STATE OF NEW JERSEY
COMMISSIONARE OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF THE TENURE CHARGES OF:

BOARD OF EDUCATION CITY OF LONG BRANCH COUNTY OF MONMOUTH.

AND **AWARD AND OPINION**

KEVIN GARIFINE, RESPONDENT
Agency Docket No. 317-10/15

BEFORE: ERNEST WEISS, ARBITRATOR

FOR THE RESPONDENT: MICHAEL T. BARRETT, ESQ.
BERGMAN & BARRETT

FOR THE DISTRICT: J. PETER SOKOL, ESQ.
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ISSUE: What shall be the disposition of the tenure charges filed against Respondent Kevin Garifine by Board of Education City of Long Branch County of Monmouth New Jersey.

BACKGROUND

Respondent Kevin Garifine has been employed by the District as a groundskeeper/plumber and worked in a number of capacities, in the various schools of the District, during his 13 years of service.

He was evaluated semi-annually and he received the highest mark in every evaluation during each year of his employment. There are no documented instances of discipline in evidence herein.

The "industrial capital punishment" of discharging Kevin Garifine occurred as a result of a playful incident on March 1, 2012 when Mr. Garifine and Mr. Rigo were working in the boys' bathroom of Gregory School. While Kevin Garifine was working in one of the stalls, several boys initially arrived in the bathroom, which increased eventually to approximately seven boys. The boys were being loud. The noise had significantly increased as testified by Respondent Garifine at the instant arbitration hearing. He also stated that he was a father of three children with various ages.

The children in question indicated that they were playing with the yellow Scotch tape for less than three minutes. It was "fun" and none complained that they were restrained when they returned to the classroom.

The tape in question, in evidence herein, was a half inch yellow Scotch electrical tape which was playfully given to some of the boys by Rrespondent. As described at the instant hearing by Respondent. He testified that he gave the boys about three feet of electrical tape and about an inch and a half piece which the boys placed lengthwise on their mouth. They used the longer, three foot piece, as a wrap loosely on each others' arms not wrists. When they were ready to leave the bathroom the boys were able to pull their arms from the tape and discard all their tape pieces into the trash can. After being less than three minutes in the bathroom, they returned to the classroom visibly "happy" according to their teacher. Later, the School Nurse indicated in writing that she did not find any tape marks on their hands or face.

THE POSITION OF RESPONDENT

In his post-hearing brief, Mr. Barrett, Esq. argued for Respondent in relevant part that, during his thirteen (13) years of service, Mr. Garifine received only the highest semi-annual evaluations of his work performance. His evaluations were submitted in evidence at the instant arbitration hearing. As stated above, there have been no documented instances of discipline submitted in evidence herein. Respondent comes before this tenure hearing as a "first offender" with documentation that his action does not meet "the statutory requirement to find abuse" (IAIU) (Institutional Abuse Investigation Unit)

On June 12, 2012, Superintendent Salvatore of the Long Branch Board of Education, received the IAIU Findings Report in the Matter of Child Physical Abuse at the Gregory Elementary School on March 1, 2012.

Four seven year old students were examined individually by the school nurse who observed no visible injuries and described the students' demeanor as happy.

(Two of the four nameless herein), both reported placing the tape on their own mouths'.

The students easily removed their arms out of the tape and returned to their classrooms. As per (school recorded) surveillance tape, the students were in the bathroom less than three minutes including their time using the facilities. Based upon the information obtained, the actions of Mr. Garifine do not meet the statutory requirement to find abuse.

(The IAIU concluded.)
Since the allegation of abuse is unfounded, the School District is not required to take any disciplinary or other actions against School Plumber Kevin Garifine. (EX. R-1) (Underline added)

In his post-hearing brief, Counsel Barrett stressed that Mr. Garifine has been employed by the Long Branch Board of Education (Board) as a groundskeeper/plumber and worked in a number of capacities in schools throughout the District.

