NEW JERSEY DEPARTMENT OF EDUCATION
OFFICE OF CONTROVERSIES AND DISPUTES

Agency Docket No.: 247-9/23
Ralph H. Colflesh, Jr., Esq.
Arbitrator

IN THE MATTER OF
TENURE CHARGES BY
THE SCHOOL DISTRICT
OF THE CITY OF TRENTON,
MERCER COUNTY,

Petitioner,

and

WILLIAM RUSSELL,

Respondent.

Appearances
For Petitioner School District:
James Rolle, Jr., Esq.
Trenton Board of Education
Trenton, New Jersey
For Respondent William Russell
Edward Cridge, Esq.
Melk Cridge LLC
Pennington, New Jersey

DECISION AND AWARD

Certified tenure charges having been filed by Petitioner, City of Trenton Board of Education, (sometimes herein "the Board") (P1), and Respondent, William Russell, 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 Petitioner should be removed from his position or suffer some lesser penalty.

Following pre-hearing conference calls with counsel regarding procedural issues, hearings were conducted on February 9, 2024 at the Respondent's offices in Trenton, New Jersey, April 12, 2024 at the Jefferson Intermediate School, in Trenton, and May 20, 2023 at Respondent's offices in Trenton. At those times and places both parties had the opportunity to

call and confront witnesses, present all relevant and admissible non-testimonial evidence, and make arguments in support of their respective positions. At the conclusion of the last hearing the parties agreed to submit briefs following the preparation of transcripts. Those briefs have been submitted to the undersigned, and, there being no unresolved procedural or evidentiary disputes, this matter is ready for adjudication on its merits.

Background:

Respondent**,** Willam Russell, was employed by Petitioner as a tenured computer teacher and working at Jefferson Intermediate School on November 18, 2022. On that date, according to the school's Principal, Nadia Ramcharan, he grabbed a student identified herein as TM by both her arms and pushed her against a wall, leaving her distraught and crying. Further, according to Ms. Ramcharan, he further antagonized the student by following her and yelled at the class that he was "tired of the bullshit." (Tenure Charges at Paras 4-5, 8). That act, in addition to other alleged behavior[1], led Petitioner to file timely Tenure Charges on September 12, 2023 seeking Petitioner's removal from his employment.[2] Petitioner filed a timely answer, and the undersigned was appointed to arbitrate the matter under the TEACHNJ law.

Relevant Factual Assertions of Petitioner:

The Petitioner presented **Nadia Ramcharan**, the Principal of Jefferson Intermediate School at all times material herein. Ms. Ramcharan testified that Respondent was a computer teacher at the school in 2022, the first year the school opened. It was her further testimony, taken as background information and not in support of Petitioner' position herein, that Respondent did

[1] Allegations involving that other behavior cited in the Charges were excluded from the hearing on evidentiary grounds. Petitioner answered Respondent's Interrogatory asking Petitioner to "identify and set forth with specificity" "each and every act or omission" which Petitioner alleged constituted conduct unbecoming a teaching staff member. Petitioner responded by exclusively identifying the event of November 18, 2022. See, Tr. 24-27; RX 2, p. 4. Therefore, this case turns only on Petitioner's alleged conduct of November 18, 2022.

[2] Respondent has been on administrative leave since in or around the month of November 2022. The hearing in this matter was delayed for settlement discussions as well as a successful motion by Respondent for an *in camera* inspection of student statements and records relevant to the November 18, 2022 incident. Those statements, collected by Petitioner shortly after the incident and provided to the State's Department of Children and Families, were otherwise protected from discovery under New Jersey law.

not comply with several administrative requirements in the fall of that year and that he "struggled with classroom—with the students a lot." (Tr. 23).

