In the Matter of the Tenure Hearing of Diane Monaco, School District of the Township of East Hanover, Morris County, Agency Dkt. No. 310-10/12

DECISION

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the School District:
John E. Croot, Jr., Esq.
James B. Johnston, Esq. (Brief only)
Schwartz Simon Edelstein & Celso

For Diane Monaco:
Gail Oxfeld Kanef, Esq.
Oxfeld Cohen

East Hanover Board of Education ["Board" or "Petitioner"], pursuant to N.J.S.A. 18A:6-10 *et. seq.*, certified tenure charges with the Commissioner of Education alleging that the Respondent Diane Monaco had committed acts of unbecoming conduct and/or other just cause for dismissal after she was arrested by the East Hanover Police Department for offenses that included driving while intoxicated, refusing to submit to a breath test, and reckless driving. The Board seeks to remove the Respondent from her tenured position.

On November 5, 2012, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that this matter was referred to me pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012, c. 26.*

On November 15, 2012, I notified the parties that hearings were scheduled for December 10 and 18, 2012. On December 6, 2012, Counsel for Respondent requested that the tenure proceedings be held in abeyance pending Respondent's municipal court proceedings.[1] On December 10, 2012, I met with the parties' attorneys. Later that day, I wrote Director Duncan a letter in support of Respondent's request. On December 11, 2012, Director Duncan granted the request.

[1] Ms. Oxfeld Kanef was not the Respondent's attorney for municipal court.

I remained in contact with the parties' attorneys during the period of time that the tenure proceedings were held in abeyance. In January 9, 2014, Counsel for Respondent advised me that the Respondent lost the DWI and refusal issues before the municipal court and was appealing them to the superior court. The tenure proceedings continued to be held in abeyance at the Respondent's request.

On July 14, 2014, Counsel for Respondent advised me that the superior court affirmed the municipal court. On July 21, 2014, Respondent informed her Counsel that she was appealing the superior court decision but wanted to move forward with the tenure proceedings. On August 4, 2014, I informed Director Duncan of the Respondent's request and requested an extension of time to commence the hearing. On August 6, 2014, Director Duncan granted my request.

The tenure hearing commenced on October 8, 2014. The first day of hearing was held at Mr. Croot's office in Whippany, New Jersey. The second (and final) day of hearing was held on October 10, 2014 at Ms. Oxfeld Kanef's office in Newark, New Jersey. During the proceedings, the parties were given the opportunity to argue orally, examine and cross-examine witnesses and submit documentary evidence into the record. Sworn testimony was received from Joseph Ricca, Ed.D. – former School Superintendent, Sergeant Michael

Filippone – Police Officer for the East Hanover Police Department, and the Grievant. The parties submitted post-hearing briefs on October 17, 2014. The record was closed upon receipt of the parties' briefs. With the consent of parties' Counsel, Director Duncan granted an extension of time until December 8, 2014 to issue this Decision.

RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. **Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation,

(a) 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, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

BACKGROUND

The Respondent had been teaching gifted and talented students at the East Hanover School District since September 2004. Her performance evaluations from 2004 through 2012 were at least "satisfactory". She has no prior discipline.

On or about April 13, 2012, the Respondent was involved in a motor vehicle accident in East Hanover Township. She was the only individual involved. The East Hanover Police Department responded to the scene. The Respondent was later arrested for driving while intoxicated and refusal to submit to a breath test.

Michael Filippone was the arresting officer. His incident report provides:

> 1. OPERATION OF THE MOTOR VEHICLE:
>
> SEE ACCIDENT REPORT #12-198
>
> (2) ARRIVAL AT SCENE – I ARRIVED AT THE INTERSECTION OF MCKINLEY AVE. AND BEECHWOOD LANE TO FIND A BLACK BMW BEARING NJ REG, [ ], HAD DRIVEN OVER THE CURB AND ONTO THE LAWN OF 80 MCKINLEY AVE. I EXITED MY VEHICLE AND OBSERVED A FEMALE SITTING IN THE DRIVER SEAT WITH THE DRIVER SEAT AIR BAG DEPLOYED. I ASKED THE DRIVER, LATER IDENTIFIED AS DIANE MONACO OF [ ], PARSIPPANY, NJ 07054, IF SHE WAS INJURED AND SHE ADVISED SHE WAS NOT. UPON SPEAKING WITH DIANE I IMMEDIATELY DETECTED AN ODOR OF AN ALCOHOLIC BEVERAGE EMANATING FROM HER

BREATH. I THEN OBSERVED DIANE'S JEANS TO BE WET AS IF SHE HAD URINATED. I ASKED DIANE IF SHE IS A DIABETIC OR HAS HISTORY OF SEIZURES AND SHE ADVISED SHE DID NOT. I ASKED DIANE IF SHE HAD BEEN DRINKING TONIGHT AND SHE ADVISED, "NO". I ASKED DIANE WHAT HAD HAPPENDED AND SHE STATED SHE WAS NOT SURE. I ASKED DIANE WHERE SHE WAS COMING FROM AND STATED "OXFORD DR". DURING THE COURSE OF OUR CONVERSATION DIANE'S SPEECH WAS EXTREMELY SLURRED. DIANE CONTINUED TO ADVISE ME THAT SHE WAS A TEACHER FROM EAST HANOVER AND WAS UNSURE HOW SHE GOT HERE. I ASKED DIANE IF SHE HAD HIT OR INJURED HER HEAD IN ANY WAY AND SHE ADVISED, "NO". I ASKED DIANE IF SHE KNEW THE ENGLISH ALPHABET AND SHE STATED, "YES". I ASKED DIANE TO RECITE THE ALPHABET FROM THE LETTER "C" TO THE LETTER "N" WITHOUT SINGING IT. DIANE BEGAN AT THE LETTER "C", BUT CONTINUED WITH "DFL". SHE THEN STOPPED AND REPEATED THE SAME LETTERS AGAIN. DIANE'S SPEECH THEN BECAME EXTREMELY SLURRED AND I WAS UNABLE TO UNDERSTAND WHAT SHE WAS SAYING. I HAD DIANE EXIT THE VEHICLE AND EXPLAINED I WAS GOING TO HAVE HER COMPLETE SOME FIELD SOBRIETY TESTS. I ADVISED DIANE I WOULD BE EXPLAINING AND DEMONSTRATING THE TESTS FIRST AND THEN I WOULD ADVISE HER WHEN SHE CAN BEGIN. THE FIRST TEST I EXPLAINED AND PHYSICALLY DEMONSTRATED FOR DIANE WAS THE ONE LEGGED STAND. I ASKED DIANE IF SHE HAD ANY PHYSICAL ABNORMALITIES WITH HER LEGS THAT WOULD PREVENT HER FROM COMPLETING THIS TEST AND SHE ADIVSED SHE IS UNDER THE CARE OF A DOCTOR FOR AN INJURY TO THE "PCL" IN HER LEFT KNEE. I ADVISED DIANE TO STAND ON HER RIGHT LEG AND RAISE HER INJURED LEFT LEG TO AVOID ANY FURTHER INJURY TO HER LEFT KNEE. PRIOR TO BEGINNING THE TEST I ASKED DIANE IF SHE UNDERSTOOD THE TEST AND SHE STATED, "YES". DIANE WAS UNABLE TO PERFORM THE TEST AS SHE WAS CONTINUALLY LEANING FOR BALANCE AND PUT HER FOOT DOWN FOR BALANCE ON THREE SEPARATE OCCASIONS. THE LAST TEST I HAD DIANE COMPLETE WAS THE WALK AND TURN. I ADVISED DIANE TO STAND ON THE LINE HEEL TO TOE WITH HER LEFT FOOT BACK AND HER HANDS AT HER SIDE AS I EXPLAINED THE TEST TO HER. DIANE WAS CONTINUALLY LEANING FOR BALANCE AND STEPPING OFF THE LINE BEFORE I WAS ABLE TO EXPLAIN AND DEMONSTRATE THE TEST. AS I BEGAN TO EXPLAIN THE TEST DIANE BEGAN TO WALK DOWN THE LINE BEFORE BEING TOLD TO DO SO. I STOPPED DIANE AND REPOSITIONED HER AT THE

END OF THE LINE SO I COULD FINISH EXPLAINING AND DEMONSTRATING THE TEST FOR HER. AS I COMPLETED EXPLAINING AND DEMONSTRATING THE TEST I ASKED DIANE IF SHE UNDERSTOOD AND SHE ADVISED, "YES". DIANE WAS UNABLE TO COMPLETE THE TEST AS SHE WAS UNABLE TO KEEP HER BALANCE WHILE LISTENING TO THE INSTRUCTION, SHE STARTED THE TEST BEFORE THE INSTRUCTIONS WERE FINISHED, SHE DID NOT WALK HEEL-TO-TOE, SHE DID NOT TAKE THE CORRECT NUMBER OF STEPS AND SHE STEPPED OFF THE LINE ON MORE THAN THREE OCCASIONS. AT THIS TIME I PLACED DIANE UNDER ARREST FOR 39:4-50 (DWI) AND SAT HER IN THE REAR OF PATROL CAR 10, C&L RESPONDED AND TOWED THE VEHICLE.

