

**STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION**

In the Matter of Tenure Charges Against
Timothy Capone

MONTAGUE TOWNSHIP BOARD OF EDUCATION

**NJ TEACH #:
235-9/22**

Petitioner

**Opinion
and
Award**

- and -

TIMOTHY CAPONE, CHIEF SCHOOL AFDMINISTRATOR

Respondent

Before: Deborah M. Gaines, Arbitrator

APPEARANCES:

FOR THE PETITIONER:
GLEN D. SAVITS, ESQ.
LAURA M. LOGIUDICE, ESQ

FOR THE RESPONDENT:
JOSEPH A. GARCIA, ESQ.

Pursuant to NJSA 18A:6-16, as amended by P.L. 2012, c.26 ("TEACHNJ"), the tenure charges brought by the Montague Township Board of Education ("the Board", "the District" or "Petitioner") against Timothy Capone ("Capone" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and Decision on September 21, 2022. Hearings were conducted via Zoom on January 20, January 25, February 17, February 22,

February 23, June 13, June 15, August 7, August 14, and August 18, 2023.

At the hearing, the parties had full and fair opportunity to examine and cross-examine witnesses, introduce documentary evidence and make argument in support of their respective positions. The hearings were transcribed. The parties submitted written closing statements which were received on September 15, 2023, whereupon the record was closed. All evidence arguments, whether referenced or not, were fully considered in the issuance of this Opinion and Award.¹

THE CHARGES

Sworn Tenure Charges were brought against Respondent, Timothy Capone, on August 31, 2022. Because the charging document is approximately 32 pages consisting of 147 paragraphs, I have summarized them. A full and complete copy of the sworn tenure charges are attached to the Opinion and Award.

The following is a summary of the charging document:

Count 1: Unbecoming Conduct and Other Just Cause; Inappropriate and Unprofessional Conduct Towards Staff, which includes allegations of leading through fear, targeting staff, conducting Reductions in Force, verbal and emotional abusive, providing low evaluations to those staff not favored by Respondent.

Count 2: Neglect of Duty; Failure to maintain the school facilities and address known health and safety concerns.

¹At the close of the District's case, Respondent filed a motion to dismiss. I denied the motion at the time as being premature. The arguments made in the motion have been incorporated into the Respondent's closing arguments.

Count 3: Neglect of Duty and other Just Cause; Interference with Educational Continuity of District Students, which includes allegations of changing teacher assignments frequently;

Count 4: Unbecoming Conduct and other Inappropriate Conduct Toward District Parents;

Count 5: Neglect of Duty and other Just Cause; failure to ensure sufficient staff and misappropriation of staff;

Count 6: Unbecoming conduct and other Just Cause; including abuse of power; and

Count 7: Neglect of Duty, including failing to attend school regularly and failing to assist.

BACKGROUND

Respondent was hired on July 1, 2017, as the Chief School Administrator (CSA) for the Montague Township School District. His employment was governed by a Contract of Employment negotiated between him and the Board. Respondent's first Contract of Employment was executed on July 1, 2017, with a three-year term. The Board renegotiated a five-year contract of employment prior to the end of Respondent's first contract. That agreement was to be in effect for the period July 1, 2020, through June 30, 2025.

The contract of employment sets forth the CSA's job duties and incorporates the job description for the position into the Agreement.

x...x.

The contract of employment sets forth not only the job duties of the CSA but a requirement to evaluate the CSA annually in writing and that the evaluation must represent a majority of the Board. [Id.] The contract requires the Board to "describe in writing, and in reasonable detail the specific requirements for improvement in all instances where the Board deems the CSA's performance to be unsatisfactory." [Id.] The contract provides the CSA the ability to respond in writing to the evaluation, as well.

Article VI of the contract of employment deals with termination of the agreement. Relevant to this proceeding, Section E provides:

The Superintendent shall not be dismissed or reduced in compensation during the term of this contract, except as authorized by paragraphs B&C supra and N.J.S.A. 18A:17-20.2 provided, however that the board shall have the authority to relieve the Superintendent of the performance of his duties in accordance with NJSA 18A:27-9 so long as it continues to pay his salary and benefits for the duration of the term. The parties understand that any early termination must comply with the provisions of P.L. 2007, c.53, the school district accountability act.

In April 2021, the school board placed Respondent on paid administrative leave pending investigation. The exact reasons for the placing him on administrative leave were not made clear through testimony at the hearing. The Board engaged the law firm of Cleary, Giacobbe, Alfieri, Jacobs, LLC to investigate

various allegations of misconduct. A Confidential Investigation Report (Report) was completed by the firm on April 22, 2022. The report was comprised of 180 pages and included interviews with 20 members or former members of staff in addition to the Respondent.

The investigators found insufficient evidence to establish Respondent unlawfully discriminated against, retaliated, harassed, or subjected the following individuals to a hostile work environment: Chandler Howard, Nancy Wright, Aimee Nittolo, Darrell Stewart, Anna Dawson, Brenten Runne, Denise Bellini, Rachel Van Gorden, Rebecca Lehmkuhl, Jennifer Battikha, Michelle Visco, Leslie Coolong, Juliet Myers, Dawn Marion, Lina Willeford, Danielle Christmann, Lorie Jeskey, or Krista Mikulski.

However, the investigators found the evidence presented was sufficient to establish that Respondent "unlawfully harassed James Andriac and subjected him to a hostile work environment." [Id. at 179] It further determined the evidence presented was insufficient to establish that Respondent unlawfully discriminated against or retaliated against James Andriac.

The investigators found and recommended "the evidence presented was sufficient to establish that Respondent failed to discharge the obligations of his position as the District's

Chief School Administrator, as provided under the Board Policy 2131. [Id. at 180]

As a result, the District issued Sworn Tenure Charges that were issued by the Township alleging unbecoming conduct and neglect of duty.