Turning to the allegations deemed relevant to this matter, Ms. Ramcharan related that she was conducting a "walkthrough" of the building on November 18. She related that she observed Respondent through a window in the door of his classroom standing in front of a student—later identified as TM—whose back was against a wall, while manhandling her with both hands. (Tr. 29; 2 Tr. 17, 18-20, 22-24, 25-26, 31-32, 3941). Ms. Ramcharan recalled "a raucous going on" in the classroom and said that as she approached the door of the room Respondent and TM were making their way outside. (Tr. 123; 2Tr. 29-29). TM was crying hysterically at the time and asserted Respondent was roughly handling her (Tr. 29) although on cross-examination Ms. Ramcharan conceded she did not see Respondent push TM out the door. Ms. Ramcharan then said that Respondent told her he had asked TM to leave the classroom because of her behavior and to go to another room but that she was not listening and refused to do as he said. (*Id.*). Ms. Ramcharan explained it was a practice at the school for teachers to send pupils with whom they were having problems to a "buddy teacher" in order to de-escalate the situation. (Tr. 29-30). When Ms. Ramcharan asked TM to get her "stuff" and go to Ms. Ramcharan's office, she noticed TM had no shoes on (2Tr. 30) and that Respondent continued to, in Ms. Ramcharan's words, "antagonize [TM]." (Tr. 30). Ater closing the door of Respondent' classroom, Ms. Ramcharan heard him say "I'm tired of this bullshit" and then begin to interact with another student, whereupon Ms. Ramcharan asked him to leave the classroom, go to her office and contact his union representative. (Tr. 31). She said she then took TM to the school nurse because she complained of pain in her arms.(*Id.*). Upon meeting with Respondent and his union representative, Ms. Ramcharan stated, Respondent told her he was "going through some stuff," and she told him to leave the building and that Human Resources would contact him. (Tr. 32). She said that later the same day she filed a report with the appropriate state agency on institutional abuse. (Tr. 33). Subsequently, Ms. Ramcharan explained, she had students in the classroom at the time write accounts of the incident in the presence of a staff member. (Tr. 34-35, 76).

Ms. Ramcharan also introduced the District's Board Policy 3281 which addresses staff misconduct (PX 6; Tr. 36-37) and requires staff to protect the health safety, and welfare of students within the district. She opined that Respondent had not followed that policy. Similarly,

she introduced Board Policy 3211 regarding staff ethics (PX 7) which requires staff to treat students with dignity. (Tr. 38). She expressed her belief that Respondent had violated it, as well as another Board policy, 3217 (PX 8) which prohibits use of physical force upon a student except in special situations such as to quell a disturbance or seize weapons. (Tr. 38-39, 42-43). In Ms. Ramcharan's opinion, Respondent was doing none of those things. (Tr. 43-44, 45). In addition, Ms. Ramcharan introduced a memorandum (PX 5) relating to a meeting in May 2022 in which Respondent was counseled about an incident at another school and the Petitioner's restrictions on staff making physical contact with students. (Tr. 46-48).[3]

Ms. Ramcharan said she had received some training in investigating staff conduct (Tr. 56-58). As to November 18, 2022, she said she was familiar with the building, having worked there since August 2022, and knew the location of Respondent's classroom. (Tr. 60-61). She also prepared a sketch of the area outside the classroom and her approach to it as she was walking through on November 18, 2022. (Tr. 63). She explained that she both heard and saw the commotion in Respondent's classroom around the same time and testified to the positions of TM and Respondent when she first spotted them through the window in the classroom door—which opens outward into the hallway (Tr. 70) at a distance of 3-5 feet. (Tr. 64-66, 72).[4] As to the number of students present at the time of the incident, Ms. Ramcharan said she did not know. (Tr. 80, 81). Nor was she sure of the staff member who collected student statements that day (Tr. 86-87) and conceded she did not know what instructions students present in the classroom were given other than they were told to write what happened. (NT 88). Nor did she know whether the students collaborated on their statement. (*Id.*). Despite having collected only seven statements, Ms. Ramcharan recalled there being 10-12 students in the room—more students than the number of statements that were collected. (2TR 46-47). Further, Ms. Ramcharan said she thought there were no cameras in the hallway outside in a position to record events in Respondent's classroom that day. (Tr. 91, 94, 95, 96). However, on cross-examination, Ms. Ramcharan said cameras could record TM leaving Respondent's classroom (2Tr. 37) but she had not taken steps to preserve that footage. (2Tr. 38).

[3] In accordance with the ruling above on the scope of evidence relevant to this case, that information was admitted solely to provide evidence Respondent was on notice to comply with Petitioner's policies.
[4] On re-direct examination, Ms. Ramcharan estimated the distance to be about ten feet. (Tr. 121).

Turning to her own response to the incident, Ms. Ramcharan said she had made notes (R 27, 2 Tr. 14, 43; 2 Tr. 57) but did not give those notes to anyone. (2Tr. 9-10).

Ms. Ramcharan agreed with Respondent's counsel there are times a student can be removed from a classroom, including occasions when a student is disruptive, not listening, or destroying property. (Tr. 98-99. If such a student refuses to leave the classroom, she said, a teacher can call the office or school security can remove the student. (Tr. 99-100). Although Ms. Ramcharan said she had never seen a situation where a security officer had to deal with a pupil who would not voluntarily leave a classroom, she opined that officers could get physically involved in breaking up a fight and that "it may have happened" in the District that a school security officer took hold of a student and forced the student from a classroom. (Tr. 103). On November 18, 2022, she recalled, there were three or four contracted security officers at Jefferson. (Tr. 104).