(3) EN-ROUTE TO THE STATION – I ESCORTED DIANE TO THE STATION IN CAR 10 AS PTL. PATNER FOLLOWED.

(4) AT THE STATION – UPON OUR ARRIVAL AT THE STATION I HAD DIANE EXIT MY PATROL VEHICLE, AT WHICH TIME I COULD DETECT A STRONG ODOR OF AN ALCOHOLIC BEVERAGE COMING FROM THE REAR OF MY PATROL CAR. I ASSISTED DIANE INTO PROCESSING ROOM #1 WHERE I REMOVED HER HANDCUFFS AND WAITED FOR MATRON OCHS TO ARRIVE TO ASSIST WITH PROCESSING. WHILE WAITING FOR MATRON OCHS TO ARRIVE DIANE REQUESTED THE USE OF HER INHALER AS SHE STATED SHE SUFFERS FROM ASTHMA. BECAUSE MY TWENTY MINUTE OBSERVATION PERIOD HAD NOT BEGUN AS I WAS GOING TO BE LEAVING THE ROOM UPON THE ARRIVAL OF MATRON OCHS, I ALLOWED DIANE TO TAKE TWO PUFFS FROM HER INHALER AND THEN I RETRIEVED IT FROM HER. MATRON OCHS ARRIVED AT 0103 HRS. AND CONDUCTED HER SEARCH AS MYSELF AND PTL. PATNER LEFT THE PROCESSING AREA. UPON MATRON OCHS COMPLETING HER SEARCH OF DIANE, MYSELF AND PTL. PATNER WALKED BACK INTO PROCESSING ROOM #1 AT 0106 HRS., WHICH STARTED MY TWENTY MINUTE OBSERVATION PERIOD. I READ DIANE THE NEW JERSEY MOTOR VEHICLE COMMISSION STANDARD STATEMENT AND DIANE ANSWERED "YES" TO THE GIVING OF BREATH SAMPLES. I READ DIANE HER MIRANDA WARNING AT 0115 HRS. AND ADVISED I WOULD BE ASKING HER A FEW QUESTIONS. DIANE EXPLAINED SHE HAD ONE GLASS OF WINE AT BILLY AND MADELINE'S RED ROOM TAVERN IN WHIPPANY AT 1800 HRS. IT SHOULD BE NOTED UPON ME SPEAKING TO DIANE AT THE SCENE OF THE ACCIDENT SHE ADVISED SHE WAS

COMING FROM OXFORD DR. AND HAD NOT HAD ANYTHING TO DRINK TONIGHT. AT 0127 HRS. I ESCORTED DIANE INTO PROCESSING ROOM #2 TO COMPLETE THE BREATH TEST. AS DIANE WAS ABOUT TO BEGIN THE TEST SHE ADVISED ME THAT THIS WAS NOT GOING TO WORK AS SHE HAD TAKEN A PUFF OF HER INHALER ALREADY. I ADVISED DIANE IT WOULD NOT HARM THE TEST AS SHE WAS GIVEN HER INHALER PRIOR TO THE TWENTY MINUTE OBSERVATION PERIOD BEGINNING. AFTER DIANE STATED SHE UNDERSTOOD MY INSTRUCTIONS I ADVISED HER SHE COULD BEGIN TO BLOW WHEN SHE WAS READY. DIANE BARELY BLEW INTO THE MOUTHPIECE AND DID NOT ACHIEVE THE REQUIRED VOLUME NEEDED. I ADVISED DIANE SHE MUST BLOW INTO THE MOUTHPIECE OR I WILL BE CHARGING HER WITH REFUSAL. DIANE CONTINUED TO STATE THAT SHE HAS ASTHMA AND SHE ALREADY TOOK A PUFF FROM HER INHALER. DIANE'S SECOND ATTEMPT TO RETRIEVE A BREATH WAS THE SAME AS THE FIRST AS SHE BARELY BLEW INTO THE MOUTHPIECE AND DID NOT ACHIEVE MINIMUM VOLUME NEEDED. I ADVISED DIANE THIS WILL BE THE LAST ATTEMPT SHE IS ALLOWED AS IT IS CLEAR SHE IS NOT ATTEMPTING TO COMPLETE THE TEST. I ADVISED SHE WILL BE A REFUSAL IF SHE FAILS TO BLOW INTO THE MOUTHPIECE ON THE THIRD ATTEMPT. DIANE FAILED THE THIRD TEST FOR FAILING TO MEET THE MINIMUM VOLUME, AT WHICH TIME I ENTERED HER AS A REFUSAL. DIANE AGAIN STATED IT DOES NOT MATTER AS SHE HAD TAKEN A PUFF FROM HER INHALER BEFORE THE TEST. PTL. PATNER AND MATRON OCHS THEN PLACED DIANE INTO CELL 1. WHILE SITTING IN THE CELL DIANE BECAME EXTREMELY ARGUMENTATIVE AS CONTINUED TO CURSE IN MY FACE. DIANE REPEATED, "I AM A FUCKING TEACHER IN THIS TOWN" AND DEMANDED TO SPEAK WITH THE MAYER. WE PROVIDED DIANE WITH HER CELL PHONE TO CONTACT A RIDE. WE ADVISED DIANE NOT TO CALL A CAB COMPANY AS WE CAN NOT RELEASE HER TO A CAB DRIVER. DIANE IMMEDIATELY CONTACTED A CAB COMPANY FROM HER CELL PHONE IN AN ATTEMPT TO GET A RIDE. DIANE CONTINUED TO USE PROFANITY AND BECAME COMBATIVE THROUGHOUT THE PROCESS OF ATTEMPTING TO GET HER A RIDE HOME. I WAS ABLE TO CONTACT [ ] OF [ ], EAST HANOVER WHO RESPONDED TO HQ'S TO TAKE CUSTODY OF DIANE. [ ] READ AND SIGNED THE POTENTIAL LIABILITY WAIVER AND DIANE WAS RELEASED.

(4) TRAFFIC OFFENSES- EHT002617 FOR 39:4-50 (DWI)
EHT002618 FOR 39:4-96 (RECKLESS)

[Ex. SD-4, bracketed sections intentionally omitted].

By letter dated May 3, 2012, School Superintendent Joseph Ricca, Ed.D., wrote the following letter to the Respondent:

> Pursuant to N.J.A.C. 6A:9-17.1(c), all holders of certificates issued by the State Board of Examiners must report their arrest or indictment for any crime or offense to their superintendent within fourteen (14) calendar days. The report shall include the date of the arrest or indictment and it must identify the charges lodged. The disposition of any charges must also be reported to the superintendent within seven (7) days. Failure to comply with these reporting requirements may be deemed just cause for the revocation or suspension of your teaching certificate.
>
> It has come to my attention that you were arrested on or about April 13, 2012. You failed to report this arrest within the required period. Please confirm the date of the arrest and identify the charges lodged against you immediately. Once we receive this information we will conduct an investigation and further action may be taken.
>
> You must also report the disposition of the charges to me within seven (7) calendar days as required by the regulation. [Ex. SD-1].

On August 17, 2012, Ricca informed the Respondent that she was "placed on administrative leave with pay pending further investigation into the incident which occurred on April 13, 2012. [Ex. SD-2].

The Board proceeded to file tenure charges against the Respondent. Board Secretary Deborah Muscara sent the Respondent a written copy of tenure charges against her as well as the written statement of evidence. The written charges were sworn to under oath by School Superintendent Ricca on September 27, 2012:

> I, Dr. Joseph L. Ricca, of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:
>
> I am the Superintendent of Schools for the East Hanover Township Board of Education (the "Board"). The Board maintains administrative offices at 20 School Avenue, East Hanover, New Jersey 07936. I am fully familiar with all of the facts and circumstances surrounding these Sworn Tenure Charges, and I have personally reviewed the evidence in support of the charges as set forth in the accompanying Sworn Statement of Evidence.
>
> I hereby charge Diane Monaco ("Monaco"), a tenure teacher employed by the Board, with unbecoming conduct and/or other just cause for dismissal pursuant to N.J.S.A. 18A:28-5 and 18A:6-10.1, et seq.
>
> The following conduct by Monaco constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.
>
> **Facts Common To All Charges**
>
> On Friday, April 13, 2012, at approximately 12:38 a.m., Monaco was involved in a motor vehicle accident in the Township of East Hanover. As a result of her actions that evening, Monaco was charged by the police with Driving Under the Influence, Refusing to Submit to a Breathalyzer Test and Reckless Driving.

