338-14

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of David Clune:

SCHOOL DISTRICT OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY

"Petitioner,"

- and -

DAVID CLUNE

"Respondent."

OPINION AND AWARD

Agency Docket No. 47-2/14

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Daniel H. Long, Esq.
Wade, Long, Wood & Kennedy, LLC

For the Respondent:
Saul J. Steinberg, Esq.
Zucker, Steinberg & Wixted, PA

This arbitration proceeding arises under the terms of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1 and concerns tenure charges filed by the Black Horse Pike Regional School District [the "Petitioner" or "District"] with the Commissioner of Education on February 24, 2014 seeking the removal of David Clune [the "Respondent" or "Clune"] from his tenured position as a mathematics teacher.

The Petitioner alleges that the Respondent engaged in Unbecoming Conduct through (1) violating District policy concerning prohibited usage of computer networks/computers, (2) violating District policy by engaging in improper and inappropriate text messages he initiated and exchanged with two recently graduated pupils, and (3) violating District policy by failing to report his August 28, 2013 arrest by the Gloucester Township Police Department.[1] The relevant statutory reference for a tenure dismissal is set forth in N.J.S.A. 18A:6-10: "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." Petitioner has the burden to prove, by a preponderance of the evidence, that the tenure charges should be sustained. On April 1, 2014, the Respondent filed a Verified Response seeking that the tenure charges be dismissed.[2] Pursuant to N.J.S.A. 18A:6-16, as

[1] A text of the tenure charges is set forth in full in a five page memorandum received into the record as Arbitrator Exhibit #1.
[2] A full text of the Verified Response is fully set forth in a five page Statement received into the record as Arbitrator Exhibit #2.

amended by PL 2012, Chapter 26, this controversy and dispute is subject to arbitration and was assigned to this arbitrator on April 14, 2014.

An informal pre-hearing conference was held on May 8, 2014. Arbitration hearings were held on May 28 and June 18, 2014. During the course of the arbitration hearings, the parties argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony, in order received, was offered by seventeen witnesses: Detective Brian Farrell, Gloucester Township Police Department, Mrs. B., mother of M.B., Mr. B., father of M.B., Matthew Szuchy, Director of Curriculum and Instruction, Dr. Brian Repici, Superintendent, Nicole Marie Scotto, neighbor to the Respondent, Crystal Lynn Clune, wife of the Respondent, Tori Ellerson, former student Timber Creek Regional High School, Sean O'Brien, former student Timber Creek Regional High School, Corina Tripoli, former student Timber Creek Regional High School, DJ Robinson, former student Timber Creek Regional High School, Matt Wise, student Timber Creek Regional High School, David Clune, Respondent, Felicia Marie Kurz, sister of Respondent, Cathy Foltz, parent of student, Maribeth Reilly, teacher, Steven VanHorn, teacher, Dennis Wixted, Esq., Attorney for Defendant David Clune. Post-hearing briefs were filed by the Petitioner and the Respondent on July 22, 2014. An extension of time to issue an award until August 18, 2014 was granted by the Director of Controversies and Disputes, Department of Education.

BACKGROUND

At the time that dismissal charges were filed, Respondent was employed by the Black Horse Pike Regional School District as a mathematics teacher at Timber Creek Regional High School. He had been employed for approximately ten years. In addition to his teaching responsibilities, Respondent was active in the baseball program and he became head baseball coach in school year 2012-2013. Prior to this case, he had not been the subject of any disciplinary proceedings and had received satisfactory evaluations. The District does not allege that any of the charges are based upon unsatisfactory classroom teaching performance.

The charges of unbecoming conduct fall into three categories. Each will be summarized chronologically.

I. July 2013 Text Messages

Between July 4, 2013 and July 6, 2013, Clune initiated and sent seventy text or Facebook messages to two former female students of the District. One was M.B. M.B. was 17 years old and graduated from Timber Creek Regional High School two weeks before. The second was B.M. B.M. was 18 years old and also had recently graduated. The text messages were submitted into the record. Their authenticity and content are not in dispute.

At hearing, testimony was provided concerning the content of the text messages and the events that unfolded after they were sent. With respect to M.B., the Respondent initiated texting with M.B. on July 4, 2013. He asked if she was alone, asked her if she could keep a secret and said that he could get into trouble if she didn't. He asked "U have to swear this will never leave us ... No one can see this! Deal?!" He followed this with the statement "I think ur really, Really hot!!!!," and "Always have." After asking if she felt awkward, he asked "would u ever consider meeting me one night?" followed by "U know ... I won't be offended." He followed by saying "So sorry if I freaked you out: Did I?" After not receiving a response to six texts, he said "Do u hate me now?!" After receiving a response with M.B. saying she could not do that, and saying that she did not hate him, Respondent said "I'm so sorry. M___. I really do apologize. Ur right ... truth is ... you are beautiful." After stating that he would just like to meet with her one-on-one, not in a crazy way, but just to chat, he said "sorry to put u in a weird spot M__, hope you don't think I'm a creep." M.B. repeated "I just can't do that" and then said "I'm 17." Respondent said that he understood and "can you keep this between us?" and "Ur not into me huh?" Respondent then asked her if she would consider meeting with him if she were 18. M.B. responded "No. I have a boyfriend." He then again asked M.B. if she could keep this between them. Respondent went on to say "I really am sorry" and "Truth is I have thought u were hot for the past 2 years. Did you think I was hot ... at all? U can be honest. I won't be upset." He went on to say "I thought maybe u had a crush on me. Guess I was way off." He then asked her once again to promise that she'd keep

"this" a secret. His closing texts said "I'm so sorry. I feel like an idiot" and please forgive me." The record shows that Respondent's texts on July 4, 2013 were made at 8:06 p.m., 8:16 p.m., 8:30 p.m., 8:47 p.m., 9:08 p.m., 9:45 p.m. and 10:15 p.m.