Ms. Ramcharan further stated there were occasions when she herself had "held a student's" hand" while walking him/her out of a classroom but said such an act would be to calm the student (Tr. 109) and conceded such a student may not have wanted handholding. (Tr. 111). Further, she conceded there may have been times when she put a hand on a student's shoulder when the student did not want her to. (Tr. 111-112, 114).

Turning to her report of the November 18, 2022 incident (RX 26), Ms. Ramcharan concurred that it omitted the use of profanity by the Respondent to which her earlier testimony referred. She credited that omission to the fact that the profanity was uttered after TM had left the classroom. (Tr. 119). As for the written student statements she had prompted (RX 25), Ms. Ramcharan testified that one female student who was returning from the bathroom when the incident occurred wrote she did not see anything between Respondent and TM. (Tr. 134-135); a second student wrote nothing about Respondent touching TM (Tr. 135); a third stated Respondent "kicked" TM from the classroom but said nothing about actual physical contact (Tr. 136); a fourth said Respondent grabbed TM's arm but not her shoulder nor did it mention profanity (Tr. 137); a fifth said Respondent used his body (rather than his hands) to push TM (Tr. 137); and, a sixth reported that Respondent pushed MT rather than grabbed her. Tr. 138).

Ms. Ramcharan conceded that none of the statement mentions a wall against which she had testified Respondent had pushed TM. Ms. Ramcharan further agreed she had no statement from MT herself and did not remember if she received one from her. (Tr.139-140). However,

Ms. Ramcharan said that the student statements corroborated elements of her testimony about seeing Respondent removing MT from the classroom, MT crying, MT being "manhandled" by Respondent (Tr. 145), and Respondent physically forcing MT from the classroom.

Also testifying for Petitioner was **Cheryl Tolor**, the District's Executive Director of Human Resources ("HR"). Ms. Tolor recalled first dealing with Respondent in the fall of 2022 when Ms. Ramcharan called her about the November 18, 2022 incident. According to Ms. Tolor, Ms. Ramcharan explained the incident and asked her to gather student statements. (Tr. 165-166, 203). Ms. Tolor further said she met with Respondent and his union representative sometime after November 18, 2022 but did not know exactly when. At that meeting, she recollected, she gave Respondent an opportunity to explain his version of what had happened, but he did not. (Tr. 170). Ms. Tolor said she did what she called a "secondary investigation" (Tr.172-173) which resulted in a March 27, 2023 report she authored for the Board's Superintendent. (PX 3). The report was admitted although, given the undersigned's ruling that specific references to incidents other than that of November 18, 2022 are not admitted, references to those other allegations are not being considered. (Tr. 176).

Ms. Tolor's recommendations to the Superintendent in that report included a recommendation for tenure charges "in alignment with" Board Policy 3217 (PX 8) as well as letter of reprimand from Ms. Ramcharan for violation of Board Policy 3281 (PX 6) which prohibits inappropriate comments to pupils or about pupils and Board Policy 3211 (PX 7) which prohibits "usage of corporal punishment." (PX 3, p. 5).

Recalled for further testimony at the May 20, 2024 hearing, Ms. Tolor testified that she had examined Board Policy 3217 which prohibits physical contact with students except in special circumstances which Ms. Tolar said were not present in this case.[5] (3Tr. 46-49). She further testified that she believed Respondent also violated Board Policy 3281 which prohibits staff from, *inter alia,* using "inappropriate language or comments." (PX 3Tr. 50-51).

[5] Policy 3217—Use of Corporal Punishment—states in pertinent part :The board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appear to be open defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching. Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law….A teaching staff member who: uses force or fear to discipline a pupil except as such force or fear may be necessary to quell a disturbance threatening physical injury to others...[or] touched a pupil in an offensive way...will be subject to discipline by the Board and may be dismissed."(PX 8).

On cross-examination, Ms. Tolor testified that she held a teaching certificate in Legal Studies" and was a classroom teacher of college subjects in various high schools as part of a special program run through Essex County College. (Tr. 189-190) She also said she holds a certificate of eligibility for New Jersey public school superintendent certification. (Tr. 190-191). As to her report on the November 18, 2022 matter, she testified it was finalized on March 27, 2023 (Tr. 191, 195) after her meeting with Ms. Ramcharan on December 5, 2022. That memo does not refer to her meeting with Respondent, referenced above, which Ms. Tolor said occurred around November 18, 2022. (Tr. 193, 194). As to that meeting with Respondent, Ms. Tolor testified again that he chose not to make a statement to her, a refusal Ms. Tolor said did not influence her conviction that he had violated Board policies. (Tr. 199-201). When asked if she knew how many students were present in Respondent's class when the incident with TM occurred, Ms. Tolor said she did not know but that she received a total of seven student accounts from Ms. Ramcharan. (NT 205). She also said she did not recall whether or not she got a statement from TM. (Tr. 205) and said she had not spoken to any of the students. (Tr. 212). Ms. Tolar also denied recalling whether findings of the State's Institutional Abuse Investigative Unit ("IAIU") regarding this matter played a role in her March 27, 2023 report.