When the police officers arrived at the scene of the accident, they found Monaco insider her vehicle on the front lawn of a residence. The police investigation revealed that, while driving north on McKinley Avenue approaching its T intersection, striking the curb and coming to rest on the lawn of a residence. The vehicle caused property damage to the curb as well as the lawn.

When the officers arrived, the vehicle was still engaged in drive although it was shut off. The officers detected a strong odor of an alcoholic beverage on Monaco's breath. Her speech was extremely slurred. An officer observed Monaco's jeans to be wet as if she had urinated. While at the scene, Monaco denied that she had been drinking. She continued to advise the officers that she was a teacher in East Hanover. She denied hitting or injuring her head in any way. Monaco was unable to recite the alphabet from C to N in accordance with the officer's instructions. Her speech became so slurred that it could not be understood. Monaco failed filed sobriety tests administered by the officers. She was placed under arrest for Driving Under the Influence.

Monaco was transported from the scene of the accident to the East Hanover police station in the back of a patrol car.

Monaco's previous driving record included a prior violation for Driving Under the Influence as well as violations for Operating While Suspended or Revoked.

Charge I

At the police station, Monaco claimed that she had one glass of wine at Billy and Madeline's Red Room Tavern in Whippany at 6:00 p.m. on April 12, 2012. An officer noted that she had previously denied having anything to drink when questioned at the scene.

Charge II

On or about April 13, 2012, Monaco operated a motor vehicle while under the influence of alcohol in violation of the law. It was not her first offense for this conduct.

Charge III

An officer attempted to administer a Breathalyzer test to Monaco. The officer reported that she barely blew into the Breathalyzer and did not achieve the minimum volume needed to complete the test in three attempts. Monaco claimed that the test would not work because she had asthma and had taken a puff from her inhaler. However, the officer noted that it was clear she was not attempting to complete the test. He entered her as a refusal to comply with the test.

Charge IV

While in a cell at the police station, Monaco became extremely argumentative. She continued to curse in an officers face. Monaco repeated "I am a fucking teacher in this town" and demanded to speak with the Mayor. As indicated above, at the scene of the accident she also continued to advise the officers that she was a teacher in East Hanover. The police provided Monaco with a cell phone to contact a ride home. She was advised not to contact a cab company as the police could not release her to a cab company. Monaco immediately proceeded to contact a cab company in an attempt to get a ride home. She continued to use profanity and became combative throughout the process of attempting to get her a ride home.

Charge V

Monaco failed to report her April 13, 2012 arrest to the Superintendent of Schools within fourteen (14) calendar days as required by N.J.A.C. 6A:8-17.1(c).

The foregoing conduct by Monaco constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

On October 15, 2012, the Board held a closed session and determined by a majority vote "that there was probable cause to credit the evidence in

support of the charges and that the Sworn Tenure Charges are sufficient, if credited, to warrant dismissal and/or reduction of salary of Diane Monaco." The Board served the information upon the Respondent. On October 17, 2012, the Board filed with the Commissioner of the Department of Education the written tenure charges and supporting evidence against the Respondent.

On October 25, 2012, the Respondent, through her attorney, submitted an Answer denying the charges and the "facts common to all charges".

On November 5, 2012, the matter was referred to me pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012, c. 26.*

At the commencement of the October 8, 2014 hearing, Respondent's Counsel stated that the Respondent now admits Charges II and III of the Board's tenure charges. Testimony was then taken during the arbitration proceedings that I summarize as follows.

Dr. Ricca was the School Superintendent at the time of the Respondent's motor vehicle accident and subsequent arrest. The Chief of the East Hanover Police Department notified him of the Respondent's arrest. Ricca testified that employees are notified at the beginning of each school year that they have an obligation to "report their arrest or indictment for any crime or offense" to the

Superintendent within 14 calendar days. [See Ex. SD-3 & N.J.A.C. 6A:9-17.1 et seq.]. The notice is also part of the policy packet that is handed to employees on orientation day. The Respondent did not comply with this legal obligation. On May 3, 2012, Ricca handed the Respondent a copy of his letter of same date concerning her failure to report her arrest. The Grievant denied that she had been arrested. She stated that she was only involved in a traffic accident for which she received a ticket. An internal investigation followed and tenure charges were later filed. The Respondent continued to teach until August 17, 2012 when she was placed on administrative leave with pay pending the outcome of the investigation.

Michael Filippone is a police officer with the East Hanover Police Department. He was recently promoted to Sergeant. Filippone described the scene of the incident and the Respondent's demeanor throughout that night. His description was consistent with the contents of his incident report. [See Ex. SD-4]. He indicated that he arrested the Respondent for DWI and placed her in handcuffs. She was not free to leave the scene. The Respondent was read her Miranda rights at the scene of the accident. She was later provided with a written version of Miranda that she signed at headquarters. [See Ex. SD-5]. Filippone indicated that the Respondent was "cooperative" during the transport to headquarters, but her demeanor changed when the officers attempted to administer the breath test. Filippone testified that for the remainder of the night

she was "uncooperative", "insulting", "rude", "up and down", and "calm, then enraged". The Respondent stated she was "a fucking teacher in East Hanover" and "wanted to talk to the fucking Mayor". The Respondent claimed that she knew the Mayor, but she repeatedly mispronounced the Mayor's last name.

Filippone testified that the Respondent was placed into a holding cell after she was processed for her arrest. The EHPD maintains a surveillance camera with audio of the holding cell. A copy of the video surveillance was admitted into evidence. [Ex. SD-6]. The video corroborates Filippone's description of the Respondent's demeanor and comments. At one point the Respondent admitted that she had been arrested for DWI before. [Ex. SD-6, 2:24:30]. She later stated, "this is a fucking DWI, not a fucking arrest" to which the female matron on duty responded, "if you weren't under arrest you wouldn't be in a cell." [Ex. SD-6, 2:26:30-2:26:42].

The Respondent testified on her own behalf. She discussed her teaching experience, accomplishments and background. [See Ex. R-4]. She has a Master's degree in education and a supervisor's certificate. She has never received an unsatisfactory rating or been disciplined. [See Exs. R-1, R-2, R-3, R-5, R-6, R-7, R-8, R-9, R-10]. She is currently employed as a real estate agent and a pharmaceutical technician.

The Respondent testified that she did not report the offenses of April 13, 2012 to the Superintendent because she did not consider them to be criminal offenses. She also did not consider herself to have been arrested. The Respondent was aware that notice concerning a duty to report an arrest or indictment for any crime or offense was included in a packet of information that was handed out at the beginning of each school year. She emphasized, however, that the reporting requirements were never discussed. The Respondent was aware that the reporting requirements were enacted in January 2009, but never reported her first DWI (DUI) offense from May 2009. That incident also involved a traffic accident.

The Respondent testified that on the night of the incident she initially denied having anything to drink because she was scared and disoriented after her motor vehicle accident. She also indicated that when the officer asked her if she had been drinking that, in her mind, she thought the officer was asking her if she had many drinks, not just a few. The officer finally asked her how many drinks she had to which she replied "one". The Respondent then admitted during her testimony to having one drink at dinner and another at a friend's house. She testified that she misunderstood the officer's inquiries.

The Respondent explained that she told the officers that she was a teacher in town because she was demeaned and humiliated by the fact that

three (3) male officers watched her go to the bathroom in the holding cell.[2] She stated that she wanted to call a taxi for a ride home because her daughter was already at work and her friend did not answer the phone. The Respondent testified that she mispronounced the Mayor's last name but knew him personally from school activities. She wanted to speak to the Mayor because she felt mistreated by the police officers.

The Respondent explained why she believes that she should not lose her teaching position. First, she has had a great teaching record for many years. Second, she was off work on Spring Break at the time of the incident. Third, she was not on school property. Fourth, although she informed the officers that she was a teacher in town, it is information they would have discovered anyway. Lastly, she indicated that a DWI is a serious offense but it is only a motor vehicle violation.

The parties presented the following arguments in support of their respective positions.

[2] During cross-examination, the Respondent was asked to review the surveillance video. The male officers cannot be seen in the video at the time that she was using the toilet in the holding cell. A male officer can also be heard asking the Respondent if she was dressed. A female matron was also present, but the Respondent claims that the matron was not at the holding cell the entire period of time.