During his 13 years of service, he was evaluated semi-annually and those evaluations were submitted in evidence at the hearing. A review of those evaluations will demonstrate that he received the highest mark possible in every evaluation during each year of his employment. "General Rating" comments like "good," "very good" and "excellent" pepper the evaluations. During his tenure of service for Petitioner, it is quite clear that he excelled at his job. In addition, there have been no documented instances of discipline submitted in evidence. As a consequence, Mr. Garifine comes before this tribunal as a "first offender."

In prosecuting these tenure charges, the Board takes the position that the question of discipline in this case should be measured not by what Mr. Garifine actually did but, rather, what he was perceived to have done by virtue of the acts of others. He clearly and without hesitation acknowledges his acts, acknowledges that what he did was wrong and injudicious and is prepared to accept both the responsibility for and consequences of those actions. However, he should not have to be responsible for the acts of others that were a significant factor in the exponential growth of this incident as to constitute supervening events.

It is quite clear through the prism of three (3) years that what Mr. Garifine did on March 1, 2012, although inappropriate, was not actually harmful to the children involved. But interestingly, as early as the evening of March 1, 2012, lead investigator Police Detective Michael Decker was quite aware of what actually did and did not happen earlier that day. In the middle of page 2 of Detective Decker's report (B-21), the following is stated:

> I explained to them [the parents] that after speaking with Hunter and Jeffrey that the children did not feel threatened or in danger. I explained to them that the children thought that the maintenance workers, no matter how inappropriate, were joking with them. The parents agreed that they don't believe that their children were harmed, but they could not understand why the school had handled the situation in the manner that they did. It was explained to me that they [the parents] received a phone call from the school stating that their children were bound and gagged in the bathroom by two maintenance workers and that a photograph was taken by one of the workers. **(Emphasis Added)**

A day or two after the event, when it became clearer still that, though injudicious, the bathroom event was in and of itself relatively benign, an individual believed to be the uncle of one of the children involved, leaked information to a local news outlet essentially echoing what the principal had told the parents. That is, that the students were bound and gagged, forcibly prevented from leaving and that pictures were taken of them. It was this misinformation leak that brought the District into the local and, eventually, national media spotlight.

The entire theme of the Petitioner's prosecution here is that Mr. Garifine is to blame for all of this. Any reasonable review of the facts here must conclude that while Mr. Garifine and Mr. Rigo share a modicum of responsibility, they and, in particular, Mr. Garifine, are not responsible for this matter becoming a national

media event. One can reasonably conclude that maintenance workers doing what they did in this instance might cause a rumble within the school and even within the District. But the fact of the matter is that those kinds of events happen all the time and no one would reasonably predict that an event such as this would garner national headlines. It is far easier to understand and predict that an event such as this would result in media attention when the Chief Operating Officer of the school calls parents telling them that their children were bound and gagged in the bathroom by two adult male maintenance workers' who took a picture of them. Indeed, as stated by Detective Decker (see quote above), after only 2 or 3 hours of investigation and explanation, "the parents agreed that they don't believe that their children were harmed, but they could not understand why the school had handled the situation in the manner that they did. **(Emphasis Added.)**

The bottom line is that Mr. Garifine's behavior that day should be measured by what it actually was and not by what others claimed it to be either by embellishment or fabrication. Similarly, the tenure charges should be analyzed and measured by what the proofs actually show and not by some conclusary determination that this event cost the District one million dollars and Mr. Garifine should be solely responsible.

RESPONCE TO THE HEREIN TENURE CHARGES

(As presented in the post hearing brief of Respondent')

Tenure Charges #2, #3, and #4 should be dismissed outright as there was absolutely no evidence adduced at the hearing that even suggested access to tools.

While Board witness Dudeck glibly suggested that tape was a tool, Mr. Garifine acknowledged that he provided two small pieces of tape to the students that first entered, and one larger piece of tape to the four students (dropping it over their hands) just before they left. There is no evidence in the record at this point suggesting that the students "had access to his tools."