Further, at the May 20, 2024 hearing, Ms. Tolar testified to effective teaching ratings given to Respondent in the past (3Tr. 56) and acknowledged that none of the student statements taken about the November 18, 2022 incident mentioned Respondent's use of bad language which Board Policy prohibits. Further, like Ms. Ramcharan, Ms. Tolar agreed there are circumstances under which a security officer could forcibly remove students from a classroom (3Tr. 68-69) and further agreed a teacher could physically remove a student from a classroom. (*Id*.). However, she testified that Board Policy does not permit a teacher to use physical force against a pupil who is even extremely disruptive but conceded that a security officer could. (3Tr. 71-71 74-75).

Two student witnesses also testified on behalf of Petitioner and are identified herein as "**AH**" and "**MM**."

The first, **AH**, testified that she was a student at Jefferson Intermediate School and had Respondent as a teacher and TM as a classmate in Respondent's class. (3Tr. 7). She characterized Respondent as a "very kind and friendly and welcoming" teacher and said she had no recollection of him having "bad interactions with any students." (3Tr. 8). However, she

recalled the incident in question here. According to her testimony (3Tr. 8-9), TM was "dancing and playing around" near the door of the room when Respondent asked her and others to sit down. When TM refused, AH stated, Respondent directed her to sit down, an order that she also refused. At that point, AH recalled, Respondent told her to leave the classroom, which she also declined to do. Respondent then "grabbed her hand and tried to lead her out the class, but she pulled against him…[and] they kept pulling back and forth" until Respondent dragged her out of the class causing TM to hold herself against the door so she could not be pulled further. At that time, AH said, Respondent grabbed TM and, AH thought, TM hurt her wrist. From AH's perspective, when Ms. Ramcharan appeared the Principal at first saw but then could not see what was happening because Respondent was standing in the doorway. (3Tr. 10-11, 20-21Meanwhile, AH recalled, TM had gotten loose and was "roaming the hallways" because she was upset. (3Tr. 23-24). Later, AH said, pupils were given paper to write down what happened. (3Tr. 10-11). AH then authenticated a writing she said was her statement of the matter given on November 18, 2022 (3Tr. 13-14) which was admitted as "BX 9"[6].

AH described TM as an associate but not a friend and said she had not spoken to TM about Respondent. (3Tr. 17-18). She estimated that Respondent had asked TM to take a seat about five to six times and that each time TM either ignored him or said "no." (3Tr. 18-19). Similarly, AH recalled, TM refused when Respondent asked her to leave the room, and he put his hand around her waist and started pulling her out. (3Tr. 19, 21-22).

MM testified that Respondent asked TM to either sit down or leave the room, but TM "wasn't paying him no mind." (3Tr. 27-28, 35). MM said that Respondent walked over to where TM was standing and told her to sit down or get out, and she ignored him again at which time "he put her to the wall." (3Tr. 28). In doing so, MM recalled, Respondent used both his hands and seemed to grab TM by the shoulders, and, although he did not push her to the wall, he "pinned" her there. (3Tr. 29-30, 37). MM also gave a written statement of the incident which was admitted as "B-10".[7] (3Tr. 31-32).

[6] This exhibit, referred to in the transcript as "BX9," is actually PX 9.
[7] As with "BX9", this exhibit is actually PX 10.

Relevant Factual Contentions of Respondent:

Respondent, **William Russell**, only offered testimony from himself. He stated he had taught in the District for about 24 years (3Tr. 78) and that his evaluations for school years going ack to 2002-2003 were all satisfactory. (3Tr. 81-82; RX 5-R 17).[8] Mr. Russell, describing himself as a trained "technology teacher" (3Tr. 106-107), explained that on November 18, 2022 he was teaching TM's class coding through the use of keyboards. (3Tr. 85-86). He said that on that day he was distributing candy to the class as a treat, something he said he had done in the District for 20 years. (3Tr. 87). TM, according to Mr. Russell, began dancing until he told her to stop and take her seat three or four times to no avail. (3Tr. 88). Mr. Russell said he then told her more loudly and said if she did not obey she would have to go to the class across the hallway where there was a music teacher who was his "buddy teacher, *i.e.*, a fellow staff member who would take referred students who needed settling. (3Tr. 88-90; 117-119). Mr. Russell said TM still refused (3Tr. 114) and began screaming at him loudly, which quickly escalated the situation. (3Tr. 90). He said he then stood and approached her, telling her again to take her seat and work with her computer, but MT continued yelling at him defiantly and was extremely angry. He said at that point the door of him room opened and Ms. Ramcharan appeared.