Positions of the Parties

Position of the Board

The Board argues Respondent engaged in conduct unbecoming a Chief School Administrator and Constituting other just cause for removal such that counts 1, 4 and 6 must be sustained. It contends the concept of conduct unbecoming is an "elastic one" as defined by the courts. It asserts conduct unbecoming is generally defined as conduct "which adversely affects the morale or efficiency of the [department]' or 'has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services.'" [citing In re Young, 202 NJ 50, 66 (2010)]. The District maintains the credible record evidence shows Respondent engaged in consistent inappropriate and unprofessional conduct towards his subordinate staff members, particularly those who disagreed with his decisions.

The District argues the record evidence establishes Count One, which includes allegations Respondent led through fear, targeted staff, conducted reductions in force, engaged in verbal and emotional abuse, and provided low evaluations to those staff

not favored by him. Specifically, the District cites Respondent's treatment of teacher Dawn Marion, who had over 20 years of service with the District. It notes the record evidence establishes Marion publicly complained during a May 7, 2019, school board meeting about the teacher reductions, leaks in her classroom ceiling, and a toxic school culture. [J-1, 2019 School Board Meeting Notes] It notes, Marion expressed her belief to the Board that Respondent would retaliate against her for remarks.

The District argues the record evidence demonstrates Respondent, indeed, retaliated against Marion after she spoke at the School Board meeting. It contends the record evidence shows only one week later, Respondent advised Marion by letter that her March 2019 sick leave request was being denied for lack of proper documentation. It contends the leave related to her son, who had serious mental health issues and the letter shows Respondent was aware of the reasons for the leave. [D-11] In addition, on May 20, 2019, Respondent suspended Marion and required her to submit to a psychological fitness for duty examination based on a comment she made when he denied her permission for leave. [D-11] Marion acknowledged saying words to the effect that if her leave was not approved she would stick her finger down her throat to make herself sick. The District

notes that Marion advised Respondent she was not serious about the comment and, indeed, was found fit for duty. [Id.]

The District contends Respondent continued his targeting of Marion by then taking disciplinary action against her on September 13, 2019, regarding the same events that he had already suspended her for and had already sent her for and examination for cause. [Id.] The District notes that after this, Marion was the subject of repeated disciplinary actions, which led to her leaving the district. It argues it is highly suspect that Marion, a teacher with over 20 years of experience, suddenly had five disciplinary actions in such a short period of time. It contends Respondent's testimony that his review of her sick leave records was coincidence is simply not credible her record as a teacher had been exemplary prior to this time.

In addition to Marion, the District argues the witness testimony also established Respondent had a list of long serving staff members he did not like and wished to leave the school. The District maintains he achieved his objective through instituting a dual certification requirement for all teachers, which led to Reductions in Force (RIF) for those teachers who did not obtain a dual certification. It contends the dual certification requirement was a mechanism to rid the school of tenured staff and replace them with non-tenured employees who he would be able exercise more control over.

According to the District, Respondent's subterfuge is demonstrated by the fact that none of the witnesses who testified had any awareness of the dual certification requirement or had seen anything in writing regarding the alleged dual certification policy. It notes that of the 18 teachers he targeted, only two remained in the District.

The District further cites the testimony of James Andriac, who at the time was the Director of Student Services, in addition to being a teacher. It notes Mr. Andriac testified Respondent directed him to provide false evaluation ratings for teachers he disliked, such as the Mr. and Mrs. Nittolo. Likewise, he was instructed to give inflated ratings to Respondent's favorite staff members, such as Daniele LaStarza. The District maintains Mr. Andriac's testimony is highly reliable since he testified that he understands the potential risk he is under for acknowledging such conduct.

Likewise, the District asserts, the record evidence showed Respondent used social gatherings to divide staff into favored and non-favored groups. It contends numerous witnesses testified that he invited only some members of staff to happy hours either at a local pub or his home. Moreover, it notes, he pressured certain staff members to attend. It avers Ms. Howard testified that when she was not able to attend one of the

dates, Respondent applied social pressure on her which made her believe attendance was mandatory.

The District further argues Respondent also targeted Mr. Andriac to control and humiliate him. It contends Respondent subjected Andriac to supervisory controls he did not place on other members of staff, such as making Andriac sign in and out of the building daily and maintaining a log to account for his time and activities during the day. It notes that numerous witnesses knew of this treatment and respondent's contention that the log was a means of working with Andriac to improve his productivity is belied by the fact that Respondent never reviewed these records with him.

Moreover, the District argues the record evidence shows Respondent engaged in inappropriate communication with members of staff such as Andriac, teacher Rachel Van Gorden, and social worker Daniel La Starza. It contends the screenshots of various group texts show Respondent referred to Andriac as "Nancy", "Mary" and other derogatory terms. It argues Respondent's encouraged others to disparage Andriac, as demonstrated by various texts making fun of Andriac including one having a bird soil him a man's head (in reference to something that happened to him) and wearing ruffled clothing. It contends Ms. Van Gordon, a relatively new teacher, testified she felt like the texts were meant to "haze" Mr. Andriac.

With respect to Count Four, the District argues the record evidence demonstrates Respondent engaged in unbecoming conduct and unprofessional conduct and inappropriate conduct toward district parents. The District argues a key component of Respondent's job responsibilities was to promote communication and supportive relationships within the community. Yet, it contends, the record evidence shows Respondent had a Facebook page, titled Timothy Capone, CSA where he would publicly post inflammatory comments and engage in argument with District parents. It notes a July 30, 2020, post singling out parents Holstein and Guida as spreading disinformation; an August 11, 2020, post singling out Ms. Guida as misleading; September 26, 2020, post regarding grant writing. It notes Respondent comments were inflammatory and nasty.