Respondent again initiated text messages with M.B. on July 6, 2013 at 8:12 p.m. He asked her to accept his apology, said he "was out of line," was "sorry" and "I hope u forgive me." He again asked her "just please ... don't tell anyone." M.B. said "I accept."

Respondent initiated text messaging with B.M. on Friday, July 5, 2013 at 2:59 p.m. after seeing her picture on a profile, Respondent said he never had her in class but noted that she always seemed nice. After exchanging pleasantries about the summer, he said "well, u look great. Always thought u did, B" and to "hit me up if you feel like chatting." He said "Hope u don't think I'm a creeper. I'm really not. Just think you look good. K. I'm done. Like I said, I'll be here." Similar to his request to M.B., he asked B.M. "could we keep this convo between us?" B.M. asked Respondent how old he was and he responded "34 and I'm separated." He asked her if she was 18. When she responded "Yeahh", he said "Thank God! Maybe, if u want, we could hang one day or night ... ? If ur opposed, I totally understand. No worries, really." She responded "I mean I heard you're a really cool guy from school lol but its kinda awkward that my dads only 3 years older that you." Respondent then asked "One more question,

confidential ... u smoke?", a reference to whether she used marijuana. After she asked him "smokeee what?" Clune responded "U know ... If u ever wanna shoot the shit and get baked, hmu. Just me and u though. It would have to be hush ..." Later, at 7:04 p.m. on Friday, July 5, 2013, Clune texted her again saying "Pimpin' ... lmao!" The text was accompanied by his picture. After B.M. responded "lmaooo! Looking good", Clune responded "U mean that?!" and "thank u ... ur hot too. I always noticed u in the halls between u and me ... very hot and u look mature." After thanking him, Respondent said "Ur welcome ... u look DYNAMITE! What do u think of me ... honestly?" After B.M. gave him a "thumbs up sign", he responded "I guess that is good!" He then said, "So ... do u wanna smoke w/m one evening ... or would that be too weird?" After B.M. responded, "that would be cool ..." Clune responded "U PROMISE u can keep it on the DL????!!!!" B.M. asked him why he was so worried about that and he responded "Cause I don't want ANYONE finding out that a) I think ur smokin' hot and b) I wanna smoke with u baby." He did not receive a response. Clune then sent successive texts saying "U know what I mean sweetie," "If ur available Sunday ... I'll be around. U let me know," "Hope ur not mad, I'd like to c u is all," "U there?" and "If I'm annoying u, I apologize." A short time later he sent another text containing a smiley face along with the statement "U think I'm crazy?" B.M. again did not respond to these messages.

At 10:03 a.m. on Saturday, July 6, Respondent initiated a text to B.M. asking her "if I'm bothering u ... I'll stop. She responded "Look clune you really

werent bothering me or freaking me out till you started sending message after message after message without me answering. That's kinda weird." He responded "OK. Ur right. I'm sorry. I'll hit u up another day. My apologies, really." At 3:38 p.m., he texted B.M. again saying he was "Sorry for sending u a million messages, I was a little messed up at the time. Hope to chat with u soon B." According to Respondent, he had been drinking. B.M. did not respond to this message. At 8:35 p.m., he texted B.M. again saying "I'm really sorry about all of this. My apologies, really. Hope ur summer is good."

The events that led the District to learn about the messaging were the subject of testimony from Detective Brian Farrell. Det. Farrell's involvement began after he was assigned by the Gloucester Township Police Department to investigate after the matter was reported to the police by the District. Det. Farrell's testimony on how the District learned of the messaging parallels a portion of the statement he made on a Master Incident Report on July 15, 2013. He stated that the information was provided to the school district by a male teacher, Mr. Munz, at TCRHS. The report states:

> On 7/6/13 he went to work out at Planet Fitness. While at Planet Fitness, he was approached by a former student, B.M. who works at Planet Fitness. B.M. told Mr. Munz that Mr. Clune has sent her messages on Facebook over the weekend. B.M. then showed Mr. Munz some of the messages. Mr. Munz stated that after he was done his work out he went over to Anntonino's to get something to eat. While at Anntonino's he saw another former student, S.D. S.D. told Mr. Munz that Mr. Clune was contacting another student named M.B. Mr. Munz did not see any of the texts but S.D. told him they were real creepy especially since M.B. is only 17. Mr. Munz stated that he did contact Mr. Clune and told him he needed

to stop what he was doing because it is wrong and that the girls were talking about it. The next day Mr. Munz told Melissa Sheppard who is a principal in the school district about what the students told him. Ms. Sheppard then informed her administration who then notified the police.

Det. Farrell has been employed by the Gloucester Township Police Department for 16 years and is assigned to the Juvenile Unit. He testified that he began his investigation by first speaking to Mrs. B, the mother of M.B., on July 8, 2013 at her home. Mrs. B was upset and alarmed that Respondent had initiated text messaging with her daughter and at the content of the messages. She was especially disturbed by the reference to her daughter being told by Respondent that he felt she was "smokin' hot," "really hot" and after learning that she was only 17 said he thought she was "hot" during her last two years of high school when she may only have been 15. Det. Farrell then met with Mr. and Mrs. B on July 10, 2013 at the Police Department to again review the incident.