In addition, there is absolutely no evidence that the Board, the central administration or the building administration made any effort, on the day in question (or any other day in Mr. Garifine's experience), to police or in any way close off the bathroom in question. It is certainly not Mr. Garifine's responsibility nor is it within the ambit of his authority, to be closing down school bathrooms. While reasonable people can argue whether a policy is needed to address a circumstance such as this (there was no policy), those same people would have to conclude that the building administrator has *some* responsibility in supervising such a circumstance. They take no responsibility here.

Tenure Charges #5 and #6 are charges that call into question, the propriety of the actions of Mr. Garifine on the day in question. As stated at hearing and as stated above, Mr. Garifine acknowledges what he did. He acknowledges providing small pieces of tape to the students in what was clearly a joking manner. He also acknowledges having given a larger piece of tape to the students in response to their request that be provided. Such actions were unnecessary and outside of the scope of his employment. There was no work basis for those actions and he should be held accountable for what he did. Critical to this acknowledgement of responsibility, however, is the limitation that his accountability should be for "what he did." If

there was no media spotlight and no lawsuits directly related to the media spotlight, it is submitted that tenure charges would not have been filed, let alone prosecuted. Indeed, but for the embellished irresponsible initial communication from principal to parents and the subsequent, nearly identical leak to the press of the bogus account of what occurred, there would be no media response, no lawsuits and in all likelihood, no tenure charges. To hang all of this around Mr. Garifine's neck is unfair and legally inappropriate.

Tenure Charge #8 seeks to terminate Mr. Garifine for being untruthful and evasive. This allegation is baseless. The conversation between the Superintendent and Mr. Garifine on that day and over the telephone was an informal conversation and not an interrogation. At the time of the conversation, Mr. Garifine had already spoken with the investigator and told him precisely what happened. Mr. Garifine's statement, if parsed, is actually accurate. He didn't do anything (nothing close to what he was accused of doing by the principal and later in the media); he didn't touch the children but rather handed them tape; and he didn't wrap them up. He did what he testified to doing and nothing more. An informal conversation where protestations of innocence were made, can hardly be described as an interrogation and his comments cannot accurately be described as untruthful and evasive.

The balance of the tenure charges relate to the lawsuits that followed the events in question. The argument that the passing of information from the principal to the parents and the publication of the fabricated news release constitute supervening causes was made above and will not be repeated herein again at length. However, it must be pointed out that nothing in the investigation of the event, either

by the police or the Institutional Abuse Investigation Unit (IAIU) found its way into the lawsuits. Rather, it was the language employed by the principal to the parents and subsequent leak by the parent (or uncle) to the press that was mimicked in the lawsuits. A review of Tenure Charge #9 makes this abundantly clear. Both the police investigation and the IAIU investigation found that the event was intended as a joke and, as or more importantly, was interpreted by the children as a joke. In addition, both investigators found that the children were un-phased by the event and were laughing about it rather than being cowed by it. The language of "bound and gagged" is taken directly from the principal's comment and press release. In view of the direct connection between those two things, it is irrational to conclude that Kevin Garifine is solely responsible for the lawsuits as alleged in the Tenure Charges (Charge #10) - Mr. Garifine "caused two lawsuits by four families." **(Emphasis Added.)**

The police did a thorough investigation and found that no charges were warranted. Even in the face of that determination, the parents were free to file charges against Mr. Garifine but chose not to. IAIU did a thorough investigation and found that no action should be taken against Mr. Garifine in view of their determination that the charges were unfounded. Indeed, even the Petitioner itself completed an investigation and determined not to terminate the employment of Mr. Garifine. They were certainly free to terminate him but they chose not to. Curiously, they now do so, after three (3) years and only in the face of a determination by the Commissioner of Education that Mr. Garifine now enjoys tenure status.

