grant of sole authority for the review of coaching performance and all recommendations for the hiring of coaches be at the discretion of the Athletic Director. Tatum testified that he never sent the letter. However, he reiterated his desire that Respondent and Iona work together in regard to coaching hires.

Concluding his direct testimony, Tatum said that he disagreed with Fallon's conclusion that Respondent had violated the District's Harassment Policy. Even more remarkably, on cross-examination he specifically rejected the charge that Respondent was insubordinate although he admittedly signed the Tenure Charge against Respondent that included a charge of insubordination. Tatum also repeated his direct examination testimony that Policy 4111.A regarding hiring of personnel (R 39) did not apply to the hiring of coaches, despite Respondent's

claim that it did. Tatum said that historically coaches had been hired on the recommendation of the Athletic Director. Somewhat coloring his earlier testimony about the "Comments Related" form (R 76), Tatum said that the form can be used for other than disciplinary purposes.

Tatum also testified that there had been complaints other than Respondent's about the practice of rehiring coaches who had poor win-loss records and that that criticism led to questions about coaches' evaluations by Ionta. Turning back to Respondent's administrative leave, Tatum repeated his devout wish that Respondent and Ionta had worked together on coaching decisions, but that Respondent wanted more authority in that area than Ionta had. In fact, Tatum explained, a purpose of Respondent's administrative leave was to separate the antagonists. That leave, with pay, concluded with the December tenure charges.

Relevant Evidence of Respondent:

Guy Francis, M.D., a member of Petitioner's Board of Education, testified that he had heard complaints about the way coaches were hired and complaints that some seemed to be coaching simply for the stipends they received. At the time Respondent was hired as High School Principal, Francis said, High School sports teams were doing poorly for the most part. He said that upon appointment as Principal, Respondent announced an ambitious program for the improvement of not just athletics but the school generally. (R 12). Dr. Francis related that Respondent had been successful in his role as principal of the elementary school which had been problematic when he was hired but became high performing under Respondent's leadership. He further recalled that when interviewed for the High School position, Respondent said he wanted accountability of coaches and proposed implementing study hall for athletes. Dr. Francis said there were no Board objections to Respondent's aspirations at that time and Respondent assured the Board winning would lead to improved school spirit, academic progress, and a "winning environment." In fact, Dr. Francis testified, it was exactly that aim that influenced Respondent's hiring as Principal.

According to Dr. Francis, Superintendent Tatum never claimed the hiring of coaches was strictly in the domain of the Athletic Director. He said that as a Board member and as a parent of children in the Petitioner's schools, he learned that Respondent was an effective disciplinarian having introduced a dress code and effected a no-nonsense approach. Dr. Francis said that at the

time Respondent was hired and began at the High School, the Board had no issue with the fact that he coached basketball professionally outside his regular duties.

Addressing Petitioner's job posting and interview process known as Policy 4111.A (R 39)[5] Dr. Francis pointed out that nothing in the policy excluded coaches from selection by building principals, and recommendation by the Superintendent to Petitioner's Board. He further referenced minutes of a Board meeting on February 16, 2016 at which Tatum affirmed an interview process for coaches by Ionta and "the building principal" and, Tatum believed, by "a small committee involving some students." (R 40, p. 27). Dr. Francis also highlighted a statement by Board President Nufrio at a Board Work Session on April 12, 2016 that the Board intended to formalize the interview process, explaining that "if you look at it, it gives the building principal the sole voice after the interview to make the [hiring] recommendation to the Superintendent or the [Assistant Superintendents] so we are now ensured that the principle will have the voice that he or she should have all along." (R 41, p. 21). At the same time, Dr. Francis recalled that Tatum had stated that the selection of coaches for hire or re-hire was a collaborative effort of the Athletic Director and the Principal although Police 4111.1 says appointment recommendations generally is for the principals.

Dr. Francis also testified that Mr. Nufrio, a sometime-Board member and Board President had conflicts of interest in that a family member of his was employed by Petitioner and reported to Tatum and that there were other such conflicts of interest among Board members.[6] As for Tatum, Dr. Francis pointed out that his contract as Superintendent ("Chief School Administrator") was renewed on May 14, 2019 for a three-year term running between July 1,, 2018 and June 30, 2021. (R 63, p. 2019-287). Dr. Francis was not on the Board at that time. Nufrio was Board President but abstained from voting on the Tatum renewal.

The renewal came about two months after Respondent had filed an Affirmative Action Complaint against Nufrio. (R 67). That complaint was filed with Petitioner through Tatum's office on March 8, 2018, and—as stated above--accused Nufrio of harassment, bullying, abuse of

[5] Adopted April 19, 2016. (R 42, p. 21).