In addition, the District maintains the record evidence showed Respondent even directed staff to take negative actions toward the students of parents who expressed disagreement with him. It notes Ms. Van Gorden testified Respondent advised her not to provide a permission form to a student for soccer because he did not want to deal with the student's parent and pressured her not to select student DB for a leadership position in the agricultural program because he did not like the parent.

The District contends MEA President Runne also testified that he was pulled out of his work activities at times to

discuss the PTA elections and that Respondent publicly accused one candidate of stealing from her former PTA in another district.

The District contends it has established Count Six, (Unbecoming conduct and other Just Cause) by his abuse of authority to benefit himself. Specifically, it cites the testimony of Ms. Howard, Ms. Van Gorden, Mr. Runne, and Ms. Lehmkuhl that Respondent made them call into school board meetings to say positive things about Respondent and his activities. All felt pressure to do so and suffered petty slights such as Respondent not speaking to them, or changing their assignment for a period of time, if they did not.

The District argues the record evidence establishes Respondent failed to discharge his duties as alleged in Counts 2, 3, 5, and 7. According to the District, neglect of duty means Respondent failed to perform specific functions of his job. With respect to Count 2, which deals with Respondent's failure to maintain the school's facilities, the District contends the record evidence shows Respondent failed to ensure mundane duties such as sweeping and cleaning were performed to more serious structural issues as failing to take action to attempt to replace the leaking roof. The District cites numerous emails from teachers in the record reporting a failure to have clean classrooms, leaks, and other problems.

The District notes that Darrel Stewart, former facilities manager testified he believed the most pressing issue facing the physical plant was replacing the roof and that money spent elsewhere should have gone to that priority. The District acknowledges Respondent tried to get a referendum passed by the school board to replace the roof. It contends Respondent failed to be more proactive when the referendum was not passed.

The District contends the record evidence shows Respondent attempted to pass his responsibilities for the physical plant to Mr. Andriac who testified his job description did not include such responsibilities.

With respect to Count Three, the District argues the record evidence shows Respondent's neglect of duty by inappropriately reassigning staff thereby interfering with their continuity with students. The District cites the testimony of both Mr. Runne and Ms. Lehmkuhl that their assignments were changed frequently. It notes Runne testified that he had 7-8 changes during a single year. Likewise, Lehmkuhl testified that during she was unaware of her assignment for the 2019-2020 school year until two weeks before school started. She testified she was advised she would be teaching math, but only two days before the school year began, she was reassigned to teach math and science. She testified that within the two years she taught in the district,

she was reassigned 7-10 times. The District notes Danielle La Starza corroborated that teacher assignments changed frequently.

The District asserts these changes were especially pernicious because they were often perceived by the staff as punitive. It notes Ms. Howard testified that soon after she refused to call into a Board meeting, she was reassigned from Kindergarten to Middle School Special Education. It notes Mr. Andriac confirmed the timing of these events.

The lack of staffing, it contends, was underscored by Mr. Andriac's testimony that he was often forced to search for any able body to cover classes.

In addition, the District argues Respondent's misappropriation of staff was demonstrated by his constant pulling interventionists from their assignments to discuss the political issues he was concerned with regarding the school board. The district maintains the record evidence shows Respondent's actions caused the teachers to feel ill-equipped to carry out their duties.

With respect to Count Seven, the District argues the record evidence shows Respondent lack of regular presence in the building and failure to respond to staff concerns constitutes neglect of duty. It contends both Andriac and Runne testified Respondent was frequently out of the building. In fact, Andriac testified on at least one occasion he knew Respondent was

hunting during the school day on his parent's property. Andriac, it notes, also testified that on one occasion he was called in from a sick day because there was no administrator in the building.

The District maintains that Respondent's neglect of duty and conduct unbecoming constitute just cause for termination. It argues the factors to be considered in such judgments include, the nature and gravity of the offense, premeditation and aggravating factors, present attitude, and the impact of the conduct. It cites several decisions under the NJ Teach to support this contention.

Here, the District argues, as Chief School Administrator, Respondent is subject to a higher standard than all other employees in the school and is required to act with the utmost integrity, good judgment, and self-restraint. [citing, Witmer NO. 493-07 (Comm'r Decision Dec. 24, 2007)]. It notes the Commissioner's decision was upheld by the appellate division which cited the requirement of a CSA to be act with honesty, integrity, good judgment, and fairness.

The District maintains the record evidence shows Respondent failed to meet these standards by abusing his authority, stifling all dissent, publicly humiliating staff, parents, and school board members with whom he disagreed. It notes he

engaged in targeting employees he disliked or disagreed with to either get them to leave employment or punish them.

Finally, it asserts his neglect of duty, either for personal gain or negligence all constitute reasons to terminate his employment.

The District contends the record evidence shows Respondent's actions were willful and purposeful. While it acknowledges he had no prior discipline or counseling, it avers former Board President Plotsky acknowledged that most of the issues that arose as part of the confidential investigation were not known to the Board at the time. Finally, the Board maintains Respondent's present attitude that his actions were justified or attempting to shift blame to others indicates that corrective action would be fruitless.

Position of Respondent

Respondent argues District has failed to establish just cause to terminate Respondent. It contends Respondent's contract of employment provides he may only be terminated for incapacity, inefficiency, unbecoming conduct and other just cause pursuant to N.J.S.A. 18A:6-10(b). It argues the District has brought "groundless" tenure charges against Respondent because there was no other way it could legally remove him without paying out the full five-years of his employment contract.

Respondent argues the District has taken a "kitchen sink" approach to the charges and has even attempted to add allegations during the hearing. It contends the way the charges are written made it difficult for Respondent to "discern the totality of what the Board is alleging" which violates the Tenure statute which requires that charges "shall be stated with specificity as to the action or behavior underlying the charges. The Union notes the District has not cited any rules, law, or policy other than Respondent's job description which it alleges his conduct violated, nor has it established Respondent did anything inconsistent with the goals and objectives of the Board.