At that instant, according to Mr. Russell, TM tried to go around him. He put his arm out to stop her and "kind of like, moved her, but not hard" as TM ran to Ms. Ramcharan crying, at which time, he said, the incident was over. (3Tr. 93-94). As for Ms. Ramcharan, he said she did not enter the room and denied that he and she had dialogue. TM then left the room with her belongings when Ms. Ramcharan told her to do so. (3Tr. 94-96). Mr. Russell said that TM came back to retrieve some other belongings, at which point he told her he needed a conference with her parents. He denied using the word "bullshit" (3Tr. 96, 141) and categorically denied putting his hands on MT's shoulders or waist, putting her against a wall, and touching her in any way during what he called an "engagement" (3Tr. 97, 98) other than when she came in contact with his arm which he said happened simultaneously with her walking into him. (3Tr. 103, 120; 3Tr. 142). He opined that had MT stayed in his classroom it would not have been possible for pupils to get any work done. (3Tr. 104).

[8] There was no evaluation in the COVID impacted year of 2019-2020. (3Tr. 80).

Respondent also testified to prior interactions with Ms. Ramcharan, starting with a time he attempted to help a new teacher who was having trouble controlling her class. (3Tr. 140-141). Eventually that teacher had to file a report but did not know how to do one. When he notified Ms. Ramcharan, he alleged, she refused to help. (3Tr. 99-100). He further asserted Ms. Ramcharan had a policy of not allowing students to be brought to the school's office. (3Tr. 100-101).

On cross-examination, Mr. Russell denied allowing MT to take off her shoes on November 18, 2022 or seeing her without shoes. (3Tr. 1114-115, 116-117) and said TM's anger was a threat to or disturbance of classroom order. (3Tr. 124).

Arguments of Petitioner:

Petitioner relies on the evidence to support its contention Respondent should be dismissed for "inefficiency, incapacity, unbecoming conduct, or other just cause" NJSA 18A:6-10. Citing *Bound Brook Bd. of Ed. v. Ciripompa*, 228 NJ 4 (2017), Petitioner notes that unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit standard of good behavior due from one who stands in the public eye as an upholder of that which is morally and legally correct." (*Id*. at 13-14, quoting *Karine v. City of Atlantic City,* 152 NJ 523, 555 (1996). Simply put, Petitioner argues, unbecoming conduct involves acts that tend to harm morale or damage the public's image of a school system. *In re Emmons,* 63 NJ Super 136 (App. Div. 1960). As such, the concept of unbecoming conduct is variable or "elastic."

Petitioner next argues that evidence proving unbecoming conduct is not necessarily limited to the admissibility standards of a court proceeding. Rather, in an administrative setting such as the instant matter, the "residuum" rule applies, allowing the consideration of evidence otherwise inadmissible as long as the tribunal's decision is ultimately based on a preponderance of a "residuum" of judicially admissible evidence. *Weston v. State*, 60 NJ 36, 51 (1972); *In re Tenure Hearing of Cowan*, 224 NJ Super. 737 (App. Div. 1972); *In Re Polk,* 9 NJ 550 (1982). Given that principle, Petitioner says, the undersigned is obliged to consider any evidence material to the case. *Manchester Twp. Bd. of Educ. v. Thomas P. Carney, Inc.*, 199 NJ Super 266

(App. Div. 1985); NJCAC 1:1-15.5., including hearsay evidence. *Ruroede v. Borough of Hasbrouck Heights*, 214 NJ 338 (2013).

Petitioner says it has presented four bases for a finding of unbecoming conduct. First, Petitioner cites the eyewitness testimony of the students who testified that Respondent was the aggressor in the confrontation between him and TM. That testimony is corroborated, Petitioner says, by Respondent himself who said he initiated contact with TM, approached her, and at least bumped her with part of his body. Three other witnesses, Petitioner says, testified they saw him put his hands on TM. Petitioner says none of this was necessary because Respondent could have called security or allowed TM to return to her seat. As such, Respondent's actions violated Petitioner's policy 3217 which prohibits an employee to resort to force or fear in treatment of pupils "even those whose conduct appears in open defiance of authority." Petitioner says that given Respondent's height and weight, it is unreasonable to assume he was not resorting to fear and the testimony proves he used force against TM.