Mr. and Mrs. B each testified at the hearing. M.B. did not testify. Each expressed their dismay at the content of the messages and the impact that the messages had on their daughter. They testified to their belief that Respondent betrayed the trust that students should have with their teachers. They observed that Respondent was aware that his conduct was wrong by repeatedly asking M.B. to keep the conversation secret and by acknowledging that he could get into trouble if anyone found out. This latter point was based upon repeated statements Respondent made to their daughter that their conversation should remain strictly between them. They pointed out that when Respondent learned

that their daughter was a minor, he continued the messaging even to the point of asking their daughter if she would be interested in meeting with him if she were 18.

Det. Farrell also met with B.M. B.M. was 18 years old and also had recently graduated from TCRHS. She confirmed to him that she had received Facebook messages from Respondent on July 5 and 6, 2014. According to Det. Farrell, B.M. said she was "initially ok" but got "weirded out" by the continuing nature of the messaging.

On July 10, 2013, Det. Farrell interviewed Respondent at the Police Department. According to Det. Farrell, Respondent said he was "wrong" and that he had been going through turmoil, a reference to his mother passing away the previous September and his recent separation from his wife. He said that he was drinking during that week, denied drug use and said he had been acting stupid and was apologetic.

On July 15, 2013, the District wrote the Respondent notifying him of its confidential employee assistance program that it offers through Cooper University Medical Center. At hearing, Respondent testified that he did not access the program and had not sought counseling or treatment from the time of his suspension on July 11, 2013 through the time of arbitration hearings.

After the investigation, and with consent from M.B. and her parents, criminal harassment charges [N.J.S.A. 2C:33-4A) were certified against Respondent by Detective Farrell on July 10, 2013. B.M. decided not to file charges. The complaint-summons was scheduled for a hearing in December. On the day of hearing, the complaint was dismissed. The parties disagree on the disposition of the complaint. The District asserts that M.B. appeared but decided not to testify because she did not wish to face Respondent and that, for this reason, the case was dismissed on technical grounds. M.B.'s parents testified at hearing that this was the basis for dismissal and described the fragile emotional state of their daughter at the time. Respondent disagrees and asserts that the court entered a not guilty finding based upon the judge's statement that the charge could not be sustained even if there had been testimony. Respondent's attorney who was present for that proceeding, Dennis Wixted, Esq., offered testimony in support of this contention.

2. Internet Usage

After Respondent was arrested on the harassment charges, the District conducted an investigation of Respondent's use of the school internet during time periods when he would have either been in class or engaged in preparation time. Testimony concerning that investigation and what it revealed was offered by Matthew Szuchy, Director of Curriculum and Instruction. He defined the investigation as an Internet Usage Search. Szuchy testified to the technical details of how entries were retrieved and identified. Through Szuchy's testimony,

exhibits were submitted into the record reflecting hundreds of entries in May and June of 2013 that included access to Facebook or similar social networking sites, Twitter, Youtube, Pennsylvania lottery, gambling sites, sports-related sites and travel sites. In addition, Szuchy conducted a search on Respondent's computer usage with his school computer outside of class or preparation time. One such site revealed was for an Atlantic City escort service. The District contends that Respondent's internet usage violated District Policy #3321. Respondent asserts that such usage is common among teachers and that the District did not investigate comparative use by other teachers.

3. Failure to Disclose Arrest

The District, pursuant to District Policy #3159, maintains a policy that requires the District to be notified of an arrest within fourteen (14) calendar days. The District's policy parallels the provisions of N.J.A.C. 6A:9-17.1. On August 28, 2013, there was a domestic disturbance involving the Respondent and his wife at their residence. A police investigation ensued after the initiation of a call from Respondent's wife. Official police records of the incident are in the record including a sworn statement from Respondent's wife describing violent acts and verbal barrages by Respondent. As a result of this incident, Respondent was arrested and charged with Simple Assault and Criminal Mischief. Although the District contends that Respondent's conduct is relevant in considering tenure dismissal, the tenure charge associated with this incident is the Respondent's failure to notify the District of his arrest. During the arbitration hearings,

Respondent and his wife each testified to the details of the disturbance. Their testimony reflected agreement on some details and disagreement on others. Generally, testimony from Respondent's wife tended to support Respondent's version of events despite having made contrary sworn statements in the official police report that she claimed were false.

Position of the District

The District contends that it has established that Respondent's overall conduct represents unbecoming conduct in a teacher and justifies his dismissal. The District points out that M.B. and B.M. were both recent graduates of Timber Creek Regional High School, one of whom was 17 years old and the other 18. In contrast, the Respondent was 34 years old at the time and, as a teacher in the school, he demonstrated a lack of fitness to fulfill his role as a teacher and to represent the District. The District emphasizes that the Respondent's observation to M.B. that he thought she was hot over the past two years occurred during the time that M.B. was a junior and senior in the high school where Respondent taught and after she told him she was 17. With respect to B.M., he first confirmed that she was 18 years old, made inappropriate comments related to her appearance and stated that he wanted to shoot the shit and get baked with her, a reference to joining him to smoke marijuana. He also referenced observing her in the school hallways while she was a student and that she looked very hot and mature.