[6] Indeed, on April 23, 2018, Dr. Francis and two other Board members filed a Conflict of Interest Complaint with the New Jersey School Ethics Commission against Nufrio for ethics violations under the New Jersey Code of Ethics for School Board Members. Their Complaint was sustained to the extent the Commissioner found Nufrio was improperly involved with the employment status of his daughter-in-law's supervisor, and without authority, had issued a Rice Letters to Tatum and Respondent, all without authority. (R 68). The Commission forwarded its findings to the New Jersey Office of Administrative Law on February 26, 2019. The record does not disclose OAL proceedings on the matter.

power, retaliation discrimination, targeting and unethical conduct. It came after Nufrio, as characterized by Respondent, reprimanded him telephonically at a public meeting of Board and municipal officials on March 6, 2018, for not staunching a proposed student walk-out planned for March 14, 2018. The walk-out was part of a nation-wide action to protest the lack of more restrictive gun laws. During the meeting, according to Respondent's Complaint, Nufrio scolded him for allegedly organizing the walk-out and subsequently, upon learning the walk-out was a student initiative, upbraided Respondent for having lost control of the High School and obliquely threatened both Respondent and Tatum with action by the Board's personnel committee if the walk-out were not stopped. R 67, pp. 2-3). Respondent's complaint asserted that Nufrio was trying to find a rationale for retaliating against him and remove him from his position as Principal. In an apparent effort to support his charges against Nufrio, Respondent's complaint cited a "Rice Letter," *i.e.,* a notice to Respondent that his employment was going to be discussed by the Board, that Respondent received the same date as his Complaint.

Also appearing for Respondent was **Terrel Rutty**, currently a Vice Principal at the High School. Mr. Rutty has known Respondent a while, having been coached by him in basketball when Mr. Rutty was a high school player and having coached high school basketball as a volunteer with him later. He described Respondent as a person who was dedicated to youth development with a personal approach. In 2015, Rutty said, he came to Union High School as a Vice Principal. Respondent was already serving as Principal at the time and, according to Rutty, was already building a team approach to administration. In that framework, Rutty was tasked with assisting troubled students. He described Respondent as very successful in having a positive effect on all students at the High School and credited him with implementing a "credit recovery" program for students whose progress had been slowed. More specifically, Rutty referred to a chart listing student suspensions at the High School from the beginning of Respondent's tenure. (R 80). Rutty testified that the number of suspensions for all reasons had steadily dropped from 605 in the year before Respondent's arrival to 277 in the 2017-2018 school year. Additionally, according to Rutty, graduation rates increased and Respondent began a proposal for a new High School Building.

As for the High School athletic program, Rutty stated that Respondent wanted excellence. He also said he assisted in the hiring of a new girls' track coach, Ms. Damiano, and that he was

on a committee that included Ionta. He said that Respondent was under the impression that Damiano had coaching experience in track events but in fact she had not. Rutty categorically denied that Respondent ever said Damiano should not have been hired because she was a lesbian.

Rutty also recalled an episode in which the family of a football star at the High School complained to Respondent that their son was rendered ineligible for college scholarships because he lacked sufficient credits to satisfy the National Collegiate Athletic Association's standards for scholarship. Apparently, Rutty said, the student's counselor had never alerted him to his deficiency.

Turning to the relationship between Athletic Director Ionta and Respondent, Rutty said he had a cordial relationship with her, was unaware of any conflict between her and Respondent, and had no knowledge Respondent every treated her badly. He also testified that a "Comments Related" form could be issued by the High School Principal, as he understood the protocol.

Somewhat surprisingly, Respondent called **Linda Iona** as a witness, who offered lengthy and detailed testimony. Employed since 1981 by Petitioner as an athletic trainer, she testified she was made Athletic Director in 2010[7] and said she first worked with Respondent in August 2015 after he was appointed High School Principal. She recalled how in that month Respondent conducted a pre-year pep rally of staff and students at which time he admonished coaches and her on the High School's poor athletic record and told the attendees that if the record did not improve he would be looking for replacements[8]. Ionta said all the coaches were offended by Respondent's remarks.

Turning to an Affirmative Action Complaint she filed on July 21, 2017 (R 77), Ionta repeated its allegations about a meeting in the spring of 20015-2016 she had with Respondent to discuss the hiring of girls' track coach.[9] She had recommended Adriane Damiano, but said

[7] The Athletic Director's job description was introduced as R 15. Notably, it does not mention the Director's responsibility for hiring and retaining coaches. Just as notably, Ionta testified she was unsure whether she had ever seen it prior to the hearing.

[8] Ionta appears to have actually been referring to a meeting Respondent conducted on September 3, 2015, as testified to by Respondent, below and as charge in her Affirmative Action Complaint. (R 77, p. 1; *also see,* R 13).