The Board's Position

The Board provides the following legal arguments in its post-hearing brief:

POINT I

THE INCIDENT OF APRIL 13, 2012 CONSTITUTES CONDUCT UNBECOMING A TEACHING STAFF MEMBER OR OTHER JUST CAUSE WHICH WARRANTS DISMISSAL.

Respondent is charged with conduct unbecoming a teaching staff member and/or other just cause for dismissal. It is clear from the records that on April 13, 2012, Respondent put the public at risk in driving her car while under the influence of alcohol. As such, she betrayed the public trust. It is also clear from the records that Respondent tried to influence the officers of the East Hanover Police Department by exploiting her status as a Township teacher and an alleged associate of the Mayor.

Respondent attempted to conceal the fact that she had been drinking by initially telling the officers she had not been drinking. See SD-4. In addition, the video documentation of her combative behavior toward the officers and a civilian Matron clearly shows at least eight (8) instances when she attempted to use her alleged political connections with the East Hanover Township Mayor in an attempt to influence the way they processed her arrest. See e.g., SD-6 at 1:37:00[3].

She attempted to use her asthma inhaler to conceal from the officers the truth. The fact is she was indeed under the influence of alcohol and her prior statements about her alcohol consumption were false.

With that said, such a serious offense warranting dismissal of a school teacher was found in a case with

[3] Respondent's misbehavior is documented throughout the video. In the interest of convenience and for purposes of this brief, this portion of the video is cited as a sample. Other samples of Respondent's misbehavior are cited throughout this brief. The reader may review the other portions of SD-6.

strikingly similar facts to those present in the instant matter. See East Orange Board of Education v. Lewis, 2010 N.J. AGEN. LEXIS 60; Oal Dkt. No. 11406-09; Agency Dkt. No. 234-9/09 (2010). In Lewis, a tenured teacher with the East Orange Board of Education, Dawn Lewis, was involved in a one car accident in Union, New Jersey. A police officer from the Union Police Department responded to the scene of the accident. The officer interviewed Lewis and determined there was alcohol on her breath. He subsequently arrested Lewis, handcuffed her and placed her in his squad car. She was transported to Union Police headquarters and charged with inter alia D.U.I., and refusal to take a breath test.

In upholding the tenure charges and dismissing Lewis from her tenured position, the Arbitrator determined that:

> "Teaching is a calling requiring an unusually high degree of self restraint and controlled behavior. Adolescents are especially vulnerable to the influences of their teachers, who serve as role models and help to shape how youngsters actually view themselves...Being a teacher requires an intense dedication to civility and respect for people as human beings."

As with the instant matter, the teacher in Lewis was charged with conduct unbecoming a teacher. The arbitrator considered and adopted the following definition of unbecoming conduct:

> "Unbecoming conduct is an elastic term broadly defined to include any conduct which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services. Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct. Despite the apparent vagueness of this standard, it fairly and adequately conveys its meaning to all concerned. In the context of a school tenure case, the touchtone is fitness to discharge the duties and functions of one's office and position."

The arbitrator in Lewis further observed that New Jersey courts have held that failure or refusal to undergo sobriety testing can constitute conduct unbecoming. Citing In re: Emmons, 63 N.J. Super. 136 (App. Div. 1966).

As a teacher, Respondent is held to a high standard of conduct. See In Re: Tenure Hearing of Robert A. Dombloski, 1999 N.J. AGEN LEXIS 905; Agency Dkt. No. 117-4/97. Moreover, the Commissioner of Education has determined that,

> "The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires *inter alia*, a consistently intense dedication to civility and respect for people as human beings. The Commissioner has, on past occasions, determined tenure charges arising from incidents which happened in the evening both on and off school property." Id. at 9. (Citing In Re Beam, 1973 S.J.D. 157, 163).

For educators, civility in dealing with others is not an option. It is a requirement. As noted by the Commissioner of Education, "[t]his heavy duty requires a degree of self restraint and controlled behavior rarely requisite to other types of employment." See In Re: Tenure Hearing of Rogelio Hernandez, 1999 N.J. AGEN. LEXIS 1340; Agency Dkt. No. 474-10/98 (1999). (citing In Re: Tenure Hearing of Jacques Sammons, 1972 S.L.D. 302, 321).

Her behavior in the jail cell as documented by the video was anything but civil. See e.g., SD-6 at 2:32:04. In fact, her behavior was in direct conflict of the Commissioner's determinations as noted above.

The video shows a person who is intent on using her status as a teacher and as an alleged associate of the East Hanover Township Mayor to influence the officers and Matron. See e.g., SD-6 at 1:37:00. Once the jail cell closed, she knew she was in trouble. She therefore adopted a combative, vulgar demeanor with very clear threats of retaliation against the officers and Matron because of her

employment as an East Hanover Teacher and her alleged association with the Mayor. See e.g., SD-6 at 2:32:04. The video is very clear in this regard. Alternatively, the video as a whole, reveals the officers and the Matron remained completely professional with Respondent despite her combative behavior. See SD-6.

Respondent's misconduct in putting the public at risk, concealing her own intake of alcohol and then abusing her status as a teacher and alleged associate of the Mayor to influence the officers and Matron at the East Hanover Police Department is the essence of unbecoming conduct and constitutes an outrageous abdication of her responsibilities as a role model for her students. See Sammons supra.

It is well established that the term "unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct which has a tendency to destroy public respect for government employees and competence in the operation of public services. See Karins v. Atlantic City, 152 N.J. 532, 554 (1998) quoting In re Emmons, 63 N.J.Super. 136 (App. Div. 1960).

In Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1975), the Court established that the touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of his or her office or position. A finding of unbecoming conduct does not require a violation of any specific rule or regulation, ***but rather may be based primarily on an implicit standard of good behavior.*** See In re Emmons, supra, at 140 (emphasis added).

In the case I/M/O Tenure Hearing of Ernest Tordo, 1974 S.L.D. 97, the Commissioner once again reiterated that teaching staff members are:

> public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the

public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

In this matter, Respondent clearly breached the public trust placed in her position as a middle school teacher. Respondent is supposed to be a professional employee:

> To whom the people have entrusted the care and custody of . . . school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. I/M/O Tenure Hearing of William Thomas, OAL Dkt. No. EDU 5908-07 (October 11, 2007) quoting I/M/O Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302.

The allegations contained in the Tenure Charges and the evidence that has been presented during the tenure arbitration in support of said Charges clearly demonstrates that Respondent is unfit to be an educator in public school. Specifically, Respondent engaged in deceitful conduct when she provided false information to Sgt. Filippone. In addition, she tried to conceal her consumption of alcohol by not cooperating with her breath test. See SD-4. She used her inhaler for asthma to compromise the breath test. Lastly, her behavior in the jail cell can best be described as uncontrolled, vulgar, dishonest and highly unprofessional. See e.g., SD-6 at 1:38:00 and 2:32:04. Clearly, these are behaviors that, by any standard, would destroy the public's trust in a teaching staff member.

The Respondent, as a teacher, is a role model. See In Re: Tenure Hearing of Jacques Sammons, 1972 S.L.D. 302. Teachers, "are required to set a good example for the children entrusted to them. Teachers mold the habits and attitudes of their pupils, and these pupils not only learn what they are taught by the teacher but from what they see, hear, experience, and learn about the teacher." Id. Her behavior during her arrest and subsequent processing was not befitting one who is required to be a role model. See e.g., SD-6 at 2:13:00. Neither is driving in the town where she teaches while intoxicated. Respondent placed herself and everyone in her path in danger.

The "inherent duties of a public employee include compliance with all reasonable rules and regulations, and duties arising from a fiduciary relationship to the public and from such duties as arise by the nature of the office held." Hartmann v. Ridgewood, 258 N.J.Super. 32 (App.Div. 1992). See also City of Asbury Park v. Department of Civil Service, 17 N.J. 419 (1955); Pfitzinger v. Bd. of Trustees PERS, 62 N.J.Super. 589, 602 (Law Div. 1960); Jalel Ghavami v. City of Newark, 2005 WL 1862136, at 5, (N.J. Admin. 2005).

Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. See Id. quoting Ducher v. Department of Civil Service, 7 N.J.Super. 156 (App.Div. 1950).