According to the District, the content of the text messages support its conclusions that the Respondent did not display the requisite self-restraint and controlled behavior that is required for teachers who are entrusted with the care and custody of school children. Because the arrest on harassment charges became a public matter, the District views the Respondent's conduct as undermining the public's respect for the school system and its confidence in its operation. In this regard, the District contends that the Respondent misused his authority and placed his ability to have successful future teacher-pupil relationships into serious question.

Petitioner cites the testimony of Superintendent of Schools Dr. Brian Repici in support of the tenure charges. After learning of the events, on July 11, 2013 the District suspended Respondent with pay and directed him not to access any premises of the school. Respondent was also directed not to contact any students from school. Yet, Respondent acknowledged at hearing that he made numerous contacts with students and former students during his suspension period. Dr. Repici also referred to a warning Respondent had been given a couple of years earlier about the dangers of contacting students. He also directed the July 15, 2013 letter to Respondent providing opportunity to enter the Employee Assistance Program, an invitation Respondent declined. Dr. Repici recommended to the District that Respondent violated Policy #3282, Social Networking Sites, and Policy #4230, Outside Activities by his conduct. Dr. Repici acknowledged that the M.B. and B.M. had recently graduated but concluded that

Respondent violated the public trust, engaged in questionable ethical and moral behavior and that the District did not want to risk subjecting future pupils of Respondent to unwanted solicitations or drug use. Dr. Repici described the media onslaught resulting from Respondent's arrest and release of the text messages and that he received calls from parents who were concerned over the possibility that their daughters would be scheduled in Respondent's math classes.

The District asserts that precedent supports its position. It cites Tenure of Sammons, 1972 S.L.D. 302, 321, Karins v. City of Atl. City, 152 N.J. 532, 554 (1998), Gish v. Board of Education of Paramus, 145 N.J. Super. 96, 105 (App. Div. 1976), certif. den., 74 N.J. 251 (1977), cert. den., 434 U.S. 879 (1977), In the Matter of the Tenure Hearing of Robert Mantone, 93 N.J.A.R.2d (EDU) 322 (1993). Petitioner contends that direct similarities are present between the instant case and Mantone. Mantone involved a teacher with 24 years of service who, as here, had satisfactory evaluations and no prior disciplinary actions. Letters to juvenile students made references to their beauty and contained language that included invitations to be with them, such as "I still find you a very attractive young woman and I wondered to myself what it would be like to be with you. I think about it a lot. Am I crazy? Could my dream ever come true with you?" The District notes that the teacher, similar to the testimony of Respondent, denied that he had a real intention ever to meet socially with the young females who he contacted. The tenure charges in Mantone were sustained based upon

findings that the teacher had abused his public trust, took advantage of his position to solicit and demonstrated a lack of self-control and restraint.

The District further contends that the Respondent's solicitation of B.M. to use marijuana with him and his acknowledgement at hearing that he regularly smokes marijuana also constitutes unbecoming conduct. The District notes that marijuana is an illegal drug and that use of illegal drugs is sufficient justification for the removal of a tenured teacher from a teaching position. Moreover, the District points to the Respondent's testimony that he continues to smoke marijuana, does not believe that marijuana use for a teacher is a problem and his suspect denial that he would not have smoked marijuana with B.M. despite his invitation to do so. He further indicated in his testimony that he did not see a problem with proposing to B.M. that she "get baked" with him, a reference to smoking marijuana, presumably with Respondent providing the drug to B.M. The Petitioner again cites precedent in support of its position. It refers to In the Matter of the Tenure Hearing of Sondra Yanniello, Board of Education of the City of Millville, Cumberland County, 95 N.J.A.R.2d (EDU) 262 (1995). In that case, the Commissioner observed that local districts are assigned the responsibility to help prevent substance abuse among students. See also Board of Education of Willingboro, ct of Burlington v. Lott, 93 N.J.A.R.2d (EDU) 516 (1993) *citing* In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph, 1980 S.L.D. 721.

The District also cites the Respondent's involvement in a domestic violence incident which led to his arrest and his failure to report the arrest as a clear violation of District Policy #3159 and the provisions of N.J.A.C. 6A:9-17.1. It sees this violation, as well as his consistent violation of school internet policy, as part of a behavior pattern involving multiple incidents that supports the Petitioner's desire to revoke Respondent's tenure, thereby terminating his employment with the District.

Position of Respondent

Respondent offers many defenses in opposition to the tenure charges. It emphasizes that he had almost ten years of employment as a math teacher, satisfactory evaluations and an absence of any prior disciplinary proceedings. Counsel submits that Respondent enjoyed a good reputation within the District. Several present and former students of Respondent offered testimony in support of his character and competence as a teacher.

Matt Wise is a senior at TCRHS. He was a geometry student in Respondent's class while he was in the eleventh grade. He testified that Respondent was "there for the kids" and he never saw him conduct himself in an inappropriate manner. He testified that he was aware of his alleged conduct but was not told to testify in any specific manner. DJ Robinson knew the Respondent as his basketball coach and teacher and is now in college. Robinson testified that Respondent helped him out while he was a student and

while he was struggling while taking a math class in college. Robinson testified that he never saw the subject matter of the text messages. Tori Ellerson graduated from TCRHS in 2013. She was a student in the calculus class taught by the Respondent when she was a senior. She testified that the Respondent was honest, trustworthy, and she did not observe him engaging in any inappropriate behavior. She felt safe in his classroom and found him to be "fun" and "lighthearted." She testified that she was "utterly surprised" when becoming aware of the charges against the Respondent but that she was not aware of the specifics of the charges. Sean O'Brien was a 2007 graduate of TCRHS. He testified that the Respondent was truthful, honest, law abiding, helpful and trustworthy. Respondent was his teacher for two years. He learned of the text messages by word of mouth and testified that the issue over the texts did not change his opinion of the Respondent. He testified that he never saw the substance of the text messages. Corinna Tripoli is a 2013 graduate of TCRHS and was a student of Respondent during her junior and senior years. She testified that Respondent helped her when she was taking an algebra course at community college. She testified that he was honest, law abiding and did what was "best for the students." She learned about the charges against him but did not know about the specifics of the texts and said that what she had heard did not change her opinion of him. Respondent also notes that even M.B. wrote a teacher appreciation note to Respondent towards the end of her senior year complementing him on the manner in which her class was conducted.