[9] In addition to the Damiano charges and other indictments, Ionta's Complaint alleged Respondent's dissatisfaction and criticism toward Ionta about coaches she had hired and Respondent's insistence that he—not she—had the authority to hire them. She specifically expressed the view that Respondent's criticism was racially motivated by the coaches' race (White), and that Respondent had accused her of bias in not notifying an interested candidate in an open coaching position. Ionta reported that as a result of her conversations with Respondent she was unable to

Respondent rejected her recommendation because "she doesn't look like a head coach." Ionta said Respondent elaborated by explaining he was close to a family with an in-coming 9th grade girl who was a very promising track athlete and said he was not comfortable with the family meeting Damiano because of her overweight appearance and spiked hair. Ionta said she was so upset that she reported the matter to Tatum who told her the two had to work out their difference. That conflict resulted in two head coaches being hired, one for track events and one for field events. Ionta said she felt her job was threatened by Respondent's words.

Ionta conceded in her testimony that Damiano had not had success as a girls' field hockey coach (R 16) but that she had consistently evaluated Damiano as satisfactory over a seven-year period 2011-2016. However, Ionta said that Respondent did not mention that record in regard to the track team job. She agreed that she had not complained of Respondent's alleged reference to Damiano's sexual orientation.

Addressing the matter of a High School quarterback's lack of credits to meet NCAA requirements for athletic scholarship eligibility, she agreed he was short one class and got no scholarship offers. Ionta expressed her belief the student's guidance counselor was at fault for not alerting the student.

As for the "Comments Related" form Respondent issued to her (R 76), Ionta testified that Respondent told her she had to sign it, but that Tatum rescinded it and told her not to sign and that her career was not affected by it in any way. However, Ionta testified that she felt criticized and harassed by it. On cross-examination, Ionta said the form should not have been issued to her and that in all previous cases the form had been used for disciplinary purposes. Nevertheless, she conceded there were no policies addressing the use or impact of the form.

Ionta told the undersigned that Respondent kept urging her to fire head High School football coach Lou Grasso and head High School Basketball coach Kevin Feeley because student athletes could not see themselves in those two White individuals, but she conceded Respondent never explicitly characterized his objections to the two in racial terms just as he had had made no direct mention of Damiano's sexual orientation. She also asserted that her job as Athletic Director gave her the right to name coaches, who ultimately had to be approved by the Superintendent and officially contracted by the Board.

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sleep, anxious, and upset, and accused him of intimidation over her in respect to matters where he had no supervisory authority.

Among her interactions with Respondent, Ionta said Respondent demanded to see the won/loss records of all coaches in August 2015 just before his first year as High School Principal (R 18) and urged her to advertise for the position of girls' head track coach (R 19), the position to which she wanted to appoint Damiano. She said she considered the former request harassing. Ionta said Respondent further advised her of study halls every afternoon there was not a game or meet and that the earliest practice could start was 3:45 PM. (R 20). She further testified that despite Board Policy 4.111.A (R 39), which addresses the hiring/interview process for Petitioner's personnel, the policy never applied to coaching positions and that despite her requests Tatum never made clear who had primary responsibility for naming coaching candidates to him and the Board.

Ionta's testimony also concerned her a meeting, which she secretly recorded, with Respondent in May 2017 after an assistant boys' track coach complained to Respondent about not being notified of a pending vacancy in the head coaching position. (R 48). At the meeting, the two discussed the hiring of coaches generally and Ionta reiterated her view that she as Athletic Director had a sole authority to hire coaches without input from Respondent. Subsequent to that meeting, Respondent appealed to Tatum for a meeting with Tatum, Ionta, and Respondent, and possibly others to discuss the matter. (R 25). Ionta testified she did the same that very day in an email to Tatum in which she claimed Respondent accused her of "being biased to him." (R 24). Ionta related that the hoped-for meeting never occurred.

Respondent's involvement in hiring continued, Ionta said, into the summer of 2017. On July 25, 2017, he reminded her of an email he had sent four days earlier asking for "your final 2 or 3 appointments" for a physical education vacancy for the upcoming school year. Pointedly, Respondent stated in the email "No teacher will be approved without interviewing with me." He also asked whether she had spoken with the girls' basketball coach about an assistant position. (R 26). Respondent continued oversight of the athletic program when he asked her on September 21, 2017 for a copy of an eligibility list for High School Athletes. (R27). In the winter of that same school year, Ionta testified, Respondent complained that he did not know what was happening with "this track [team] situation" and again reinforced his position that "no coach gets hired without my approval." (R 31). She also testified to another email Respondent sent her in late March 2018 asking for evaluations of winter sport coaches and stating that he "would like to sit down with you to discuss the coaching positions" for the Fall and Spring of 2018-2019 school

year. In that same email, Ionta pointed out, Respondent insisted once more that, "No re-appointment should be sent up for board approval without my consent first." (R 32).