Respondent contends the accusations are, for the most part, merely complaints made by disgruntled employees based on beliefs, not evidence. It notes none of these complaints was ever raised until after Respondent was placed on leave. Respondent contends the District has failed to comply with Respondent's Contract of Employment, as it never provided Respondent with notice never received proper notice. It also notes, the Board has further failed to produce documents that should have been in its possession, such as evaluations and instead attempted to shift the burden to Respondent to provide documentation.

Respondent argues most of the actions cited in the charges deal with policies and actions Respondent made with the support and authorization of the school board and there is no evidence Respondent did anything inconsistent with their goals and objectives. It contends Respondent treated all employees with respect and improved the school district for the better of students and the community.

With respect to the specific allegations, Respondent makes the following arguments:

Schedules, RIFS, Dual Certifications and Substitutes

Respondent asserts the above policies were undertaken when he began in the district to address specific issues the District was facing. Respondent contends, in 2017, teachers have unequal schedules with respect to teaching time and preparation periods. Some teachers had multiple prep periods and taught less than the contractual school day, while others had much more demanding schedules.

In addition, Respondent noted that although the school district is relatively small, it had large influxes of students entering the District and large numbers of families leaving the District at various times of year. Respondent instituted, with the Board's approval, a requirement for teachers to be dual certified to have more flexibility to reassign teachers and to provide coverage for substitutes.

Respondent acknowledges a handful of teachers were subject to a RIF because of non-compliance but maintains this cannot be the basis of discipline. It notes former Board President Glen Plotsky testified that everyone was aware of the dual certification requirement and that no one was non-renewed in the first year if they were not able to obtain the certification. Respondent's inability to produce documentation to show employees were placed on notice should not be held against him, Respondent argues. In its motion to dismiss, Respondent noted the lack of notice regarding his removal from duties, coupled with the length of time in charging him, all make it impossible for Respondent to have in his possession such material.

As to the District's reduction in the use of hired substitutes, Respondent argues it was a budgetary decision to try to meet staffing needs though coverage rather than hiring outside substitute teachers to cover absences. Respondent argues the testimony that some teachers believed he did not use subs to hide what was happening in the District from the community are mere allegations. Respondent notes Plotsky testified the school board was aware of and agreed with Respondent's decision to not only require dual certifications, but also to use available staff for coverage was a cost saving measure approved by the Board.

Building Maintenance and Repairs

Respondent maintains the record evidence shows there were numerous issues with the physical plant when he arrived at the district. These included the need for a new roof, removal of underground oil tanks, a new heating system as well as other repair issues. Respondent contends there is no dispute he attempted to obtain funding to accomplish these important projects. However, there is no dispute the school board did not approve the referendum.

Notwithstanding the rejection of the referendum, Respondent notes the Board headed by Mr. Plotsky increased the school reserved from approximately \$69,000 to \$2,000,000, which allowed Respondent to fund major repairs on the roof, removal of the oil tanks and installation of a new heating system. Respondent notes he was able to hire Darrell Steward through the maintenance budget to assist in repairing the roof and perform custodial and maintenance duties and received positive ratings for his performance in this area.

Respondent contends he addressed cleanliness issues in the school by hiring an outside service to clean overnight and establishing a job called "custodians" to be bus drivers and custodians, to allow for needed services within the District's budget.

Respondent contends complaints regarding cleanliness or leaks had been addressed. It notes the only grievance filed about cleanliness was not pursued by the Union.

Respondent argues that allegations regarding IEPS, Grade Skipping and Student KB were never either directly or indirectly included in the Tenure charges and therefore, should not be considered. Likewise, it notes that allegations regarding improper teacher certification and the suggestion that Danielle LaStarza did not have sufficient credits to receive a master's degree plus 15 credits were also not included in the tenure charges and must, according to the statute, be dismissed.

Miscellaneous

Respondent groups numerous allegations into miscellaneous claims. Respondent argues the claim by Ms. Lehmkuhl that he did not allow her to take maternity leave or provide her with a place to pump her breast milk are unfounded, but also never part of the Tenure charges.

Respondent contends Ms. Christmann's allegations regarding his use of the all-call system were also not included in the tenure charges and should not be considered. Moreover, Respondent maintains the record evidence shows that when the Board changed the policy for how the all-call system may be used, Respondent never violated the policy.

Respondent denies rating any staff member untruthfully. As to the allegations made by Mr. Andriac, Respondent notes Andriac acknowledged Mrs. Nitollo was not the best teacher. Likewise, Andriac testified he had never reviewed a social worker prior to reviewing Ms. LaStarza. Respondent advising him to give her 4's across the board because she was great is not an improper use of authority.

Respondent maintains there is no evidence he engaged in misconduct by inviting staff to happy hours or other social occasions. Respondent argues the evidence showed many of the engagements happened organically or by word of mouth and there is no evidence of any misconduct involved.

Retaliation, Intimidation, Discrimination

Respondent contends the allegations he retaliated, intimidated, or discriminated against any staff member have no merit. Respondent acknowledged that during the relevant period, he was friendly outside of work with staff members Andriac, LaStarza, Runne, Van Gorden, and others. Respondent contends the evidence of joking between them is just that, teasing among friends. Respondent argues no one complained about any communication until well after Respondent was placed on leave and interrogated by the Board's attorney.

Respondent argues the testimony from Andriac, Van Gorden and Runne that Andriac was teased relentlessly must be placed in

context. Respondent maintains Andriac's testimony that he was emotionally harmed by Respondent's bullying is not credible.

Respondent contends Andriac sent many sexually explicit text messages to the group chats between these individuals and memes "flipping off" Respondent and others. Respondent contends Andriac's testimony that he sent a message to LaStarza to "eat a bag of dicks" was in response to a message LaStarza had sent to him about an LGBT conference, the suggestion being he is gay. However, when looked at in its full context, it is clear his "bag of dicks" message was in response to LaStarza teasing about his use of font he used in a report.