Mr. Garifine's legal responsibility in this matter should be measured by the actions he took on March 1, 2012. As stated above, he accepts full responsibility for those actions. If the Arbitrator believes that these actions in and of themselves constitute misconduct sufficient to warrant termination in the face of no prior documented transgressions, then he will be detenured. However, if his behavior is measured by what he did that day and that day alone, as it should be, then he should not lose his tenure status. If some penalty or consequence must be imposed, then a letter of reprimand, increment withholding or brief period of suspension should be imposed.

Finally, all tenure charges should be dismissed as a consequence of N.J.S.A. 18A: 6-7(a). This statute and the requirement of the statute were pleaded as an affirmative defense in the Answer to Tenure Charges filed on October 13, 2015.

> N.J.S.A 18A:6-7(a) states the following:
>
> > When a complaint made against a school employee alleging child abuse or neglect is investigated by the Division of Youth and Family Services, the division shall notify the school district and the employee of its findings. Upon receipt of a finding by the division that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the division from the employee's personnel records. A complaint made by the Division of Youth and Family Services shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment.

This provision is important for two reasons. First, it's clear and concise language prevent tenure charges from being prosecuted in a case such as this where a determination of "unfounded" has been made by DYFS (IAIU). Second, it

demonstrates the import that the legislature placed upon IAIU investigations and determinations. For those reasons, and the above stated reasons, the Tenure Charges should be dismissed.

PORTIONS OF THE POST HEARING BRIEF OF SCHOOL DISTRICT OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY.

Counsel J. Peter Sokol argued extensively in relevant part on behalf of the District, that the removal from his tenure position of Mr. Garlfine, for "misbehavior" or "other offence" under the tenure statute and if so, whether he should be removed from his tenured position of employment, or in the alternative, whether suspension without pay is warranted for his March 1, 2012 behavior.

The District argued that the Respondent provided no valid excuses for his misbehavior on the day in question. It is also expected that he should be reinstated without a suspension or loss of pay since the event in question became exaggerated by others, to the local and national media.

The District further argued that Respondents' behavior is inexplicable with seven year old boys in an elementary school bathroom and for lying about his participation in the events to the Superintendent and to the BOE investigation. In its post hearing brief the District listed a sampling of 28 separate statements of excuses during the sworn testimony of the of the Respondent at the instant arbitration hearing.

The District also argued that his inaccurate and incomplete description of his actions demonstrate to this day that he is not

professional enough to be trusted with a return to a public school district's employment.

Based on the above, Mr. Garifine is responsible for his inappropriate, unprofessional and inexplicable actions and the damages that resulted and he should lose his tenured position of employment.

DISCUSSION AND OPINION
(*In the interest of time and space the tenure charges of Kevin Garifine submitted by the District, are hereby attached but not reproduced herein but replied above herein, by Counsel Barret for Respondent.*)

Respondent Kevin Garifine was assigned to fix a plumbing problem in one of the stalls of the second floor boys' bathroom in the Gregory Elementary School, on the morning of March 1, 2012.

The bathroom door lock was broken. Initially, two seven or ten year old students came in, followed by additional elementary students mostly seven years old and came to the bathroom at around the same time in the morning when classes were in progress.

A number of seven year old students came into the bathroom and were making much noise while Respondent was repairing a flushing problem in one of the stalls.

Students H.D, V.O, J.F, and M.D were all seven year old and were examined individually by the school nurse who observed no visible injuries and described the students' demeanor as "happy."

Students H. and V. were talking to the staff and Mr. Garifine gave the two boys tape to cover their mouths to stop them from talking and interrupting their work. H. and V. both reported placing the yellow Scotch one half inch wide tape and about one and one-half inch in length and placed it on their own mouths by suggestion of Mr. Garifine. Given the half inch wide tape, it was impossible to have been "bound and gagged"

All four students reported that either the Janitor Supervisor (Mr. Rego), or Mr. Garifine subsequently wrapped tape loosely around the students' arms as they stood in a circle. The students easily removed their arms out of the one-half inch tape and returned to their classrooms. As per a recorded surveillance tape, (B2 in evidence) the students were in the bathroom for less than three minutes, including their time using the facilities.