Moreover, recent case law suggests that progressive discipline is ***not*** a fixed and immutable rule to be followed without question because some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. For example, in American Arbitration Association Decision, 2010 AAA LEXIS 439, Arbitrator Renovitch acknowledged,

> The more prominent factor in evaluating the appropriateness of a penalty is the nature of the offense. 'It is said the degree of penalty should be in keeping with the seriousness of the offense.' Elkouri & Elkouri, How Arbitration Works, Ch. 15.3.F(i), 'Nature of the Offense: Summary Discharge Versus Corrective Discipline,' p. 964 (6th ed. 2003). One arbitrator described the two general classes of offenses – extremely serious and less serious. Extremely serious offenses usually justify enforcement of a discharge. 'Summary discharge in lieu of corrective discipline of the employee is deemed appropriate for very serious offenses.' Id. at 965. 'Very serious offenses' include 'stealing, striking a foreman, [and] persistent refusal to obey a legitimate order.' Id. at 964. They may also include ***single acts*** of negligent work performance, for example when an employee's failure to follow a rule creates a significant risk of potential harm. Id. at 965.

American Arbitration Association Decision, 2010 AAA LEXIS 439 (Renovitch, 2010) (holding dismissal was warranted

when Grievant failed to perform an end-of-run check, which resulted in a sleeping student being left on her school bus. The Arbitrator further noted that the District "did not have to take into account Grievant's length of service and commendable performance appraisals" as a result of "the extremely serious nature of the offense"). (emphasis added). See American Arbitration Association Decision, 2010 AAA LEXIS 1037 (Tener, 2010) (holding Grievant's conduct in stating to his class, "I could fucking kill somebody right now"; aggressively swiping items off of his desk; and then leaving the class unsupervised for seven minutes was so egregious and threatening that there was no need to consider his prior satisfactory record and there was no justification for a penalty less than dismissal). See also American Arbitration Association Decision, 2009 AAA LEXIS 1202 (Dichter, 2009) (holding dismissal of a teacher who engaged in an overly personal relationship with a student was sufficient for dismissal. In reaching said conclusion, the Arbitrator acknowledged that while progressive discipline would be acceptable when an offense was not so severe that severing the employer-employee relationship was merited, immediate dismissal was warranted where the offense was so egregious). See also American Arbitration Association Decision, 2005 AAA LEXIS 908 (Simon, 2005) (holding Grievant's conduct in taking Fund Raiser funds without the knowledge, consent or approval of the Booster Club officers and members and refusal to return said funds to the Booster Club officers, constituted a sufficiently egregious event to warrant termination from a coaching position. The Arbitrator held that there "are always offenses that justify more severe discipline, or even termination, despite the employee's long tenure and/or good record.")

Moreover, in American Arbitration Association Decision, 2011 AAA LEXIS 5, (Garraty, 2011), Grievant, a 3rd grade elementary teacher, was terminated after she was accused of assisting her students on the "State Comprehensive Assessment System test." Id. at 3. Specifically, Grievant was accused of "view[ing] the contents of student tests during the time in which . . . [she was] administering the test"; [r]eview[ing] students' tests between test sessions, and both during and after the administration; "[u]s[ing] verbal and non-verbal cues to assist students during the administration of the test"; and "[i]nform[ing] students as to the questions they got

wrong and gave them the opportunity to fix . . . [those] questions." Id. at 3-4. In concluding that the District met its burden by a preponderance of the evidence, the Arbitrator upheld Grievant's termination as her behavior was not in "the best interests of the children." Id. at 48-49. See also American Arbitration Association Decision, 2012 AAA LEXIS 481 (Buckalew, 2012) (noting dismissal would have been warranted if the District was able to prove that Grievant school teacher assisted students on the State Comprehensive Assessment System test).

Thus, even though the incidents leading to this matter happened during Respondent's off duty hours, she still has an obligation to conduct herself in an appropriate manner. Here, Respondent gave false, misleading information to the officers regarding her consumption of alcohol. See SD-4. Respondent attempted to influence the officers processing of her arrest by citing her status as a teacher and an alleged associate of the Township Mayor. See e.g., SD-6 at 1:36:29 and 1:37:00. She has displayed a lack of candor, with both the officers (about her drinking) and then the Superintendent by concealing the fact that she had been arrested. In her testimony, she showed no remorse in her behavior.

Respondent testified that she should not be terminated in part because the East Hanover schools were closed for spring break on the date of her arrest. However, the Commissioner of Education has already determined that, "dismissal may be imposed upon a tenured employee for unbecoming conduct, even if conduct did not occur in the course of a teacher's employment." See Dombloski, supra at 8-9. Here, her conduct occurred at East Hanover Police Headquarters, not at the middle school. Nonetheless, she cited her job with the school district as a means to influence the officers in implementing their arrest procedures on at least three (3 separate instances while in the cell. See e.g., SD-6 at 1:36:29; 2:09:19 and 2:53:00.

Moreover the Commissioner of Education has determined in prior tenure cases that teachers engaged in misconduct that is not work related are not entitled to per se mitigated penalties. See In Re: Tenure Hearing of Randall Dunham, 2000 N.J. AGEN. LEXIS 934; Agency Dkt. No. 173-

6/99; OAL Dkt. No. 173-6/99 (2000), aff'd by State Board of Education. In Dunham, the Commissioner determined that,

> "Moreover, even assuming *arguendo*, respondent's claim that his conduct was not work related, it does not necessarily follow that such a situation calls for a mitigated penalty. The mere fact that misconduct occurred at a time and place entirely apart from school and even may involve people entirely unrelated to it does not immunize the offender from disciplinary sanction commensurate with his offense. Indeed the Commissioner has not refrained from imposing the penalty of dismissal upon a tenured employee for unbecoming conduct even if such conduct did not occur in the course of the teacher's employment, where it is otherwise warranted." Id. at 13-14.

Respondent also testified that she should not be terminated in part because of her acceptable employment records with the school district. In fact, the observations and evaluations she entered into evidence were designed to mitigate any penalties that may be imposed. Considering the serious nature of her arrest and her combative attempts at exploiting her status as a teacher and an associate of the East Hanover Mayor, See e.g., SD-6 at 2:32:04, her employment records do not outweigh the seriousness of her misconduct. In fact, the seriousness of her misconduct greatly outweighs any potential mitigating factors linked to her employment history. See In re: Dunham supra at 14-15.

Respondent's conduct is beyond the pale and does not warrant progressive discipline (See discussion below; progressive discipline not required by Commissioner in tenure cases, in any event). It is of the sort that is plainly shocking to the conscience. As a public employee for East Hanover Township she put the citizens of East Hanover at risk while driving under the influence of alcohol. This is not a garden variety D.U.I. arrest of a motorist. The Respondent, a public school teacher, crashed her personal vehicle onto the front lawn of a residence in the township where she teaches. Thankfully, neither the Respondent nor anyone else were injured. Nonetheless, Respondent violated her duties to her students, their parents, the citizens of East Hanover, and her colleagues under any standard of arbitral authority.

The Commissioner of Education has dismissed teachers who have engaged in deceitful conduct. Specifically, acts of dishonesty, untruthfulness and deception have been found to constitute unbecoming conduct sufficiently fragrant to warrant an employee's dismissal from a tenured position. Moreover, it is well settled that even a single "dishonest act by a public employee violates the public trust and may be sufficient to justify an employee's dismissal from his or her position. In re Tenure Hearing of DePasquale, 92 N.J.A.R. 2d (EDU) 537, 540.

The determination as to whether a teacher has engaged in conduct warranting dismissal from a tenured position requires consideration of the nature of the act, the totality of the circumstances and the impact on the teacher's career. I/M/O Tenure Hearing of Molokwu, OAL Dkt. No. EDU 9650-04 (2005) citing In re Fulcomer, 93 N.J.Super. 404, 421 (App.Div. 1967). Usually, a series of events demonstrating a pattern of behavior is an indication of "unbecoming conduct." Id. See also I/M/O Tenure Hearing of William Cowan, 224 N.J.Super. 737 (App.Div. 1988) (incidents over eleven years established a course of conduct warranting dismissal). However, if an incident is sufficiently flagrant, one incident will suffice to remove a teaching staff member from his or her position. See Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E. & A. 1944). See also I/M/O Tenure Hearing of Stephen Fox, OAL Dkt. No. EDU 7955-04 (2005) (where the Commissioner found that regardless of a teacher's long and distinguished teaching career, one sufficiently flagrant event could lead to a tenured teacher's dismissal for conduct unbecoming).

This tribunal must assess the credibility of the various witnesses. In this regard, it is noteworthy that Respondent's credibility is an issue.

Respondent's testimony throughout this proceeding was self serving and disingenuous. At approximately. 1:36:15 of the video, a male officer asks Respondent, "Do you have your clothes on?" Respondent answers in the affirmative. See SD-6 at 1:36:15. This contradicts her testimony that she was upset because inter alia the male officers watched her going to the bathroom in the cell toilet. If the male officers were indeed watching her go to the bathroom, why would one of

them need to ask her if she is dressed? This makes no sense. There would be no need to ask such a question if, as Respondent alleges, the male officers were observing her. The truth is the male officers were not watching her. Thus, her contention that she became angry in part because the male officers watched her go to the bathroom is not credible.