Ionta conceded that she did not tell Respondent about a comment head Hight School football coach Lou Grasso made to a Black athlete that the athlete should try to attend an historically Black college or university so the student could have relationships with all the Black co-eds he wanted. Also, Ionta introduced an evaluation of Grasso for the 2016 season in which she commended him on his won-loss record and for "developing out student athletes in a positive direction…[and for an] effort that is beyond reproach." The evaluation noted that "many of our student athletes are receiving scholarships." (R 37).

Cross-examined by Petitioner's counsel, Ionta testified that she did not report to Respondent in his role of High School Principal or to any building principal, and that Respondent's treatment left her upset and feeling intimidated every day and that her Affirmative Action complaint (R 77) referenced only a sampler of his hostile acts toward her. She also represented that a proposal for building principals to hire coaches upset her, and that she was further emotionally distressed when Respondent threatened to report her for "cheating" because many student grades turned out to be wrong, an outcome, Ionta explained, resulted from a computer problem. At the same time, she conceded that she could not remember Respondent or any other principal actually making coaching decisions, including in other school districts.

Respondent, Corey Lowery, testified in his own behalf, beginning with his resume (R 10) which shows his work in public education from when he began in 1998 as an elementary teacher though his experience at Union High School as well as his coaching experience at the collegiate level, excluding his more recent experience as head basketball coach at Lincoln University and currently as assistant coach at Seton Hall University.

Respondent began with a brief history of his relationship with Tatum, one that began years earlier in the Hillside School District where Tatum was a principal and served as Respondent's mentor at an elementary school before Respondent eventually became vice-principal of a middle school there. In 2007 Respondent moved to the District where Tatum was already serving as an administrator before becoming Superintendent. Respondent recounted how he joined the District as principal of the Franklin Elementary School which, he testified without contradiction, he transformed from an underachieving building which had been rated "needs

improvement" to a high achieving school in about two ½ years. He said he also was instrumental in getting a new playground built for the school.

Respondent continued by saying that in 2014 Tatum asked him to consider becoming High School Principal, an invitation that Respondent said he initially resisted. He re-considered, he stated, and when Tatus approached him again in 2015, he assumed the post. At that time, Respondent recollected, parents were complaining about the performance, appointment, and evaluation of coaches and about Ionta, who was viewed as only appointing coaches she favored.

On September 3 of the year he became Principal, Respondent recalled, he held a meeting with an agenda (R-13) that sited his own coaching success and announced "Losing is not acceptable" while advising that every coach would be observed and that he and Ionta and a committee would discuss which coaches should be retained. Respondent explained this was an effort to motivate coaches whose collective record (R 36) he deplored. Despite these efforts, Respondent testified that parental complaints were received about not only the athletic program (R 34) but individual coaches (R 35) in the following years.

Turning to the controversy between him and Ionta over hiring Linda Damiano's as girls' track coach in the 2015-2016 school year, Respondent said that despite her unsuccessful record as head coach of girl's field hockey (R 38)[10], Ionta wanted to hire her as head coach for track events on the girls' track team because it was Damiano's "turn."[11] Admitting he resisted the appointment, Respondent denied every alluding to Damiano's sexual preference or that he even viewed her as having a preference for female sex partners and said that no one other than Ionta ever suggested he had such a bias.

In January 2018, Respondent acknowledged, he sent an email to Tatum about coaching changes for football and soccer as well as basketball after that sport's season was over. (R 30). In that email he expressed the opinion that Ionta's expectations for coaches were "below my standard, thus allowing all of our teams to underachieve yearly." As for the more general question of who was to recommend applicants for coaching jobs, Respondent pointed to his High School Principal job description, which states the Principal: "Interviews, recommends for

[10] Damiano's first coaching evaluation of record was for her work as assistant field hockey coach. (R 38).
[11] Damiano had previously served as an assistant on the girls' track team, coaching field events. There is no evaluation of her for that service in the record.

appointment, assigns, supervises and evaluates the performance of all school employees…" (R 14), a mandate Respondent said he took as authorizing him to nominate coaches.

Respondent also asserted that aside from being placed on administrative leave by the District, he had never received any disciplinary action in any school job he had held in any district. He added that Tatum never told him he was being "insubordinate." On cross-examination he agreed that no prior school or district in which he had served was subject to a threatened State takeover.