Likewise, Respondent argues Andriac was also shown to have been the instigator of inappropriate comments dealing with allegations that LaStarza sent a text that she did not want to play with his balls. Respondent notes the entire chain shows it was Andriac who began the text chain by asking LaStarza to read a book titled "Do you want to play with my balls" for the Goodnight Montague Bears program which started during Covid. Likewise, Respondent argues his testimony that he was being made fun of by jokes about bird poop and wrinkled clothes is also not credible since he texted a meme of himself a cross between a bird and a pig and posted with a smiling face for a photo of his soleless shoe.

Respondent argues Ms. Van Gorden's testimony about being uncomfortable with the communications in group texts is belied by the texts she sent on these days.

Respondent argues a review of the text messages submitted into evidence shows it was not credible for any of the participants to claim they were uncomfortable or discriminated against, apart from the recipients of Andriac's messages. It notes Van Gorden, Runne, LaStarza and Respondent all sent good natured messages, whereas Runne regularly responded with sexually explicit and crude text messages. In fact, Respondent notes, neither Andriac nor Van Gorden claimed to be the victim of any discrimination when they were questioned during the investigation.

Respondent argues that the allegations he called Andriac "Nancy", or a "little girl" is evidence Respondent was questioning Andriac's manhood or sexuality has no merit. Respondent cites Mr. Runne's testimony that Andriac was referred to as "Nancy" in reference to Nancy Wright who was perceived as someone who complained a lot.

Respondent contends his text that said Mary Andriac was due to auto correct and not him calling Andriac a girl or sissy. Respondent argues when the messages are reviewed, it makes no sense he would refer to Andriac as "Mary", as alleged. The

preceding text messages related to wrinkled clothes and when he typed "not nice Mr. Andriac" it autocorrected to Mary.

Respondent argues that while some of the text exchanges may not have been appropriate for the workplace, he stresses the "chat" was among a group of friends and not work related. He notes there is no evidence of him engaging in inappropriate texting.

Moreover, Respondent avers, the record evidence shows he addressed inappropriate communication that occurred in the workplace. Respondent testified that he sought the guidance of the Board's attorney to understand his obligations to address conduct amongst friends and family outside the school. He was advised, he testified, that he was only responsible for workplace conduct. He testified following this advice; he largely ignored these messages.

Respondent notes he never formally disciplined Andriac but, instead, coached him regarding his conduct. Respondent contends he began a file separate from Respondent's personnel file only for the purpose of compiling notes for his evaluation. Respondent maintains the school has failed to keep this file, and thus the lack of documentation should not be held against Respondent. Respondent maintains he also moved Mr. Nitollo from the area Ms. LaStarza worked when he learned about sexually

harassing behavior from Nitollo. He noted Nitollo was non-renewed after review with the Board's attorney.

As to the allegations regarding Ms. Marion, Respondent contends he relied on the advice of Board counsel placing Marion on leave and examination for cause. It notes the investigation report itself concluded there was no evidence of retaliation against Marion.

Respondent contends the record evidence demonstrates the changes he made regarding teacher schedules, reductions in force dual certifications and using current teachers for substitution coverage were all policies undertaken in conjunction with the school board to address issues in the school and, thus, cannot constitute unbecoming conduct or neglect of duty.

Respondent notes that when he began in the District, many teachers were not working full schedules, while others were working more hours. Respondent contends Former School Board President Plotsky corroborated his testimony. Respondent contends he evened out prep periods for staff to correct the disparity and to ensure all teachers worked their contractual hours.

Similarly, Respondent proposed to the Board a policy to require teachers to obtain dual certifications to allow the District the flexibility to reassign staff according to the

needs of its student population. Respondent argues the record evidence demonstrates the student population varied substantially during the year as there might be a large influx or students or many students leaving the district.

Respondent notes Former Board President Plotsky testified that the Board approved this plan and the need for a reduction in force for those teachers who did not meet the dual certification requirement. Respondent contends there is no evidence the requirement was not shared with the staff. In fact, it notes, Plotsky testified no one was non-renewed in the first year of the policy.

Likewise, Respondent argues, Respondent's reduced use of substitute teachers is not grounds for discipline. It notes the policy was a means to reduce costs for the district. Respondent contends the allegation that he did so to prevent parents from seeing what was happening in the school is based on nothing more than speculation from a witness. It notes the savings were part of the plan to reduce costs to ensure proper allocation of money for capital repairs and programs.

IEPs, Grade Skipping and Student KB

Respondent argues the testimony by various witness about IEPs, grade skipping, and student KB were not part of the sworn tenure charges and must be dismissed. Moreover, it argues the record evidence is insufficient to establish misconduct.

Decision

After carefully considering the entire record before me, including my assessment of witness credibility and the probative value of evidence, I find the District has established just cause for termination. My reasons follow.

Respondent has been charged with seven counts of misconduct under N.J.S.A. 18A:6-10(b), identified by the District as conduct unbecoming and other just cause and neglect of duty. Respondent is employed pursuant to a contract of employment. While the contract has a provision containing various mechanisms for terminating the Agreement, for purposes of this case, the contract provides that the superintendent shall not be dismissed except as authorized by pursuant to NJSA 18A:17-20.2. NJSA 18A:17-20.2 provides for the termination of a superintendent for inefficiency, incapacity or conduct unbecoming or other just cause.

As a threshold matter, I note Respondent asserts the charges against him are a pre-text for the newly elected school board to terminate Respondent's contract of employment early. Respondent argues only eight months after he signed a new contract, he was suddenly placed on administrative leave and then one year later was subject to tenure charges. Respondent maintains the investigation that took place after he was placed on leave (without proper notice under the law or his employment

contract) was an attempt to dig up reasons to justify the Board's action.