Respondent also claims she became angry because the officers entered her cell and intimidated her. She said she disapproved of the way the officers were treating her. Such is the reason she wanted to complain to the Mayor. Yet, a review of the video reveals her combative tone and attempts to have someone contact the Mayor began well before any of the officers entered the cell. See e.g., SD-6 at 1:36:29. In addition, the officers and Matron were professional in dealing with Respondent throughout her stay in the cell. See SD-6.

Respondent further testified that she felt she was not placed under arrest because she was not finger printed. However, she was: 1) handcuffed, See SD-4; 2) transported to police headquarters while handcuffed, See SD-4; 3) pursuant to Sgt. Filippone's testimony he read Respondent's Miranda rights to her, 4) signed her Miranda waiver form, See SD- 5; and 5) was placed in a jail cell. See SD-6. These are all facts that lead to the inescapable conclusion that she was indeed placed under arrest. Her claim that she did not believe she was under arrest merely because her fingerprints were not taken is simply not credible.

At approximately 2:24:13 of the video, the female Matron tells Respondent she cannot call a cab. Respondent then states, "I've done it before. I've been arrested for D.W.I. and I've done it before.". See SD-6 at 2:24:13. Thus, the video reveals she clearly knows she is under arrest because she admitted to such.

In view of all of the foregoing, as well as the numerous supporting factual indicia discussed throughout this brief, this Tribunal must find the testimony of Respondent not to be credible. When all of the evidence is considered, it is clear that Respondent's defense is contrived at best; it simply does not survive analysis. It is also clear that the testimony provided by the Petitioner's witnesses, the document evidence and

video evidence is fully supported and represents what really happened.

Here, Respondent established a pattern of concealing her consumption of alcohol and arrest for D.U.I. as soon as Sgt. Filippone began talking to her at the scene. See SD-4. She told him she had not been drinking. In her testimony, she states she told Sgt. Filippone she had not been drinking because she felt he was asking about a large number of drinks and because she was disoriented from the crash. This is self serving and simply not credible.

POINT II

RESPONDENT'S FAILURE TO REPORT HER ARREST CONSTITUTES CONDUCT UNBECOMING A TEACHING STAFF MEMBER OR OTHER JUST CAUSE FOR HER DISMISSAL

Respondent, as a duly certified public school teacher, is required under New Jersey Law to report her arrest for any crime or offense to the East Hanover Superintendent of Schools within fourteen (14) calendar days. See N.J.A.C. 6A: 9-17.1(c); Amended to N.J.A.C. 6A: 9B-4.1.[4]

The notice documenting Respondent's obligations to report having been arrested is clear. See SD-3. It reads in pertinent part:

> "All certificate holders (including substitute) shall report their arrest or indictment for ***any crime or offense*** to their Superintendent of Schools within fourteen (14) calendar days." (Emphasis added).

Here, the Respondent failed to advise the Superintendent of Schools of her arrest. See SD-1. Respondent claims she did not report her arrest because it is a traffic offense as opposed to a criminal offense. However, the

[4] Chapter 9B, State Board of Examiners and Certification, was recodified in part from Chapter 9, Professional Licensure and Standards, by administrative change, effective August 4, 2014. As part of the recodification, attendant technical changes were made to the rule text concerning cross-references and the applicability of current chapter definitions. See 46 N.J.R. 1743(a).

reporting requirement as noted above is broad. It includes arrests for "any crime or offense." See SD-3. Since D.U.I. is an offense, See Widmaier supra at 494, she was obligated to inform the Superintendent of her arrest. See SD-3. Yet, she failed to do so. See SD-1.

Recently, the Department of Education noted,

> "The Department continues to believe that this new reporting requirement is properly written. ***Restricting the reporting of offenses to only criminal offenses or to those that fall within the terms of the forfeiture statute, N.J.S.A. 2C:51-2, or the disqualification statute, N.J.S.A. 18A:6-7.1, would not take into account other offenses that could still comprise "unbecoming conduct."*** Moreover, the proposed language is consistent with the reporting requirement currently in effect for both paper and online applications for certification, not all of which result in Board of Examiners' action to block application for certification. Also, someone arrested for unpaid traffic citations may be a persistent scofflaw whose behavior could be questioned by the Board of Examiners." (Emphasis added) See 41 N.J.R. 128(a).

Clearly, the Department of Education takes a very broad view of the term "offense", indicating that even unpaid traffic citations may constitute unbecoming conduct. Given this broad interpretation of the regulation, Monaco's argument that her arrest did not represent a reportable "offense" must fail.

The Appellate Division has held that when a person is taken to police headquarters for the purpose of submitting a breath test for drunk driving; N.J.S.A. 39:4-50,[5] such constitutes an arrest. See State v. Harbatuk, 95 N.J. Super. 54 (App. Div. 1967). In Harbatuk, the defendant was charged with drunk driving, after being involved in a motor vehicle accident. Id. at 56. After the Defendant was stopped by the police, he was transported to headquarters, for the purpose of submitting a breath test. Id. at 57. After submitting to a breath test, the officers concluded Defendant was under the influence of

[5] The Court describes the offense as codified in 1967 as "driving while under the influence of intoxicating liquor."

alcohol. Id. The Court ruled that with the facts as noted above the Defendant was under arrest. Id. at 60-61.

Here, the facts are similar to Harbatuk. Thus, Respondent's claim that she did not deem herself to be under arrest because she was charged with DUI as opposed to a criminal offense must fail.

D.U.I. is a serious offense. As the New Jersey Supreme Court noted, "New Jersey's D.W.I. statutes were enacted to curb the senseless havoc and destruction caused by intoxicated drivers." See Widmaier supra at 487. (citing State v. Tischio, 107 N.J. 504, 512 (1987)). Potential penalties, upon conviction, include revocation of one's driver's license, monetary fine, community service and/or jail time. See N.J.S.A. 39:4-50 et seq.; see also N.J.S.A. 39:4-51. Driving under the influence of alcohol is so serious that some states allow for a jury trial. See e.g., Colo.Rev.Stat. 42-4-1301 et seq. (2014).

The offense of D.U.I. is codified in New Jersey's traffic laws. N.J.S.A. 39:4-50. The Courts consider the offense to be quasi criminal in nature. See Widmaier supra at 494. As the Widmaier Court noted,

> "It is settled law that our Motor Vehicle Act is a penal statute: it is quasi criminal in nature. ***Quasi criminal offenses are a class of offenses against the public which have not been declared crimes, but wrongful against the general or local public which it is proper should be repressed or punished by forfeitures or penalties***" See Widmaier supra at 494 (Emphasis added) (citing State v. Laird, 25 N.J. 298, 302-03 (1957) (Quotations omitted).

In the present matter, Respondent clearly engaged in deceitful conduct when she lied to Sgt. Filippone. Her demands that the officers call the Mayor was a desperate effort on her part to escape from charges that were in the process of being appropriately filed. She tried to obtain benefits from the officers through her status as a teacher and her alleged acquaintance with the Mayor. She threatened retaliation if the Matron did not comply with her requests. See SD-6 at 2:32:04.

Respondent's claim that she was confused about the meaning of her reporting requirements is self serving and unpersuasive. She testified during the hearing that she holds a certificate as a supervisor. As such, she should certainly be aware of the importance in complying with the State's laws and the policies and procedures of the school district. Her other claim that she was confused because she has, in the past submitted certification applications for non teaching positions outside the school district that did not require the disclosure of a D.U.I. offense is also unpersuasive. Other documents that are unrelated to the school district's policies and regulations are irrelevant.

Instead, it is more likely that she failed to advise the Superintendent of her arrest because she knew she may be disciplined. It is also likely she was more concerned that the Superintendent would discover her first D.U.I arrest from 2009 and her failure to report that arrest as well. As such, she tried to conceal the April 13, 2012 arrest from the Superintendent.

Therefore, Respondent's conduct clearly constitutes unbecoming conduct or other just cause.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Board has proven all of the tenure charges lodged against the Respondent, and the facts developed at the hearings clearly demonstrate that Respondent should be dismissed from her tenured teaching position. [District's Brief, pp. 7-22].