Respondent obliquely suggested that Tatum's action in placing him on administrative leave was related to Nufrio's threat to and criticism of both Respondent and Tatum for the proposed student walk-out in 2018 testified to by Tatum**,** above. He also claimed Nufrio had tried to get him placed on administrative leave because some parents had falsely accused him of calling some students "thugs." Respondent contended that Nufrio first expressed animosity toward him after a back-to-school night in the autumn of 2016 when Nufrio arrived after the meeting began and Respondent did not stop the meeting and introduce him to the audience. According to Respondent, Nufrio complained about the perceived slight.

Respondent's most critical testimony came at the end of his direct examination when he contended that Tatum admitted being pressured to put him on administrative leave in 2018 because Tatum's original contract with the District had expired and he needed one more multi-year contract to retire comfortably. That second contract for the term July 1, 2018 through June 30, 2012 was secured, but not until May, 2019. It gave Tatum a base compensation and stipend package worth $17,000 more than his first contract. (R 62, p. 1).

Respondent agreed on cross-examination that Tatum was his boss and that disobedience of a lawful directive would amount to insubordination.

Arguments of Petitioner:

Petitioner prefaces its argument with the observation that Respondent could be removed from his tenured position for unbecoming conduct or other sufficient cause. NJSA 18A:6-10, but concedes Petitioner has the burden of proving tenure charges by a preponderance of credible evidence. *In re Ziznewski*, 2012 WL 1231874, at *1 (NJ Super. A. D. Apr.13, 2012). The

evidence is to be found by the tribunal's common sense, intuition, and experience in making credibility determinations. *Barnes v. United States*, 412 U.S. 837 (1973).

Addressing the unbecoming conduct charge toward Athletic Director Linda Iona, Petitioner cites authority that such conduct is not only that which destroys public respect for governmental services but further says it includes behavior that adversely affects the morale or efficiency of professional members of a public school *In re Tuitt*, 2014 WL 10208983 (NJ Super AD 2015) as well as conduct that that demonstrates a willful and continued disregard for administrative decisions. *In re: Simon,* OAL Dkt. No. EDU 3659-11, 2013 WL 363175 at *29 (NJ Adm. January 22, 2013). Petitioner adds that another indicator of such conduct is a pattern of behavior, including one persistent over a number of years. *In re Molokwu*, OAL Dkt. No. EDU 9650-04, 2005 WL 3234798 at *1 (October 26, 2005). Petitioner also points out that where an employee is put on notice that conduct is forbidden, persistence in that conduct constitutes both insubordination and unbecoming conduct. *In re Richardson*, OAL DKT. No. EDU 5560-97, 1998 WL 668704 (NJ Adm. June 1, 1998).

More specifically, Petitioner cites *Bound Brook Bd. Of Educ. V. Ciripompa*, 228 NJ 4 (2017) for the rule that an employer need not establish the elements of a hostile work environment case to show harassing behavior by an employee against a co-worker. Instead, unbecoming conduct merely requires evidence of inappropriate conduct. Id. at 14. Petitioner then argues that Respondent's conduct toward Ionta met the unbecoming conduct standard in that it violated Petitioner's Workplace Harassment Policy and in doing so it disrupted the working relationship between Ionta as Athletic Director and Respondent as High School Principal.

Next, Petitioner submits that Respondent's alleged insubordination constituted conduct unbecoming, citing *Ziznewski*, 2012 WL 1231874, *Laba v. Bd. of Educ*., 23 NJ 364 (1957), and *Ricci v. Corp. Express of the East, Inc*., 344 NJ Super 39 (AD 2001) and says that insubordination can even occur where there is no specific order has been directed to the allegedly insubordinate individual. *Id.; In re Getty*, OAL Dkt. No EDU 98750-88, 2009 WL 1607541 (NJ Adm. June 4, 2009) and when it occurs it deserves higher scrutiny among public educators than other tenured employees. Petitioner then characterizes Tatum's testimony both at hearing and in his depositions as representing that Ionta was solely responsible for recommending coaches and not the role of Petitioner.

Assuming it has established unbecoming conduct through Respondent's insubordination, Petitioner argues such conduct is grounds for dismissal, claiming that the creation of a toxic work environment by Respondent is a factor that should be considered when weighing removal from a tenured position. *In re Falcomer*, 93 NJ Super. 404 (AD 1967) and *Toozani,* OAL Dkt. No EDU 09713-11, 2011 WL 7068333 (NJ Adm. Dec. 28, 2011). Petitioner further says a Board of Education is not obligated to extend progressive discipline prior to seeking dismissal. *Matter of Kellish*, 2019 WL 5061240, at * 5 (NJ Super AD October 9, 2019). In particular, Petitioner looks to *In re Simon*, OAL Dkt. No. EDU 3659-11, 2013 WL 363175 (N.J. Adm. January 22, 2013; *In re Bailey*, OAL Dkt. No. 6985-07, 2007 WL 4138226 (N.J. Adm. Nov. 14, 2007); and *In re Walker,* OAL Dkt. No. HEC 15457-12, 2013 WK 2480717 (N.J. Adm. May 2, 2013) for the holding that despite a previously unscarred record, an employee may by dismissed where there is a repetition of inappropriate conduct and violation of employer policies and directives.