Additional testimony in support of Respondent was offered from others, including Respondent's colleagues. Cathy Foltz worked with the Respondent in a restaurant. He was her daughter's teacher in 2009. She testified that she never observed him engage in any inappropriate conduct and had no knowledge that he ever conducted himself inappropriately during class. She testified that she was not aware of the text messages. Maribeth Riley was a teacher at TCHRS for 20 years and knew Respondent when he was a student at the school. She testified that he was a hard worker, truthful, reputable and never observed him acting in an inappropriate manner. Riley recently retired from the District. She testified that she never saw the specifics of the text messages and knew only what she had read about them in newspapers. Steven VanHorn is an English teacher and has been a coach in the District's baseball program and knew Respondent while coaching. He also knew Respondent when he was a student at TCRHS. He was not aware of any negative statements ever being made by other teachers or students nor observed the Respondent engaging in inappropriate conduct. VanHorn did read the specifics of the text messages and felt that they were "harmless." He did not recall that there were any references in the texts to drug use. He disliked how the Respondent was portrayed in the media and said that he was aware that he had apologized to the former students that he had texted. Nicole Marie Scotto is a neighbor who resided across the street from Respondent. She regarded him as truthful and she trusted him "wholeheartedly." Scotto was aware of the text messaging only from what she

read in the newspapers and testified that nothing that was reported changed her opinion of him.

In respect to two of the three charges (internet usage and failure to notify the District of arrest), Respondent asserts that they only involve technical or regulatory types of violations that cannot constitute conduct unbecoming a teacher, even if they are proven.

Respondent acknowledges that he did not report his August 28, 2013 arrest as required by District policy and N.J.A.C. 6A:9-17.1. However, Respondent submits that this violation was neither willful nor intentional. He notes that the July 11, 2013 letter from the District suspended him and specifically prohibited him from contacting staff members. Because the arrest in the domestic dispute occurred several weeks thereafter, Respondent asserts that the policy of the District was not on his radar screen and that the failure to report the arrest was inadvertent and not a defiance of authority or policy. He further contends that this event had no adverse impact upon the morale or efficiency of the District and that the pressure of such impact, not present here, is a requirement in order to find unbecoming conduct.

Respondent further submits that the District has not established that his internet activity constitutes conduct unbecoming a teacher. Respondent notes that the District did not present any evidence of other teachers' usage of the

internet and therefore no comparisons can be made, including the possibility that Respondent's usage could have been less than the non-class time usage by the average District teacher. Retired English Teacher Maribeth Reilly testified to her belief that teachers often access the internet, an apparent reference to doing so during class. She testified that while she was a teacher she would access the internet during prep periods and lunch. She acknowledged that she would not access the internet during class time except in connection with class related subject matters. Respondent also notes that a meaningful contrast between the District's allegations and an arbitrator's decision in a tenure proceeding wherein the arbitrator found the respondent's conduct was conduct unbecoming a teacher. [See In the Matter of Tenure Charges against Dale R. Orlovsky, the Board of Educ. of Toms River Reg'l Schools, Ocean Cnty, decided by the Arbitrator January 6, 2014]. In Orlovsky, unlike the instant case, the respondent had exchanged graphic sexual emails and had been twice previously warned about his internet usage and the arbitrator relied heavily upon his failure to observe the warnings. Respondent also contends that he arrived at school 50 minutes early to prepare for the upcoming school day and that this voluntary school time more than offset the insignificant amounts of time that the internet may have been used inconsistently with the policy.

Respondent offers several defenses to his text contacts with M.B. and B.M. Respondent acknowledges that such contacts could reasonably be found to have been inappropriate but that all of the circumstances surrounding the

messaging require a finding that either no disciplinary action is warranted or, assuming some disciplinary action is warranted, the removal of tenure and dismissal is an unduly harsh penalty and must be reversed.

Respondent contends that in the years leading up to July 4, 2013, Clune suffered from personal issues that contributed to an emotional downward spiral culminating in brief out of character conduct beginning July 4, 2013 while spending a holiday weekend with his family. These impactful events were set forth in detailed fashion through the testimony of Respondent's wife, Crystal Lee Clune and Clune.

Crystal Lee Clune testified to events that created stress and anxiety that caused Respondent's out of character conduct. She testified that the two were still married but separated at the time that the media covered the July 2013 events. She testified that Respondent had been very close to his mother, Dolores. Dolores was diagnosed with ovarian cancer in 2008 and underwent chemotherapy and radiation treatment. During 2011, Dolores experienced a recurrence of the cancer and suffered pain. Around this time, Respondent's father, William, had several surgical procedures in connection with opthomalogic problems caused by a detached retina. In addition, Mrs. Clune testified that she had been diagnosed with melanoma during this time period, was undergoing treatment and also had developed a very painful lumbar condition. Her conditions interfered with her work as a real estate representative, thereby

causing financial hardships to her and Respondent and also placed additional severe responsibilities on Respondent.