After careful review, I do not find sufficient basis to dismiss the charges solely as a pretext. While I note the District did not specifically provide an explanation for the impetus of placing respondent on leave, my review of the investigation report convinces me that there was information obtained in April 2021 that indicated Respondent may have engaged in inappropriate conduct which would have warranted placing him on administrative leave to investigate. (J-5) I note the investigation did not result in any findings regarding the incident. However, as can happen during an investigation, information was obtained that led the Board to consider other charges, which are the subject of this proceeding. Certainly, the investigation took a substantial amount of time. However, the Respondent has received his salary and benefits in accordance with his contract of employment during this time.

Turning to the charges, I concur with Respondent that the charges have been drafted in a manner that makes them difficult to address specifically because many of the paragraphs of the charging document contain assertions or statements that are not in fact "specifications." For example, paragraph 27, which states "There was a clear line drawn between staff members that Mr. Capone did not like and those that he did, as evidenced by

the obvious distinction in the treatment each group of staff members received." In addressing these charges, I have attempted to assure that I address the specific allegations at issue and will refer to the paragraph numbers where appropriate.

I further note that I allowed the District great latitude in presenting its case, which included testimony which that was not initially clear whether it related to the sworn tenure charges. Given how many specifications were contained in the charges and how broadly they were written I allowed the testimony with the ruling that I would determine if it were relevant to the charges as written. However, after careful review, I find that many of the issues witnesses testified about, such as Ms. Marion, Ms. Lehmkuhl, and others testified about matters that were not included in the sworn tenure charges. Because the statute requires the charges to state with specificity the allegations, my findings do not address allegations that are not found the sworn tenure charges. As I noted in the hearing, to the extent that any such testimony relates to credibility, or other facts at issue, I have considered it and refer to where relevant.

While I do not find the charges were a pretext, I note that many of the charges relate to policies or issues that were either approved by the school board, known to it at the time they occurred, or should have been known to it at the time

because the board has oversight responsibilities. Under the terms of Respondent's Contract of Employment, the school board must evaluate the Superintendent annually, in writing and the evaluation must represent a majority of the Board. The criteria for evaluation are those agreed by the Board and Superintendent prior to the evaluation. Determinations by the Board that the Superintendent's performance is unsatisfactory in any manner must be described in writing with reasonable detail with specific recommendations for improvement. The Superintendent in turn is provided the right to respond in writing to the evaluation. (Respondent Exhibit 18). Thus, where issues were known, approved, or should have been known and were not addressed by the Board, I cannot find they constitute unbecoming conduct or neglect of duty. In essence, many of the allegations relate to inefficiency, for which evidence of counseling or corrective actions be provided.

In this regard, I find insufficient record support to sustain **Count Two** of the charges. Count Two (Neglect of Duty) alleges Respondent failed to maintain school facilities or address known health and safety concerns. Specifically, allegations 47, 48, and 49 involve allegations that Respondent failed to replace the school's roof and HVAC system. While the District cites testimony from teachers that there were leaks in their classroom and that Director of Maintenance told him a new

roof was needed, I do not find these opinions substantiate the specifications.

Replacing the roof and HVAC system are major capital projects which require extensive funding and must be approved by the school board. It is undisputed that Respondent attempted to obtain approval through a referendum to fund these projects. The school board rejected the referendum.

Notwithstanding the lack of direct funding, former Board President Plotsky testified the reserve funds in the budget were increased to two million dollars which enabled tackling some of the major issues regarding the building. According to Plotsky, the District's priority was removal of underground oil tanks, because they threatened the District's ability to be insured. Funds were also used to install a new HVAC system and repair the roof using a plastic sealant to repair most leaks. According to Plotsky, Respondent received an excellent rating for these actions.

The testimony from other staff members that they believed the construction of new administrative office suite is evidence that Respondent allowed continued disrepair and evidently did not address the problem is not substantiated. Certainly, staff members may have opinions on how the school dollars are spent. However, the remodeling was not done covertly. There is no evidence Respondent exceeded his authority by making these

changes or that they somehow impacted the overall maintenance of the school.

As to the issues of cleanliness and maintenance, I do not find evidence of Neglect of Duty constituting just cause for termination. The record evidence shows that complaints about specific classrooms being dirty were addressed, for the most part, by the custodial department. The charges allege that teachers believed there was mold in the building. In fact, the record evidence shows teacher Dawn Marion filed a complaint with the NJ Department of Occupational Health and Safety. The Complaint closed by the Department with a finding that any issues that existed had been addressed. There was no record evidence presented that mold was actually present in any part of the school.

While there were pictures submitted into the record of dirty filters and some issues regarding leaks, these photos are undated, and they do not provide sufficient evidence of neglect of duty.

Finally, as to the complaint alleging that Respondent had gotten rid of the custodial staff, the record evidence shows these reductions were made with the approval by the school board. (See, J-9; School Board Minutes May 7, 2019) The record evidence establishes Respondent in fact hired Darrel Stewart to direct maintenance, contracted with an outside cleaning service

for overnight cleaning and instituted a new position called "bustodians" who served as custodians and bus drivers to meet the budgetary needs of the District. While the District provided no evidence of annual evaluations, former board President testified he retained the draft ratings he prepared for Respondent and this realignment of the custodial staffing was considered one of Respondent's accomplishments for the 2019-2020 school year.

Likewise, I find insufficient record support to sustain **Count Three**. Count Three alleges Neglect of Duty and Other Just Cause: Interference with Educational Continuity and District Students. Specifically, the District focused on frequent reassignment of staff members in between and during the school year. I note at the outset that it is not clear this allegation states a claim for misconduct. While the record evidence establishes a number of teachers had their assignments changed, this is not unheard of in a school setting. The record evidence showed there were various changes in enrollment in the District, in addition to COVID having an impact on the school. There was no evidence that continuity of instruction or a negative impact on the students occurred. More importantly, this is a managerial issue the school board should have been aware of in its oversight role. There is no evidence this was a surprise to the school board. To the extent the Board believed it constituted

poor management, it was obligated to evaluate Respondent or at least put him on notice that this was an issue and let him know their expectations.