On those facts, Petitioner urges, termination is the only appropriate response, citing *In re Tenure Hearing of Fulcomer*, 93 NJ Super. 404 (App. Div. 1967). There the Appellate Division observed three considerations regarding penalty: (1) nature and gravity of the offense; (2) the accused's attitude at the time of the conduct; (3) evidence of provocation, extenuation or aggravation. The *Falconer* court also noted mitigating factors: (1) ability, record and length of the accused's service; the accused's disciplinary record; and (3) the impact of penalty on the accused's career in obtaining a position in the State. Petitioner says an application of the *Falconer* principles mandates termination, especially given Respondent's responsibility to pupils, his clearly prohibited conduct, and his demonstrated lack of remorse at hearing.

Arguments of Respondent:

Like Petitioner, Respondent cites the "residuum rule" as the evidentiary framework for deciding this case. *In the Matter of City of Camden,* 429 NJ Super. 309 (App. Div.) cert. den, 215 NJ 485 (2013). As stated above in Petitioner's arguments, the residuum rule requires a decision in this case to be supported by some quantum of competent evidence, *i.e.,* evidence that would be admissible in a court of law. *Weston, supra; Ruroede, supra.* As for the burden of proof, Respondent correctly argues it is on the Petitioner. *Douglas E. Wicks v. Bd. of Ed. of Bernards*

Twp., OAL Dkt. No. EDU 4006-00, citing *SSI Medical Serv. v. State Dept. of Human Serv*., 146 NJ 614 (1996). Such a burden means, Respondent says, specificity as to the action or behavior underlying the charge against Petitioner. Daly v. Department of Corrections, 331 NJ Dept. 344, 351 (App. Div. 2000); NJAC 6A:3-5.1(b) (1).

Respondent points out that unbecoming conduct—i.e., that which would affect morale or efficiency or tends to destroy confidence in government service—requires more than just negligence or an unwise act. *IMO Certificates of Featherson*, OAL Dkt. No. EDE 05329-05; Agency Dkt. No. 0405-177; *IMO Burlap, Camden County Dept. of Corr*., OAL Dkt. No CSV 10834-12, Agency Dkt. No. 2013-231 NJ AGEN LEXIS 64. And, Respondent argues, even if his conduct met these standards and was therefore "unbecoming," it should not result in an automatic dismissal. Rather, Respondent says, the undersigned must examine a number of factors within the context of the event and Respondent's career using the *Falconer* criteria, above.

Conceding that a single, flagrant incident might justify termination, Respondent argues that progressive disciplinary steps should be considered, including prior infractions unless there is reason to the contrary, and that discipline should be consistent with the seriousness of the wrongful act, *Elkouri & Elkouri, How Arbitration Work,* 7th ed, 15-40. Consideration must be given, Respondent maintains,, where the employer has previously condoned such acts without giving warnings they will be punished.

Turning specifically to the case at bar, Respondent underscores the degree of restraint and self-control required of public school teachers in today's permissive environment. From there, he reasons, even unjustified physical contact with a student does not create grounds for removal. *IMO Tenure Hearing of Eddie Lee Harrell*, 1979 SLD 479*; IMO Tenure Hearing of Ostergreen*, 1966 SLD 185; *IMO Tenure Hearing of Edith Craft*, Commissioner of Ed. Dec. No. 366-11; *Matter of Tenure Hearing of Boyd*, 93 NJAR. 2d (EDU) 445 ; *In the Matter of the Tenure Hearing of Barbara Emri, Comm. Of Ed. Dec. No. 371-02.* Of special note is Respondent's claim that conduct that was not cruel or premeditated may not justify removal. *Boyd, supra; Craft, supra.* Respondent points out that in *Craft*, the Commissioner of Education did not impose removal even where a teacher had slapped an eight-year old special education student in the face. Similarly, Respondent looks to egregious conduct in other cases where removal was not imposed, such as where there was inappropriate physical contact or pupils were struck by

teaching staff, *Boyd, supra*, (use of the "n word"); *Emri, supra;* in-class slurs about a student's mother, *IMO the Tenure Hearing of Poston, Comm. Of Ed.* Dec. No. 362-06; pushing a student into a seat; *IMO Tenure Hearing of Adam Mierzwa*, Comm. Of Ed. Dec. No. 283-08, and various instances of failure to supervise, *IMO Tenure Hearing of Carmen Quinones*, 1996 NJAR 2d (EDU) 649.

Moving from arguments on the penalty imposed here, Respondent argues against the credibility of Petitioner's witnesses, the assessment of which is for the undersigned with the condition that Petitioner must provide a preponderance of credible evidence. *Freud v. Davis*, 64 NJ Super 242 (App. Div. 1960). Such evidence must be drawn from credible witnesses whose credibility depends on an overall estimate of their accounts considering rationality, consistency and harmony with other evidence. *Carbo v. United States*, 314 F.2d 718 (1963); *In re Perrone*, 5 NJ 514 (1950).