According to Mrs. Clune, the severe pain and nausea that Dolores experienced while fighting ovarian cancer led Mrs. Clune to suggest that Dolores use marijuana to alleviate her symptoms and conditions. While Dolores initially rejected the idea, she agreed to use marijuana after Respondent and Mrs. Clune induced her to do so by telling her that they would join her in smoking marijuana. According to Mrs. Clune, this was the reason for Respondent's initial use of marijuana and it was she who obtained the drug for a medical purpose. She testified that marijuana did help ameliorate Dolores' symptoms and they continued to use it because of this.

Mrs. Clune and Respondent both testified to the eventual death of Dolores in September of 2012 and the events leading up to her death that are said to have devastated Respondent. According to Mrs. Clune, Respondent drove his mother to the hospital but her death was unexpected. When her condition deteriorated, Dolores said "take the machines off." Respondent yelled "MOM!" in response to her death. According to Mrs. Clune, Respondent was not the same after her death. The reference to Respondent's state of mind after the death was also made by Felicia Marie Kurz, the Respondent's older sister. She testified that she never saw him ever act in an inappropriate manner but that he became very emotional after the death.

Mrs. Clune testified to other events that she believed caused stress on Respondent. In the spring of 2013, Respondent lost the coveted head baseball coaching position he had been appointed to that year. Mrs. Clune said that her conduct also contributed to Respondent's distress around this time and she told him that she had been unfaithful to him. Nevertheless, Mrs. Clune observed that Respondent met all of his obligations and performed all of his school responsibilities despite these events. Mrs. Clune submitted that the Respondent's text messaging during the July 4, 2013 week requires a look at the whole picture. She felt that the content of the texting was distorted and were more fantasy rather than reality. Mrs. Clune questioned whether Respondent would have engaged in the activities that are suggested by the content of the messages. Mrs. Clune also testified that her complaints to the police concerning the August 28, 2013 domestic disturbance that led to Respondent's arrest were the result of her trying to cause trouble for him. According to Mrs. Clune, she made false statements at the time. She told the prosecutor that despite her written sworn statements to police, it was she and not Respondent who had pulled the phone off the wall and threw it across the room. She testified that injuries she suffered from a garage entry door being slammed on her were the result of the Respondent not realizing that she was behind the door at the time. Mrs. Clune testified that a divorce was pending and that the terms of the divorce would not include any alimony nor the receipt of funds from Respondent and she

was not due any monies except for the sharing of proceeds from the sale of their house.

Respondent offered testimony on his own behalf. According to the Respondent, reporting his August 28, 2013 arrest to the District had never crossed his mind because he had been on suspension since July 11, 2013. In respect to the charges concerning proper usage of the internet, Respondent testified that he never took time out from actual teaching to access the internet. He testified that he normally would come to school early and whatever time that was taken on the internet towards the end of class was more than offset by the time that he voluntarily spent at school. He testified that he "just knows" other teachers used the internet similar to him and that he never received any complaints about not teaching during classroom time.

Respondent testified that the text messaging began to occur on July 4, 2013 while his family, except for Mrs. Clune, were vacationing. Respondent attributes the messaging in part to alcohol consumption and going on a three-day binge. He acknowledged that it was not his normal type of behavior. He testified that references to keeping the messages secret did not relate to a desire to shield the conversations from the school system but rather were based on keeping them from his wife due to the fragile state of their marriage. He attributed the texts to a lack of judgment, that he was not in the right frame of mind and had not been thinking clearly, especially in reference to proposing to

B.M. that they meet to smoke marijuana. He believed that M.B. was 18 years old because she was a recent graduate but that he backed off after she told him that she was only 17. He testified that he is in a better place mentally now that everything has passed and with the passage of time, he is confident that things will return to normal and that his conduct would not happen again if he were reinstated.

Respondent observes that applicable case law does not support dismissal but rather reinstatement. He first points to a December 20, 2013 arbitration award In the Matter of Mark Boyle, Pittsgrove Township Bd. of Educ., Salem County (2013). In Boyle, despite finding unbecoming conduct for communicating with students via text and Facebook about non-school related matters, had taken a high school student to a play alone, and had kissed a student on the cheek, the arbitrator stated that removal of tenure and dismissal would be unduly harsh, when the conduct was balanced with all the circumstances. By way of penalty, the Boyle respondent was suspended, subject to compliance with all recommendations given by a petitioner-appointed psychologist. Respondent also refers to a February 20, 2014 arbitration award In the Matter of the Tenure Hearing of Regina Dzwonar, the School District of the City of Atlantic City, Atlantic County. The Dzwonar case involved texting students and sending offensive emails to a colleague. Noting that personal problems adversely affected respondent's professional judgment, Respondent argues:

> [T]he Arbitrator found that the Petitioner should have treated Respondent as a troubled employee rather than seeking termination. *Id.*, at 21-22. Furthermore, with respect to her multiple professional lapses, the Arbitrator found that "escalating the penalty immediately to discharge by lumping all the infractions together did not satisfy the prerequisite for progressively sever discipline." Id. at 22. The Arbitrator concluded that suspension was appropriate and set conditions precedent for the Respondent's return, including a psychiatric examination, therapy, and participation in Alcoholics' Anonymous.