While there was testimony regarding some teachers' belief that they were transferred for punitive reasons, the record evidence is insufficient record evidence to substantiate those beliefs.

Count Five alleges Respondent engaged in Neglect of Duty and Other Just Cause by failing to ensure sufficient staff and misappropriation of staff. Specifically, it alleges that staff expressed their concerns during the investigation that Respondent failed to adequately hire and fill all necessary positions, including the hiring of substitute teachers. (J-1). After carefully considering the record evidence, I do not find these allegations constitute either neglect of duty or other just cause.

Plotsky testified the school board knew and approved Respondent's idea to require teachers to be dually certified to meet the challenges of changing enrollment and lessen the need to hire substitute teachers. Specifically, the idea was to use available staff as substitutes. Thus, clearly this was an issue of supervision by the Board. There is no evidence from the District that Respondent was in any way provided different

guidance or that he received any feedback to the way he managed these needs.

To the extent that teachers believed their licensure was somehow in jeopardy or their contractual school day being violated, there is no evidence of any grievances being brought. On its own, I do not find these allegations can form the basis of misconduct charges, given the decision to use available teachers was approved by the then school board.

Finally, I find **Count Seven** must also be dismissed as the record evidence fails to establish misconduct. Count Seven alleges Lack of Regular Attendance in the School Building a Failure to Respondent to requests for assistance. The District has not established a specific requirement regarding Respondent's attendance. Nor, given the allegations made during the investigation, did they attempt to do any further investigation regarding Mr. Andriac's claims that Respondent was hunting on his parent's property on certain occasions. I note to some extent the idea that Respondent was never present, as paragraphs 137 and 137 allege, seems to conflict with testimony regarding Respondent's interactions with staff members Andriac and Runne.

While I credit Mr. Andriac regarding an occasion when he was called from home because Respondent was not present, this

one instance is not sufficient to establish Respondent was not present in violation of any standard of conduct.

Likewise, Paragraph 140 of the charges Respondent regularly left the school with the District's former social worker to conduct residency checks during the day for multiple hours. The record evidence establishes Respondent instituted a policy of requiring residence checks to be conducted by two staff members and he acknowledged he performed these duties with Mr. LaStarza. Whether this was an efficient use of time is not within my authority. By itself, I do not find the allegation constitutes misconduct because the District has not provided evidence that he was not allowed to do so or that the time it took impaired his ability to complete his duties. As this is an issue of performance, without evidence of any standard being in place, counseling, or observation, I do not find, under these circumstances, it forms the basis for termination.

Turning to **Count One**, which alleges Unbecoming Conduct and other just cause by Respondent engaging in inappropriate and unprofessional conduct towards staff, I find record evidence to support specifications 29(iii) and (iv), and 30. The remaining allegations are dismissed for similar reasons to the previous counts.

The District maintains Respondent led the District through fear, divisiveness, retaliation, and favoritism. To that end, Specification 29.iii alleges Respondent treated staff negatively by refusing to speak or interact with specific staff members who did not support him. I credit Mr. Stewart's testimony that when he and Respondent disagreed about issues relating to maintenance of the school, Respondent would stop speaking to him for a day or two.

This form of negative treatment was not limited to Mr. Stewart. Ms. Batthika, Ms. Howard and Mr. Andriac all testified that Respondent would stop speaking to them when they had certain types of disagreements. I found the testimony of these witnesses credible, as they detailed the issues involved, and their fears of reprisal.

Respondent's behavior was unprofessional. As the leader of the school, Respondent must be able to communicate with staff and by making it clear to staff that disagreements lead to him stopping communication thwarts the communication necessary to run a school. This issue is distinct from the charges that were dismissed because the school board would not be expected to be aware of this conduct. Respondent is not supervised on a daily basis and staff members would be unlikely to raise this issue outside the school.

Likewise, I find sufficient record evidence to establish Respondent engaged in verbally and emotionally demeaning conduct towards specific staff members as alleged in Specification 29. iv. The credible record evidence establishes Respondent referred to Mr. Andriac as "Nancy" and "little girl". These references were made in front of other members of staff and in text message exchange involving other staff members. Teacher Rachel Van Gorden testified that she interpreted Respondent's remarks and actions toward Mr. Andriac as hazing.

Respondent's contention that calling Mr. Andriac "Nancy" was a reference to another teacher known for complaining rather than an attack on Andriac's manhood is of no moment. I credit Mr. Runne's testimony that Mr. Andriac was often the butt of jokes and that he was called Nancy because he complained a lot. Regardless of whether the terms were meant to mock his manhood or a way to call him a complainer, I find it constitutes verbally and emotionally demeaning action, especially as it was done in public. In fact, Mr. Andriac testified he felt belittled by these actions.

I do not find sufficient record support to find Respondent targeted staff by changing work assignments or giving them harder classes as alleged in 29.i. While the record evidence demonstrates certain staff members had their schedules changed,

there is insufficient record evidence to establish these changes were not for educational or valid managerial reasons.²

The allegations in 29.ii regarding reductions in force are also dismissed for similar reasons. The school board approved the reductions in force and had an opportunity to review the requirements for positions.

As to 29.v, while I credit Mr. Andriac's belief that he was instructed to provide certain staff members lower evaluation scores, I do not find his testimony sufficient to determine he was advised to falsify the rating as claimed. Mr. Capone acknowledged being consulted on Mr. Nittolo's rating and, in fact, Mr. Runne also testified Mr. Nittolo was "not the best teacher."