Abiding by those principles, Respondent says, the undersigned must reject the testimony of Ms. Ramcharan and Ms. Tolor, calling their testimony obfuscatory, evasive, and cagey, while he touts his own testimony as candid, open, and transparent, even admitting at one point to using the "n word" in an event not material to this case. That admission, Respondent urges, is indicative of his candor at hearing.

Respondent next argues that his service entitles him to consideration as to penalty. His clear and unrebutted testimony was that he had worked with Petitioner full-time for 24 years and for several other years in a substitute capacity and had been rated as satisfactory or "effective" in many, many of those years.. (RX 4, 5, 7, 8, 9, 10, 13, 14, 15, 20). Respondent trumpets that Petitioner's disciplinary policy (RX 22) directs that discipline should be applied "wherever possible for progressive penalties."

According to Respondent, there was no appropriate investigation of any unbecoming conduct attributed to him. Such inquiries have been found essential to disciplinary measures. *Enterprise Wire, Co,* 46 LA 359 (1966). Among other things, Respondent underscores Petitioner's failure to ascertain there had been an interview of all of the pupils present in Respondent's classroom at the time of the incident, including TM, who was not interviewed at all. Further, Petitioner's witnesses, Ramcharan and Tolor, could not identify who was with the

students whose statements of the incident were collected at the time they were, and no other investigation was done into the incident.

Respondent further charges that Petitioner did not establish a clear standard of conduct for him to follow, charging that Petitioner's witnesses could not articulate the circumstances under which a teacher is permitted to make physical contact when a disruptive student threatens the right of other students to receive an education which Respondent asserts is a property interest. , *Hernandez v. Bosco Preparatory High,* 322 N J Super 1 (App. Div. 1999). Given that interest, Respondent urges that the statute prohibiting corporal punishment, NJSA 18A: 6-1 may not be interpreted as disallowing the physical restraint Petitioner charges Respondent with imposing on TM. In fact, Respondent says, Ms. Ramcharan and Ms. Tolor conceded there were instances in which staff might physically interfere with a student even where that student is not fighting, bearing a weapon, or destroying school property.

Returning to Petitioner's witnesses, Respondent says their testimony was inconsistent internally and with other witnesses. For example, Respondent says that none of the student witnesses called by Petitioner said Respondent uttered a profane word at the end of the incident. However, Ms. Ramcharan claimed to recall him saying "I'm tired of this bullshit!"[9] Additionally, Respondent asserts that Ms. Ramcharan—who viewed much of the event through a classroom window, lacked a clear observation of the incident including important details of the allegedly forceful touching of TM by Respondent. (NT 1, 39-41). Respondent summarizes Ms. Ramcharan's testimony as inconsistent with the testimony of student witness MM and AH as to how exactly Respondent supposedly physically restrained or coerced TM.

To the contrary, Respondent touts his testimony as consistent and credible. In his account, he did not hold her by her waist, wrist or shoulders, instead telling the undersigned he said he wanted her to leave the room because of her disruptive outburst and merely put his arm out in a passive manner, causing the two to make contact as TM moved into him. That he swore, was the extent of physical contact between the two.

From the foregoing, Respondent says, the undersigned should credit his account over Ms. Ramcharan's and—to whatever extent their testimony inculpated him—the actions described by

[9] Even if he had said that, Respondent claims, the profanity was so mild as to not justify even partial grounds for his dismissal under a "conduct unbecoming standard or any other standard.

the students. Alternatively he argues, even if Petitioner's witnesses' accounts are credited, they are insufficient to support his dismissal, and the tenure charges should be dismissed.

Opinion:

The parties agree that the statutory criteria for Respondent's removal is set forth in NJSA 18A:6-10 is "inefficiency, incapacity, unbecoming conduct, or other just cause" and that Petitioner's petition relies on "unbecoming conduct." Such conduct is not necessarily limited to the violation of any rule or regulation and can be based on a breach of any implicit standard expected of a person in the public eye who is to uphold morally and legally correct values. *Ciripompa, supra*, quoting *Karins, supra*.; *Emmons, supra.* Further, both parties recognize that evidence of such unbecoming conduct must be proven by a preponderance of legally admissible evidence. In other words, a decision must be based on a residuum of judicially admissible evidence which may be joined with otherwise inadmissible evidence such as hearsay which tends to support findings of fact. *Ruroede, supra*.; *Weston, supra*; *City of Camden*, *supra.* Ultimately Petitioner bears the overall burden of proving unbecoming conduct by a preponderance of the evidence which may include that which would be admissible at law or equity and that which, although bearing on the case, would not. However, the undersigned's decision must ultimately be predicated on a residuum of such judicially admissible evidence. *Ciripompa, supra.*

In this matter, Petitioner's factual averments are entirely based on evidence that would be admissible in a judicial proceeding, namely the testimony of Ms. Ramcharan and the two student witnesses AH and MM. Petitioner views that testimony as supporting its contention Respondent engaged in unbecoming conduct, both as it would be judged by the public and as it would specifically violate Petitioner's Policy 3217 prohibiting its employees from using force in the treatment of pupils even when pupils exhibit conduct that appears to be an open defiance of authority.