In this instance involving Clune, counsel for Respondent contends that the District did not consider his emotional or psychological state and whether Clune was a "troubled employee." It is asserted that the District never considered whether Respondent's conduct would return to his former level if instead of dismissal he underwent appropriate counseling. Respondent's counsel further notes that Clune's contact was with former students who were no longer subject to the District's jurisdictions. Given all of these considerations, Respondent vigorously contends that conduct unbecoming is too severe of a label for Respondent's conduct and dismissal too severe a penalty.

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The burden is on the District to establish that there was unbecoming conduct and, if so, whether there was just cause for dismissal of David Clune.

The District has established that Respondent violated District policy #3159 and the provisions of N.J.A.C. 6A:9-17.1 by not reporting his August 28, 2013 arrest to the District. There is nothing in the July 11, 2013 suspension letter to Respondent that served as a waiver of his obligation to timely report his arrest on simple assault and criminal mischief to the District. Moreover, it does not appear that Respondent would have reported his arrest to the District during his suspension in any event based upon his own testimony. Specifically, Respondent testified that he was not aware of Policy #3159 because, despite having signed off on the Policy, he never read the contents of the Policy. Notwithstanding arguments by counsel for Respondent that the violation is merely a technical one, the District has established that there was a legitimate basis for the requirement that the Respondent report his arrest to the District based upon the policy. Accordingly, this portion of the tenure charges is sustained.

The District has also established that Respondent violated Policy #3321: Acceptable Use of Computer Networks/Computer and Resources by Teaching Staff Member between May 1, 2013 and June 24, 2013. The records establish that the usage occurred and that they occurred during times that violated District policy. Respondent was aware of District Policy through training on September 1, 2011 and September 4, 2012. Many websites visited were not related to lesson plans nor teaching responsibilities and fall outside the prohibition that

limits in-school use of materials to educational purpose. Counsel for the Respondent argues that the District's failure to provide evidence concerning comparative usage of the internet by other teachers diminishes the District's claim. Respondent testified that his usage of the internet was consistent with the usage by teaching staff generally based upon his belief that he "just knows" that internet usage contrary to policy is routine among teaching staff. No evidence of comparable usage was presented by either party. Moreover, witness Maribeth Reilly acknowledged that she would not access the internet during class time except in connection with class related subject matters. Such usage is consistent with District policy. Based upon the evidence offered by the District, I find that this portion of the tenure charges has been sustained.

I next address the charges that concern the text messaging. Counsel for Respondent offers comprehensive defenses to the District's charges. All have been thoroughly reviewed and fully considered. The policies at issue are Policy #3282 Social Networking Sites, and Policy #4230, Outside Activities. Policy #3282 states:

> The Commissioner of Education has determined inappropriate conduct outside a staff member's professional responsibilities may determine them as unfit to discharge the duties and functions of their position. Staff members should be advised communications, publications, photographs, and other information appearing on social networking sites deemed inappropriate by the Board could be cause for dismissal of a non-tenured staff member or to certify tenure charges against a tenured staff member to the Commissioner of Education.

Policy #4230 states:

> Employees shall refrain from public utterances or conduct that have an adverse or harmful effect upon the school community or interfere with the harmonious working relationship expected of district employees.
>
> Accordingly, the Board reserves the right to determine when activities outside of school interfere with an employee's performance and the discharge of the employee's responsibilities to this District.

The District's policies are generally phrased and require flexible application. I observe that Respondent's conduct must be viewed in the context that includes, but is not limited to, his fitness to be retained as an employee of the District and to perform the duties of his position without District, parental or public concern over his continued presence and contact with female students. The District need not establish that Respondent's conduct rose to the level of whether criminal charges were warranted or, if litigated, could have been proven.

Many of the messages, on their face, are clearly inappropriate. Respondent's arguments that M.B. and B.M. were no longer students and fell outside of the District's jurisdiction are unpersuasive. Respondent's conduct occurred two weeks after the time that M.B. and B.M. had graduated and their respective ages of 17 and 18 fall well within the normal ages of students who remain at TCRHS. The issue is not whether the females were under the District's jurisdiction but rather whether the District established a legitimate nexus between the messages and Respondent's position as a teacher. In respect to

M.B., it was the Respondent who initiated the messaging, telling her that he felt she was "Really hot" and "Always have." This was a reference to the time period in which M.B. was a student in Respondent's class. After M.B. told him that she was 17, Respondent did not halt his advances. Instead, he continued the messaging asking her the question if she would meet with him if she were 18. After M.B. responded "no," he continued his advance by saying "Truth is I have thought u were hot for the past 2 years." This comment places the Respondent in the position of having been M.B.'s teacher and/or a teacher in the District during the time that M.B., now 17, was 15 or 16 years of age and a junior and senior at TCRHS. As such, although M.B. was no longer a student, her very recent graduation and this unprompted expression of how he visualized her during her school years at TCRHS has clearly been established to be improper conduct linked to Respondent's position as a teacher.

As to the messaging that concerns B.M., Respondent said "I always noticed u in the halls, between u and me ... very hot and u look mature." This comment also places the Respondent in the position of expressing to B.M. how he visualized her during the time that he was a teacher and she was a student at the school. According to Dr. Repici, the publicity associated with the texts resulted in calls from parents who were concerned about whether their daughters would ever be placed in the Respondent's classroom. This was not an unreasonable concern given the Respondent's statements of a sexual nature that reached public notice.

The content of the messages to each recent female graduate clearly rise to the level of solicitation and given Respondent's unprompted statements that he viewed M.B. and B.M. in a sexual manner while they were students is sufficient to establish that the District had a legitimate justification to charge the Respondent with conduct unbecoming.