Arguments of Respondent:

Respondent, too, begins with a recitation of standards for removal of tenured public school staff, including the Tenure Employees Hearing Law which permits action against employees for unbecoming conduct. NJSA 18A: 6-10, NJSA 18A: 28-5. In doing so, Respondent recognizes that the Act is to be "liberally construed" to achieve its purposes. *Spiewak v. Bd. Of Educ. Of Rutherford,* 90 NJ 63 (1982).

Respondent next attacks Petitioner's unbecoming conduct charges, founded on the doctrine that unbecoming conduct is that which affects morale and/or public respect for public employees. *Karins v. City of Atl. City,* 152 NJ 532 (1988) and *Zimmerman v. Board of Education of Newark,* 38 NJ 65 (1962). Respondent never engaged in such conduct, he argues, citing the lack of evidence, found by Petitioner's investigating lawyer, Peter Fallon, that Respondent ever attempted to intimidate and harass Ionta into doing what he wanted even when contrary to Petitioner's policies.

The fact is, Respondent argues, Regulation 411.A, the key document in this matter as well as the respective job descriptions for Athletic Director and High School Principal, does not establish any priority for the naming of coaches for Petitioner's approval, which is a critical contention in this case. Petitioner's Board Minutes in February 2016 records Mr. Tatum as

saying there is an interview process by *both* Ionta as Athletic Director and Respondent as High School Principal for coaching applicants. (R-40).

Going further, Respondent claims that he had authority to recommend coaches, citing a statement from Nufrio that the then existing policy gave him as High School principal, the "sole voice" in the recommendation of coaches. (R 41, p. 699, 700) or was to have that power jointly with the Athletic Director. (R 41, p. 702). Respondent says that investigating attorney Fallon was aware such a policy existed in October 2017 (R-53) but seems to have never looked into it before issuing his report.

Moreover, Respondent notes the repeated requests by Tatum to Ionta and Respondent to collaborate and no references whatsoever in the record that Respondent was directed not to be involved in coaching decisions. As for the correlative issue that Respondent disapproved of one coach (Damiano) because of her alleged sexual orientation, Ionta herself testified that Respondent never referred to that trait in discussions about Damiano's coaching efficiency and Tatum denied that Ionta ever complained to him about Respondent making such a reference. Respondent complains that without further evidence of wrongfully co-opting Ionta's role or taking positions based on sexuality, Petitioner cannot prove its unbecoming conduct charge.

The same is true, Respondent says, regarding Respondent's issuance of a Comments Related form to Ionta, an act that Ionta and Fallon claimed constituted harassment of her. The form was issued by Respondent, but only after a student's parents complained of negligence by the High School's guidance staff in not notifying them their son lacked enough credits to qualify for an NCAA sanctioned scholarship and about a racially insensitive comment by football coach Grass that the student should go to an Historically Black College (or) University so he could "get" all the Black females he wanted.

Justifiably alarmed, Respondent says, he issued the notice as a way of memorializing the events. This was understandable, Respondent asserts, given his responsibility as High School Principal and the fact he had advised all coaches they should know the academic requirements for acceptance of athletic scholarships. Respondent says that although Ionta viewed the Comments Related form as criticism and that it had a disciplinary connotation, there was no guidance on the use of the forms. Fallon, however, concluded the form was a reprimand despite his own notes showing Respondent told him the form was simply a memorandum for eventual review by the superintendent (R 54) and further noting Respondent's lack of authority to issue

reprimands to Ionta. Moreover, Respondent points out, Ionta was quickly assured by Tatum that the form was harmless as to her and to essentially disregard it. Respondent emphasizes that no adverse consequences for Ionta flowed from Respondent's issuance of the Comments Related form.[12]

Addressing the insubordination charge, Respondent notes that under tenure law, such conduct is "willful and intentional disregard of…[proper]…directives" from a duly authorized supervisor. *In re Tenure Hearing of Peter Loria,* (Jan 26, 1988) (slip op. at p. 69, *aff'd*, August 7, 1998). Respondent argues that he worked within the authority inherent in his position and expressed in Regulation 411.A (R 39) and the High School principal job description (R 14). The latter, Respondent emphasizes, requires that he…. "recommends for appointment, assigns, supervises and evaluates the performance of all school employees…"(R 14). Respondent argues that in seeking involvement in the recommendation of coaches, he was fulfilling this responsibility.