The Respondent's Position

The following legal arguments have been presented in the Respondent's post-hearing brief:

> Conduct unbecoming a public employee is "any conduct which adversely affects the morale or efficiency of a public entity, conduct which has a tendency to destroy respect for public employees and their appointing authorities or conduct which destroys confidence in public service. Washington v. John J Montgomery Medical Home 96 NJAR 2d (CSV) 100.
>
> Fitness for duty in public employment is defined as
>
> > Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. Redcay 130 NJL369 Sup Ct 1943 affd 131 NJL 326 (E&A 1944).
>
> Although Ms. Monaco may have engaged in conduct which this arbitrator may deem unbecoming conduct, Ms. Monaco submits that her conduct considered in connection with her years of unblemished service, does not warrant termination from her tenured employment. The incidents alleged herein as set forth below, should either be dismissed in their entirety or are not sufficiently flagrant to require Ms. Monaco's termination from her tenured employment.

CHARGE I

> Quite frankly, because the school district failed to present any evidence to support the allegations set forth in this charge, Ms. Monaco should not have to even answer it and the charge should be dismissed in its entirety.

Nonetheless, in the event this charge is not dismissed for this reason, Ms. Monaco's defense is set forth herein.

Ms. Monaco does not deny that she said "no" at the scene of the accident when asked if she was drinking that evening. Ms. Monaco testified that she was disoriented because she had just been in an accident, she was hurt, her airbag deployed and she understood the question asked to refer to continual drinking over the course of the evening and she had only consumed one or two drinks during the entire course of the evening. Ms. Monaco did advise the officers at the station house that she had indeed consumed a few drinks that evening. Given the circumstances, that Ms. Monaco had been in an accident, the airbag had deployed and she was injured, it was entirely reasonable for Ms. Monaco to be disoriented at the scene of the accident. Once she had gained her composure and the question was asked about how many drinks she had that evening, only an hour after the incident, Ms. Monaco gave a candid answer about the drinks she did have that evening.

This alleged conduct, that Ms. Monaco gave conflicting stories to the officers, occurred outside of the school day, off school premises and not in the presence of any students or staff from the district. In this regard, this "fact" cannot form the basis of a good cause reason to discipline an employee, particularly one with no prior discipline. Moreover, based on the definition of "conduct unbecoming" set forth above, this inconsistent statement, made to one or two officers and not to the general public on one occasion surely can not be a basis for terminating Ms. Monaco's employment.

The Board of Education failed to present any evidence whatsoever to support this charge. Ms. Monaco's testimony that she was disoriented at the scene and misunderstood the officer's question was not contradicted by the employer, the entity with the burden of proof here. The Board failed to provide any evidence whatsoever to establish that Ms. Monaco intended to mislead the officers. Moreover, her conduct in answering the questions at the station house in better detail belies an assertion that she lied to the police. Given that the Board failed to provide any evidence to

establish that this contradiction was anything other than an oversight, this tribunal must dismiss this charge.

CHARGES II and III

These charges stem from motor vehicle offenses Ms. Monaco was charged with and of which she was found guilty. These charges arise under Title 39 of the New Jersey statutes. These charges are not criminal in nature. They fall under the motor vehicle code. Not a single legal decision in New Jersey exists in which a school employee was terminated from his or her employment based on a conviction for a DUI or a related Title 39 charge. All decisions regarding this type of incident involved circumstances in which the employee was accused of criminal conduct such as the possession of a controlled dangerous substance in addition to a DUI.

To discipline Ms. Monaco for her Motor Vehicle violations would suggest that employees who are charged with speeding or reckless driving for switching lanes on a highway might also be disciplined for such conduct, if the information were reported to the employing school district in some fashion. Moreover, that Ms. Monaco was involved in a motor vehicle accident should have no bearing in the within matter as no one was seriously hurt and the only individual who suffered any injury was Ms Monaco. No criminal charges whatsoever ensued from this incident.

In Tenure hearing of Robert P Valenti 1990 SLD 410, Mr. Valenti was found guilty of possession of one marijuana cigarette. Rather than terminate Mr. Valenti for this criminal conviction, the ALJ in that case determined that Mr. Valenti would forfeit the 120 days salary he already lost and would forfeit his salary increment for one year. The ALJ cited Mr. Valenti's twenty years of service to the school district in allowing Mr. Valenti return to teaching despite the conviction of a crime. In the present matter, in contrast, Ms. Monaco has been found guilty of charges set forth in the motor vehicle code. While serious acts, they do not rise to the level of criminal conduct as the charges are not found in the New Jersey criminal code. Moreover, like Valenti, Ms. Monaco has served the East Hanover district in exemplary fashion for her eight years of service. In this regard, her record must serve as

a mitigating factor even if this arbitrator finds that some discipline is warranted based on these motor vehicle charges.

The Commissioner of Education has clearly seen a demarcation dividing criminal offenses from motor vehicle offenses involving the operation of a motor vehicle while under the influence. In Michael Novak v. New Jersey State Department of Education, OAL Docket No. EDU-8709-00, (also attached hereto) Michael Novak was notified that pursuant to N.J.S.A. 18A:6-7.1 he had "failed" the criminal background check for employment as a teacher due to a conviction for driving under the influence of a controlled dangerous substance. Although initially Novak was charged with criminal acts set forth in Title 2C of the New Jersey statutes, ultimately Novak was only found guilty of operating a motor vehicle while under the influence of a controlled dangerous substance. N.J.S.A. 39:4-49.1. The Commissioner of Education noted a distinction between a conviction under the criminal code and one for a motor vehicle offense and found that Novak should not be disqualified from teaching as a result of a conviction for a motor vehicle offense even though that offense involved the use of a controlled dangerous substance.

Similarly, in the present matter, Ms. Monaco should not be disqualified from continuing to teach based on these offenses, which do not even involve the use of a controlled dangerous substance. Even according to the Commissioner, they are not criminal in nature and would not disqualify Ms. Monaco. In this regard, Ms. Monaco's motor vehicle record cannot serve as a basis to terminate her employment. With good reason, there is simply no New Jersey tenure case in which an employee was terminated due to a conviction of a motor vehicle offense.

CHARGE IV

Ms. Monaco does acknowledge that she behaved in a less than professional way when she was taken into custody on April 13, 2012. Regrettably, Ms. Monaco used foul language and advised the officers who arrested her that she was a teacher in East Hanover. Ms. Monaco explained her emotional state at the time and that she was intimidated and humiliated by the officers. These mitigating circumstances

should weigh in favor of Ms. Monaco and this arbitrator must find that termination is not the appropriate penalty, if any. Even if this arbitrator finds that Ms. Monaco's conduct herein was unbecoming conduct for a teaching staff member, such conduct, given Ms Monaco's lack of any prior discipline and prior satisfactory evaluations, should not rise to the level of requiring the termination of Ms. Monaco's employment.

In In the matter of Edmund Tyler, Burlington County Jail CSV-6614-03, Edmund Tyler served as a corrections officer in a the Burlington County Jail for approximately 11 years with no prior discipline. In 2003, he was found guilty of his second DUI and was also cited for his inappropriately defiant behavior when arrested for this conduct. Because this was Mr. Tyler's first disciplinary event, the appointing authority suspended Mr. Tyler for 15 days. The suspension was upheld on appeal. While Mr. Tyler served as a corrections officer and not a school teacher, he held a position of similar public trust and esteem as Ms. Monaco. Mr. Tyler's alleged offenses are strikingly similar to Ms. Monaco's—unblemished prior record, second DUI offense, alleged inappropriate behavior toward the police. However, Mr. Tyler was not terminated from his employment for these incidents related to motor vehicle violations. In this regard, Ms. Monaco, too, should remain in the employ of the East Hanover school district. Even if this arbitrator finds that Ms. Monaco's conduct was conduct unbecoming, this arbitrator must find that termination is not appropriate as a penalty herein.

CHARGE V

There is no dispute that Ms. Monaco received a copy of the East Hanover school district's notification of N.J.A.C. 6A:9-17.1 (now N.J.A.C. 6a:9B-4.1) requiring her to report an arrest for a "crime or offense." However, both Dr. Ricca and Ms. Monaco admitted that the district simply notified the staff of this regulation by handing a copy of it to staff and never provided any training as to what the regulation means.

The regulation states that failure to report a qualifying arrest "may be deemed just cause" pursuant to N.J.A.C. 6A:9B-4.5. N.J.A.C. 6A:9B-4.5 suggests that failure to report an arrest may result in the suspension of a certificate holder's certificate. However, nothing in the regulation suggests that

a failure to report may be deemed good cause to terminate an employee's employment. Certainly if the Department of Education wished to deem such a failure a basis for tenure charges, the Department could seemingly have done so, but it did not. Consequently, Ms. Monaco submits that this alleged failure to report cannot be a basis to terminate Ms. Monaco's employment as the statute itself does not refer to any kind of tenure charge or revocation of employment. In this regard, the district's reliance on this statute is misplaced.