I also find Respondent's invitation to B.M. to "shoot the shit and get baked ... just me and u though ..." and other similar references to joining him to smoke marijuana to be conduct unbecoming. Even if I were to put aside Commissioner of Education precedent concerning penalties for illegal drug use by teachers, these invitations to a female who graduated just two weeks prior calls into question the Respondent's fitness to be a teacher of students of similar age and reflects unfavorably on the District. I find this behavior to be conduct unbecoming.

Counsel for Respondent contends that either dismissal of the charges or mitigation of penalty for any findings of conduct unbecoming is warranted given the anxiety and stress Respondent experienced from the impact of several unfortunate events that developed during a time period that preceded his conduct. I am unable to sustain these arguments based mainly upon credibility assessments of Respondent's testimony as to his own conduct and the explanations offered by Mrs. Clune as to the causes and for his conduct.

Respondent asserts that heavy drinking during the July 4th holiday week caused lapses in judgment. Yet, his testimony states that he engaged in clear retrospection and self-contrition between messages but nevertheless, he continued the messaging. It is true that the time period during which the texting occurred was short. However, school and law enforcement intervened almost immediately after the messaging surfaced and I find that this was the reason that caused the conduct to cease. Whether this conduct would have ceased absent such intervention can only be a subject for speculation. The record is also devoid of evidence that Respondent suffered from alcoholism given all of the testimony that asserted that Respondent was able to perform all of his school responsibilities during 2012 and 2013 despite the stressors in his life. Moreover, Respondent was offered EAP assistance a mere four days after his suspension but he did not pursue medical or rehabilitation help despite knowing the charges leveled against him. Further, at hearing, Respondent testified that he did not seek counseling at any time between his suspension and the time of the hearings.

The record also reflects statements and testimony from Respondent that demonstrate an inability to be entirely truthful or accept an awareness of the seriousness of his conduct. During interrogation by Det. Farrell, Respondent said "no, I don't usually, I really don't" in response to whether he used drugs. Yet, at hearing, Respondent acknowledged that he smoked marijuana since

2011 and 2012 and continued at least once a week almost a full year after his invitation to B.M. to "get baked" with him. His continued usage of marijuana almost two years after his mother's death also raises doubts about Mrs. Clune's explanation that marijuana use only began, and was only for the purpose of providing his mother with marijuana for use as a pain killer, and that they only agreed to use marijuana in order join with her to smoke. I also find Mrs. Clune's testimony concerning the linkage between Respondent's inability to deal with stress and his improper text messaging to be suspect given her testimony that she deliberately provided false sworn statements to police that led to his arrest when she described that Respondent's behavior was violent on August 28, 2013. Respondent's believability also suffers from the internet contacts he continued to make with students after receiving a clear directive from the District at the time of his suspension to refrain from such messaging. I am further constrained to conclude that Respondent's testimony that the intentions reflected in the messaging as to meeting with M.B. and B.M. or smoking with B.M. were not something that would have come to fruition had the females accepted his invitations. The invitations and their purpose are self-evident in the continuing nature of their content. It is simply not believable that one who expressed that he had desire for each female student over a one and two year period and who has continued to engage in marijuana use would then offer a disinvitation upon acceptance.

The several witnesses who offered testimony in support of the Respondent were sincere and truthful in that they hold Respondent in high regard based upon their experiences with him in and out of school. However, they were less persuasive when offering testimony that they had little knowledge of Respondent's conduct and what they did learn was not disturbing to them. Moreover, none of the witnesses had responsibility, as does the District, for maintaining the public's trust in the school system. I also find no merit in Respondent's offer of a note written by B.M. to him during Teacher Appreciation Week that praised him for making class interesting.

In respect to penalty, I am not persuaded that a penalty less than dismissal is appropriate. While dismissal is an ultimate penalty, I cannot find that the District's judgment to seek dismissal was arbitrary or discriminatory or not commensurate with his conduct. There are no examples of conduct similar to that engaged in by the Grievant and no examples of where a lesser penalty has been imposed for similar conduct.

I agree with counsel for Respondent that Respondent's failure to notify the District of his arrest and his improper internet usage, standing alone, are violations of policy but do not warrant substantial penalty or individually rise to the level of conduct unbecoming. As such, lesser penalties for these disciplinary actions would be appropriate if the penalty issue were to be limited to either of these violations. However, these violations must be viewed in the overall context

of all of the charges and, as such, do not interfere with the District's determination that dismissal is an appropriate penalty for Respondent's conduct as a whole.

I have fully considered Respondent's contention that Respondent should be afforded similar opportunities that were afforded in Boyle and Dzwonar to reinstatement after meeting conditions precedent such as psychiatric examination, therapy and rehabilitation. It is noted that the District afforded Respondent the opportunity to access a confidential EAP through Cooper University Medical Center immediately after his July 11, 2013 suspension but Respondent declined. Moreover, during the ten month time period that lapsed between his suspension and the arbitration hearings, Respondent acknowledged that he did not access any counseling or rehabilitation program on his own. Accordingly, I do not find that a proper basis exists now to reduce the penalty of dismissal to a suspension accompanied by a conditional reinstatement.

AWARD

The School District of the Black Horse Pike Regional School District had just cause to dismiss David Clune from his tenured teaching position for conduct unbecoming pursuant to N.J.S.A. 18A:6-10.

Dated: August 18, 2014
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 18th day of August, 2014, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

An attorney licensed to practice in the State of New Jersey.