More trenchantly, Respondent points out that Tatum admitted he never gave Respondent directives to cease involvement with Ionta, and only drafted—but never issued—a supervisory letter on the topic. (R-79). Even more importantly, Respondent underscores a complete lack of evidence that Tatum ever directed him to cease and desist attempting to influence coaching decisions, that Tatum never met jointly with him and Ionta despite joint requests, and Tatum's admission at hearing before the undersigned that he never considered Respondent to be insubordinate and never told Fallon Respondent was.

As for Fallon's conclusion on the insubordination charge, Respondent alleges the report he issued was tainted by conflicts of interest relating to the fact that Nufrio had tried to improperly evaluate and made statements concerning Tatum at a time Tatum's contract was being considered for renewal (Tatum III, 140) and Fallon was never informed that Respondent had filed a complaint against Nufrio for the latter's conduct concerning the student walk-out threat in 2018.

[12] At the same time, Respondent faults Ionta for not reporting what she learned about the Grasso comments as per Petitioner's Harassment, Intimidation, and Bullying Policy (R 76), which requires acts contrary to the Policy to be reported to the school principal, which in this case was Respondent. It is uncontroverted Ionta never followed the Policy in regard to the Grasso comments.

Opinion:

As both parties acknowledge, tenure removal requires a Petitioner to prove a Respondent's "inefficiency, incapacity, unbecoming conduct, or other just cause," NJSA 18A:6-10, with the Petitioner having the burden of proof by a preponderance of the evidence. *In re Ziznewski, supra*; *Atkinson v. Parsekian*, 37 NJ 143 (1962); *In re Tenure Hearing of Danny Castro,* No. A-4875-10T3; *In re Tenure Hearing of Bridget Geiger,* No. A-1409-12T2 (A.D. Nov. 18, 2005 (slip op.). In the case at bar, Petitioner has failed to meet that burden, despite the professional skill, preparation, and ardent advocacy of its counsel.

Essentially, Petitioner had to prove that Respondent, whose High School principal record, performance evaluations, and observations were at least satisfactory (R 1-R 9), engaged in unbecoming and insubordinate conduct in regard to the wishes of Superintendent Tatum and Petitioner's policies. In bringing both charges, Petitioner heavily relied on Board-appointed Peter Fallon's report (R 57) concerning Petitioner's relationship with Ionta and Petitioner's claim Respondent failed to follow Board policies and directives regarding recommendation of coaches.

Fallon's report, of course, was mined from his own impressions as he collected statements from individuals involved and his review of Petitioner's policy. The conclusions of that report, however, were not drawn from sworn testimony before Fallon, nor can Fallon be considered a neutral fact-finder, having been Board appointed and approved by Nufrio, who was obviously discontented with Respondent. Outside the Fallon conclusions, there is nothing to support Petitioner's charges.

The simplest of the accusations against him is that Respondent was insubordinate because (1) he did not follow a supervisory directive to allow Athletic Director Linda Ionta exclusive recommendation of the hiring and re-hiring of High School athletic coaches and (2) he disobeyed Petitioner's policies to that effect. My review of the critical documents, essentially Regulation 4111A and the job descriptions of both Respondent (R 14) and Ionta (R 15) as well as the testimony of both Ionta and Tatum convinces me there was neither a policy nor directive giving Ionta sole power to recommend coaches nor one restricting the Respondent's role in that process. Instead, there was a long-standing practice of Ionta recommending whomever she favored, including the re-appointment of coaches despite unenviable records. Faced with a history of athletic failure and Ionta's seeming indifference to it, Respondent, upon his appointment as High

School Principal, took the initiative to demand improvement of both of her and the coaches she had perpetually reappointed. Although that demand seems to have taken Ionta by surprise and generated both considerable dismay and opposition, it could not have been insubordinate since there was no policy or directive that that forbade it. More specifically, there was nothing in the position descriptions of either Ionta or Respondent, nor any policy—including Regulation 4111A regarding Respondent and Ionta's roles in the recommendation of coaches.

Petitioner may answer that neither was there anything giving Respondent that responsibility, but our schools do not operate on the principle that anything not specifically endorsed or countenanced is forbidden, and Petitioner has no basis for insinuating they do. I concede that Respondent's tone, especially as described by Ionta in regard to his September 3, 2015 meeting with her and her coaches, was inadvisable, and his interaction with her was less than sensitive given her long-standing role. But Respondent was not insubordinate because there was no directive to which he had to be subordinate. Were this not enough to doom at least the insubordination charge, Tatum testified that he neither considered Respondent to be insubordinate nor gave him an order regarding the controversy with Ionta. With the failure of the insubordination charge, any claim of unbecoming conduct related to insubordination must be dismissed.