Based upon the information obtained by IAIU, during their investigation, found that the actions of Mr. Garifine did not meet the statutory requirement to find abuse.

Investigative Findings

Physical abuse/Tying/Close Confinement is "**unfounded**" regarding the actions of School Plumber Kevin Garifine, in accordance with N.J.S.A.9:6-8.21. No adjudicative findings have been made as the Institutional Abuse Investigation Unit's review herein is solely investigative.

Additional Observation

As per school administration, the school staff should have placed an "Out of Order" sign on the bathroom while doing the repairs. However, there is no written school policy relative to this issue.

The IAIU Findings Report concluded: (As above stated)

"Since the allegation of abuse is unfounded, the school District is not required to take any disciplinary or other personnel actions against School Plumber Kevin Garifine."(R1)

He was working with the presence of his co-worker Robert Rego, who witnessed the brief joking with the young students involving the one half inch yellow Scotch tape in question and who took some pictures with his smart phone. If the children were in fact "bound and gaged," pictures would obviously not have been taken by Mr. Rego. Additionally, the children would not have been capable to remove a two inch wide construction tape from their mouth and wrists, as they in fact did with the one-half inch yellow Scotch tape the size used in the average office. Clearly, such narrow tape could not cover even a seven year old mouth with which it would be impossible to be "bound and gagged".

The students who were interviewed all pointed out that they were in the bathroom less than three minutes as corroborated by the recorded School Surveillance (B2) in evidence. They removed their own tape without the help of one of the present adults. The students removed the tape themselves and discarded it into the wastebasket or on the floor on the way out of the bathroom after a period of less than three minutes, which included their sanitary stop.

Significantly, according to the record before me, they all responded, when asked, that the bathroom incident was just a joke. Additionally, if they were actually "bound and gagged" they would not have been able

to remove the tape themselves as they were leaving to return to their classroom.

N.J.S.A 18A:6-7(a) contains a portion of following:

> Upon receipt of a finding by the division that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the division from the employee's personnel records. A complaint made by **Division of Youth and Family Services** shall not be used against the employee for any purpose relating to employment including but not limited to discipline, salary, promotion, transfer demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment.

Having thoroughly considered all the evidence, arguments and allegations of both parties at the Arbitration Hearing before me, and in in their extensive post-hearing briefs, I have found that Respondent Kevin Garifine provided thirteen (13) years of unblemished service to the Board of Education of the City of Long Branch Monmouth County. However, the episode which occurred on the morning of March 1, 2012 which was essentially trivial but became enormous and embellished to almost criminal behavior. It involved the local and national print media the local Police, the Prosecutors, IAIU the State of New Jersey Department of Children and Families. All of this, due to the existence of a mysterious "uncle" of one of the children, who exaggerated a joke

created essentially by seven year old children themselves during a less than three minute bathroom break which included a sanitary stop.

Having also thoroughly considered all the evidence including the arguments and allegations of both parties at the tenure arbitration hearing before me and in their extensive post hearing submissions, I have concluded that the behavior of Kevin Garifine on the morning of March 1, 2012 was merely joking with the seven or so students who congregated in the boys' bathroom where Mr. Garifine was repairing one of the stalls that was out of order. His playfully distributing some peace's of narrow electrical Scotch tape was acknowledged their presence with a joke which they regarded as such and said so during the various investigations.

Therefore, since the evidence herein clearly demonstrated that the extensive investigations resulted in "unfounded" findings, and there was clearly no showing that Kevin Garifine misbehaved in the presence of seven or ten year old students which was nothing more than several minutes of joking. As a result I found no punishable transgression on the morning of March 1, 2012 and the tenure charges provided by the District are hereby dismissed.

The District is hereby directed to reinstate Respondent Kevin Garifine forthwith, to his employment and make him whole financially, and benefits. Should the parties herein be unable to agree on the nature and amount of his make whole remedy, then for that sole purpose I herby retain jurisdiction.

February 15, 2016 Ernest Weiss, Impartial Arbitrator.