The question is whether or not that testimony is credible when examined in light of Respondent's sworn version of the November 18, 2022 incident.

I find that it is. Ms. Ramcharan, the Jefferson School Principal, presented as a wholly credible witness and testified in a guileless, candid, and straight-forward manner concerning what she observed. In her account, Respondent, seen through a window in his classroom's door,

had both hands on TM as he had her against a wall—a violation of Petitioner's policy 3217—and after Ms. Ramcharan intervened, Respondent continued to "antagonize" TM. Moreover, I credit Ms. Ramcharan's testimony that after TM left the classroom as directed by her, Respondent expressed he was tired "of this bullshit" which itself was a violation of Petitioner's Policy 3281 proscribing Inappropriate Staff Conduct. Although it is true that neither student witness called by Petitioner reinforced Ms. Ramcharan's account in a precisely congruent manner, neither did they expressly contradict it. In fact, they supported it. Student witness AH, who described Respondent as a "very kind and friendly and welcoming teacher," told the undersigned that Respondent grabbed TM's hand and tried to lead her out of the room and that Respondent dragged her. MM testified that Respondent "put [TM] against the wall," used both and seemed to grab TM by the shoulders after which he "pinned" her there." Neither pupil appeared to have been coached or directed to testify from a script, and both impressed the undersigned with their desire to render an accurate account of the incident.

The above testimony contrasts strongly with the self-interested testimony offered by Respondent. In his version, there was no grabbing or holding or TM. Rather, he claimed TM walked into him as he merely put his arm out to stop her from going around him. In light of Ms. Ramcharan's version and that of the two students, I do not find Respondent's memory of the incident as accurate. I also do not find any basis for his assertion that Ms. Ramcharan was biased against him despite his allegation that she refused to help a new teacher file a report on student deportment in her classroom. As for the charge that he used a profanity, I note Respondent's denial but credit Ms. Ramcharan's account.

In sum, I find Respondent violated Petitioner's Policy 3217 pertaining to use of force against students and therefore a violation of NJSA 18A:6-10 against "unbecoming conduct." I also find he violated Policy 3281 which prohibits inappropriate staff conduct.

Having so determined, I turn to the last issue: the appropriateness of the penalty.

I am convinced that the 57-year old paradigm set forth in *Falconer, supra* applies. As stated above, the *Falconer* court described tests for penalties in New Jersey school tenure cases: the nature and gravity of the offense; the accused's attitude at the time; and, evidence of provocation, extenuation, or aggravation. In the case at bar, Respondent is not accused of purposeful infliction of pain on TM. Instead, he is guilty of using physical force to, in my judgment, restrain TM and coerce her out of his classroom. I find no evidence that Respondent's

attitude was pre-formed or malignant. Rather, faced with a difficult classroom management situation, he reacted without malice but out of desperation, however unwise his actions were. I further conclude his attitude and actions were provoked by TM's failure to follow his original directions which escalated to an exasperated demand she leave the classroom. Most importantly, I find no proof of an intentional infliction of harm and find no evidence any real harm occurred to her.

I consider those factors together with his long career with Petitioner and his overall satisfactory teaching record. Even if his record of occasional missteps were to be considered, I am persuaded his overall record is sufficient to mitigate his penalty here to some degree. Therefore, I find Respondent's removal should be rescinded and his tenure maintained. However, his actions justify the elimination of any pay he has already been denied and further justify the withholding of any salary increment due him for school years, 2024-2025 and 2025-2026. Petitioner shall reinstate him with all deliberate speed and without imposing any conditions on his return that are not customarily placed on others who return after an absence equal in length to that of Respondent.

An Award will be entered accordingly.

Award:

Respondent's removal is reversed. He shall be returned to his former position forthwith, subject only to conditions customarily imposed on others who return after an absence equal in length to that of Respondent. Respondent's next two salary increments—for school years 2024-2025 and 2025-2026 shall be withheld.

10/10/24 — *Ralph H. Colflesh, Jr.* (digital signature)
Date — Ralph H. Colflesh, Jr., Esq./Arbitrator