I also dismiss Specification 31, which alleges Respondent imposed additional requirements regarding Andriac's work such as making him log his daily activities. While the record evidence establishes Respondent imposed this requirement on Mr. Andriac, Respondent testified he did this for a month because Mr. Andriac was not using his time efficiently and was not completing tasks. Mr. Andriac acknowledged Respondent told him the requirement was

² The District presented testimony from former teacher Dawn Marion regarding disciplinary actions taken against her after she complained about Respondent's leadership before a school board meeting. While I note the timing of her complaints to the school board and the personnel actions against her raise questions regarding Respondent's motivations, Count One does not contain any specifications relating to these allegations.

to make him more efficient. Given that Mr. Andriac had administrative duties, I cannot find this requirement was treating him differently as other teachers did not have similar duties.

Turning to **Count Four**, the District alleges Respondent engaged in inappropriate conduct towards parents in the district constituting unbecoming conduct and other just cause. I credit Ms. Van Gorden's testimony that after receiving a request from a parent to resend a permission slip for her son to participate in soccer, she was advised by Respondent to wait until after the deadline causing the child to miss approximately one month of the program. She testified Respondent told her in effect the parent was a pain in the ass.

I also credit Ms. Van Gorden that Respondent advised her not to appoint a student as an officer to the Future Farmers of America Organization because the student's parent did support the program. I find no reason for her to have fabricated this testimony or misunderstood.

The record evidence establishes Respondent made the comments in his Facebook page toward parents as alleged, and accused one parent seeking a leadership position on the PTA of stealing from her former PTA. However, these were all actions taken well before Respondent was placed on administrative leave and even before he entered a new contract of employment. The

school board was aware of these comments and had an obligation to counsel, discipline or at least set forth a standard of conduct regarding these issues. It did not and, therefore, I do not find they constitute actionable behavior under the specific facts of this case.

Finally, as to **Count Six**, I find the credible record evidence establishes Respondent engaged in unbecoming conduct by abusing his position and authority. Specifications 121, 123, 124, 125 126 all relate to Respondent requesting teachers to call into school board meetings to say positive things about Respondent and the programs within the school. I credit Ms. Van Gorden, Mr. Andriac, Ms. Lehmkuhl and Ms. Howard that they felt pressure from Respondent to do so. Mr. Andriac testified "the script" was always the same; about how great it is to work for Capone. Likewise, Ms. Van Gorden testified Respondent requested her to call into to meeting with suggestions that her program or position could be cut if she did not do so.

Mr. Andriac testified when he did not do as requested, he found his name removed from the District's website. He also testified that he had witnessed what happened to teachers like Dawn Marion after they complained. He testified he feared being shunned or having continual disciplinary actions against him.

Former School Board President Plotsky acknowledged that it would not be appropriate for a school administrator to request

staff to speak positively on his behalf. I do not credit Respondent that he only wanted staff to be able to develop and express their positive feelings. The witnesses testified credibly they felt pushed and believed Respondent would be displeased with them if they did not comply.

In addition, I find credible record evidence to support specifications 127 and 128 alleging Respondent asked staff members to create a Facebook page for the purposes of posting information regarding school board candidates Holstein and Bogle. Ms. Van Gorden, Mr. Runne, and Mr. Andriac testified Respondent spoke to them during the school day about doing this. Mr. Runne testified that although he did not agree to do so, he saw that a Facebook page was created that provided the messaging requested by Respondent.

In addition, I credit Mr. Andriac that Respondent tasked him during the school day to assist him in canvassing the community to find potential candidates to run against Ms. Holstein and Ms. Bogle. Mr. Andriac testified Respondent provided him with a list of voters and asked him to call them regarding the upcoming Board election.

Respondent's contention that he made the request to Andriac as a friend to find candidates to run is misconduct misses the point. Respondent was Mr. Andriac's boss. It is not unreasonable for Mr. Andriac to assume the request was an order

that would have some form of repercussion if he did not do as requested.

Having found Respondent guilty of Count One, specifications 29. iii, and iv, specification 30, Count Four, specifications 85, 86, and 87, and Count Six, specifications 120, 123, 124, 126, 127, 128, 129, 130 and 131, I turn to the issue of penalty.

The credible record evidence shows Respondent's misconduct constitutes just cause for discharge. Respondent's actions were not isolated moments instances poor judgement. Rather, they were willful actions that destroyed the trust and respect necessary for continued employment. Respondent did not merely make a stray comment about a parent to a teacher. Rather, he directed an inexperienced teacher to thwart student engagement in enrichment activities, based on his personal dislike of the parents. Not only did this negatively impact the student but demonstrated highly inappropriate behavior to the teacher and communicated to her that treatment of students should be linked to how the superintendent feels about their parents.

Likewise, Respondent's engagement with teachers in school board elections was not an inadvertent lapse of judgement. He attempted to have the teachers create a Facebook page under a false name for his political purposes in relation to the school board. His belittlement or petty punishments also created an atmosphere of fear of retaliation.

Certainly, the school board failed in many ways to exercise oversight over Respondent. Where it has charged Respondent with misconduct in areas it had a duty to provide counseling or guidance, I have dismissed those allegations. However, my decision relates only to the specific instances of proven misconduct, which Respondent should have understood the consequences of his actions. These instances are sufficiently serious to warrant termination, even without prior discipline or documented poor performance. Respondent, as the Superintendent is not subject to daily oversight. He must be entrusted to lead with the trust and respect of the school community. Given his actions, and his failure to demonstrate any reflection or remorse, I find that corrective action would be futile and inappropriate in this case.

As a result, I make the following

AWARD

1. The District has proven Count One, specification 29.iii, and iv, specification 30, Count Four, specifications 85, 86, and 87, and Count Six, specifications 120, 123, 124, 126, 127, 128, 129, 130 and 131.
2. The remainder of the Counts and specifications are dismissed.
3. The District has demonstrated just cause for discharge.

Deborah Gaines

Dated: January 7, 2024,

Deborah Gaines, Arbitrator

Affirmation

State of New York }

County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: January 7, 2024

Deborah Gaines