In addition to the lack of authority in the relevant regulation itself, Ms. Monaco submits that this regulation does not require that she report a motor vehicle violation such as the DUI and refusal charges of which she was found guilty. According to the reporting regulation, Ms. Monaco was required to report an arrest for a "crime or offense." The term "offense" is defined in the New Jersey statutes under the criminal code in Title 2C. Offense means:

> A crime, a disorderly persons offense or a petty disorderly persons offense unless a particular section in this code is intended to apply to less than all three. N.J.S.A. 2C:1-14.

In addition, the Commissioner of Education has already determined a bright line demarcation between a criminal "offense" and a motor vehicle matter. In Michael Novak v. State Department of Education cited above, the Commissioner stated:

> Offense as used in this statute to disqualify individuals based on information in their criminal history background check, is a legal term of art, inextricably linked to the specific definition of this particular term contained in the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-14k, i.e. a crime, a disorderly persons offense or a petty disorderly persons offense." Consequently, in order to resolve the question as to whether petitioner's motor vehicle conviction permanently disqualifies him from school employment, it is necessary to ascertain whether motor vehicle violations are included under the rubric "offense" as defined in N.J.S.A.2C:1-14k. New Jersey Courts have uniformly answered this question in the negative.

> The Commissioner, therefore, finds and determines that, in construing N.J.S.A. 18A:6-7.1b, the plain meaning of "offense" as utilized therein must be limited to those infractions specifically delinated in N.J.S.A. 2C:1-14k and does not extend to convictions for violation of the motor vehicle laws.

Clearly, the Commissioner sees this demarcation between criminal charges and motor vehicle charges. If the term "offense" as set forth in 18A:6-7.1 means to exclude motor vehicle offenses, this tribunal must find that the Commissioner's own enacted regulation, N.J.A.C. 6A:9B-4.5 uses the same definition of "offense" as a statute found under the Commissioner's enabling legislation. Since Ms. Monaco was only charged with a motor vehicle offense and not a criminal offense, she did not therefore violate N.J.A.C. 6A:9B-4.5. Consequently, Charge V must be dismissed in its entirety.

CONCLUSION

Given that the Board of Education failed to present any evidence to support Charge I, that charge must be dismissed in its entirety. It is the Board of Education that bears the burden to establish that Ms. Monaco engaged in some kind of wrongdoing regarding the inconsistent statements made to the officers on a night she was in an accident and disoriented. The Board of Education failed to present any evidence whatsoever, let alone evidence of any wrongdoing on Ms. Monaco's part. In addition, Charge V must be dismissed in its entirety as the Commissioner of Education has determined that "offense" does not include motor vehicle offenses. Consequently, Ms. Monaco violated no rule or regulation when she failed to report her DUI.

With regard to Charges II and III, Ms. Monaco does not deny that she was involved in a DUI and a refusal to submit to a breathalyzer test, both motor vehicle offenses. As described above, these types of offenses do not disqualify Ms. Monaco from employment as a teacher. Consequently, they cannot serve as a basis to terminate Ms. Monaco's employment. They are motor vehicle offenses, not criminal ones.

Finally, even if Charge IV sets forth behavior that this arbitrator finds constitutes conduct unbecoming a public employee, this one offense, given Ms. Monaco's exemplary service over the course of her years of employment, is simply not a basis to terminate Ms. Monaco's employment. [Respondent Brief, pp. 4-13].

DISCUSSION

I have carefully reviewed the entire record of this proceeding. The Board must prove the basis for the tenure charges against the Respondent by a preponderance of the credible evidence. If it meets this burden, it must also demonstrate that dismissal is the appropriate penalty.

The Respondent was convicted of driving while intoxicated and refusing to submit to a breath test. It was her second DWI (DUI) offense. Sergeant Filippone testified to the Grievant's conduct on the night that she was arrested. Upon review of that testimony, I find it to be consistent with the information contained in his incident report and the audio/video from the holding cell. Filippone's testimony was also consistent with the information contained in the tenure charges against the Respondent. In stark contrast, the Respondent's testimony was not supported by the evidence. She offered several excuses for her conduct at the scene of the accident and in the holding cell. For instance, the Respondent claims she initially denied having anything to drink because she was disoriented from her motor vehicle accident. This testimony is not persuasive because there is no evidence that the Respondent sustained an injury from her accident, required medical attention or was otherwise incapacitated in any way. The Respondent also claims that she misunderstood Filippone's subsequent inquiries as to how much she had to drink. I cannot

credit this explanation. This was not the first time the Respondent was arrested for driving while intoxicated and has not shown any plausible reason for not understanding his questions. After a review of all of the testimony, I am persuaded by the evidence that the Respondent's answers were attempts to conceal the amount of alcohol she consumed rather than responses caused by disorientation, injury or misunderstanding.

The Respondent claims that her conduct in the holding cell was a response to poor treatment from members of the East Hanover Police Department. The evidence does not support this assertion. The evidence shows that the Respondent was repeatedly uncooperative, disruptive and discourteous to the officers who were attempting to have her call for a ride home so that she could be safely released from the holding cell. Moreover, I find that the Respondent's threats to sue the Department and her requests to call the Mayor on her behalf were misguided attempts to influence the officers and matron rather than her reaction to any perceived mistreatment.

In summary, the Respondent's justifications for her conduct on April 13, 2012 are not consistent with the evidence and the totality of all of the circumstances. I credit Filippone's testimony over the Respondent's on all relevant aspects of their interactions.

I now turn to the Respondent's failure to report her arrest. The relevant portion of the New Jersey Administrative Code requires teachers to "report their arrest or indictment for any crime or offense to their Superintendent of Schools within fourteen (14) calendar days".[6] On May 3, 2012, Dr. Ricca asked the Respondent why she did not report the April 13, 2012 offenses. The Respondent stated that she had not been arrested and was only involved in a traffic accident. The Respondent reiterated this belief during her testimony. The evidence directly contradicts the Respondent's claim. This record shows that the Respondent was arrested. She was given her Miranda rights, handcuffed, and placed in a holding cell. The Respondent testified that she was aware that reporting requirements existed, but she believed that they did not apply to her traffic accident. Her denials are wholly inconsistent with the facts. I find that the Respondent's failure to report her arrest to Dr. Ricca was based upon a motive to conceal her arrest rather than confusion over whether she had a legal responsibility under the New Jersey Administrative Code. Even if another motive could be imputed, I conclude that the Respondent had a clear duty to report the offense for which she was arrested and she did not.

The facts and circumstances above demonstrate that the Respondent repeatedly engaged in unbecoming conduct on April 13, 2012, exercised poor judgment in her failure to report her arrest to the Superintendent and did not

[6] The relevant portion of the New Jersey Administrative Code has since been re-codified in N.J.A.C. 6A:9B-4.1.

comply with her legal obligations. Her behavior is not diminished by the fact that her conduct on April 13, 2012 occurred outside of the school setting. The Respondent's actions are simply not consistent with the conduct reasonably required by a public school teacher whether in or out of the classroom. There is a common theme to the line of decisional law that addresses the high standard of conduct that teachers must possess - they are required to have "an unusually high degree of self-restraint and controlled behavior". Tenure of Sammons, 1972 S.L.D. 302, 321. The Respondent's conduct did not only meet this standard but was potentially damaging to the reputation of the school district and her ability to perform her duties as a classroom teacher. It runs contrary to conduct the school district can reasonably expect of its employees. See Karins v. Atlantic City, 152 N.J 532 (1998).

Based on the foregoing facts and the applicable law, I conclude that the Board has sustained its tenure charges of unbecoming conduct and/or other just cause against Respondent Diane Monaco. I also conclude that the penalty of dismissal was not arbitrary or excessive and instead was justifiable and reasonable under all of the relevant circumstances. The fact that the Respondent was convicted of traffic offenses rather than criminal charges does not preclude a finding of unbecoming conduct nor does it require a modification of the penalty imposed under the circumstances presented.

DECISION

The Board has sustained its tenure charges of unbecoming conduct and/or other just cause against Respondent Diane Monaco. The Respondent is dismissed from her tenured teaching position with the East Hanover School District.

DECISION

The Board has sustained its tenure charges of unbecoming conduct and/or other just cause against Respondent Diane Monaco. The Respondent is dismissed from her tenured teaching position with the East Hanover School District.

Dated: December 1, 2014
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 1st day of December, 2014, before me personally came and appeared Robert C. Gifford 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.

Linda L Gifford
Notary Public
Expires 1-10-16