As for Respondent's behavior aside from the insubordination allegations, I do not find anything in the record that amounts to unbecoming conduct. Such conduct is defined as any action that can be said to have reasonably destroyed public respect and confidence, *Karins, supra*, or adversely effects morale, *(id*.) or displayed an unfitness for one's duty. *In re: Grossman*, 127 N.J. Super. 13 (AD 1974); *In re Ranelli*, 194 N.J. Super. 492 (AD, *cert. den*., 99 NJ 181 (1984). Although the coaching controversy between Ionta and Respondent persisted for three years after the September 2015 meeting and certainly affected Ionta's morale, there is no evidence of public distrust that resulted. As for its effect on Ionta, it is difficult to put the controversy's persistence completely at the feet of Respondent or Ionta. Despite acknowledging the tension between them, Tatum, who was Superintendent of Schools, refused to meaningfully intervene and decide which of them had the authority to recommend coaches to him. Instead, the record shows he continually side-stepped the controversy with advice that they should collaborate and work together even as it was abundantly clear they could do neither. In fact,

Tatum ducked the responsibility even after the antagonists asked him to anoint one or the other with the right to recommend coaches.

This hesitancy allowed the dispute to fester which undoubtedly led to a strained relationship and at least partially generated Ionta's claim Respondent was harassing her. That claim, presented in Ionta's Affirmative Action complaint (R 77), lies at the foundation of what remains of Petitioner's unbecoming conduct charge.

In essence, Ionta charged that Respondent's dispute with her, his issuance of a Comments Related form, and his general conduct toward her violated protections under Petitioner's (and by implication State and federal) harassment and anti-discrimination policies. Ionta's complaint, however, does not allege any deprivation of employment rights or other civil rights. Nor does it expressly charge adverse conduct based on any protected class status such as gender, race/ethnicity, disability, or religion. Instead, it is what can be called a "small 'c'" complaint in that it protests Respondent's personal treatment of her based on his insistence that he recommend coaches, his criticism of her performance, his issuance of the Comments Related form, and what Ionta considered to be a generally hostile attitude toward her.

However, even if the facts are as she alleges, aside from the Comments Related charge, the complaint is merely a reflection of her personal discomfort with a success-driven, hard-driving co-worker. Given the vagueness of most of the allegations, Ionta's purported responses of anxiety, depression, and unspecified emotional turmoil seem based on nothing remotely resembling active harassment. Her most flagrant charge—Respondent's issuance of the Comments Related form—neglects the fact the form was dismissed by Tatum who assured Ionta the contents were neither disciplinary nor had any effect on her job. Further, Respondent never had supervisory authority over Ionta or had any means of disrupting her career, affecting her salary or benefits, or blocking her promotion. Neither did he have authority to change her duties, discipline, or dismiss her.

With all respect to what appears to have been Ionta's genuine discomfort with and understandable dislike of a new-comer challenging her authority, her claims cannot reasonably substantiate an unbecoming conduct charge. Candidly stated, they are a recitation of disagreements with and reactions to another staff member such as commonly occur in the workplace and allegations of severe emotional distress as a result of the relationship. For such to constitute harassment, one would have to re-define what harassing conduct is and make it not

that which would negatively affect a reasonable woman in the complainant's circumstances, but as anything that anyone does displeasing to another. Our law has not reached that nadir, and there is no rational way to conclude Respondent's behavior, even if truly described in Ionta's complaint, is conduct unbecoming within the meaning of tenure law.

True, Respondent seems exceptionally goal oriented, and, as gathered from the record here, including the testimony of Mr. Rutty, he is a forceful personality who takes command with little hesitation and absolutely no reluctance. His success at both his previous district and his work at Franklin Elementary, as testified to by Tatum and, without dispute, by Respondent, reveals both those traits and their compatibility with achievement. The traits can be very beneficial to an organization, especially where there is a history of poor performance. But they do not in and of themselves constitute insubordination or unbecoming conduct. In fact, in what appears to have been an underperforming environment, they were enviable and necessary.

In summary, having found neither insubordination nor conduct unbecoming within the meaning of the TEACHNJ Act, I find Petitioner's charges unfounded and that Respondent should be re-instated as soon as practicable with full backpay, seniority, and any out-of-pocket benefit costs that would have been covered had he not been dismissed. However, Petitioner may mitigate its damages by off-setting any financial obligations hereunder by whatever amounts of unemployment compensation Respondent received and by any earnings Respondent acquired as a result of work performed during hours he otherwise would have been on regular duty as Union Township High School Principal which shall not include hours outside his regular school day such as evening meetings which he was obligated to attend.

March 27, 2023
Date

Ralph H. Colflesh, Jr., Esq. (digital signature)
Ralph H. Colflesh, Jr., Esq./Arbitrator