

**Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire**

In the matter of:

The Tenure Hearing of Karina Perez

**School District of The City of
Hackensack**

Bergen County

:
:
:
:
: **Agency Docket No. 264-9/14**
:
:

Decision and Award

Appearances:

**On behalf of the School District of
The City of Hackensack, Bergen County:**
Richard Salkin, Esquire
50 Main Street
Hackensack, NJ 07601

On behalf of Karina Perez:
Ronald J. Ricci, Esquire
Ricci, Fava & Bagley L.L.C.
482 Notch Road
Woodland, NJ 07424

Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against Karina Perez, (Respondent) by the School District of The City of Hackensack, Bergen County (the District) and an October 6, 2014 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to N.J.S.A. 18A:6-16 as amended by *P.L. 2112, c. 26*.

The hearing in this matter was conducted on November 20, 2014 in Hackensack, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Karina Perez was present for the entire hearing and testified on her own behalf. At the close of the hearing on November 20, 2014, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on December 4, 2014 the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The parties stipulated that the issues presented in this matter may be accurately stated as follows:

Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and if so, what is the appropriate penalty, if any?

The Tenure Charge

The tenure charges in this matter were certified by the District's superintendent of schools Karen Lewis and provide in their entirety:

**TENURE CHARGES SEEKING DISMISSAL ON
GROUNDS OF UNBECOMING CONDUCT
AGAINST TEACHING STAFF MEMBER KARINA
PEREZ**

CHARGE

That Karina Perez has established a pattern of unprofessional, outrageous and unbecoming conduct documented over a two (2) year period, culminating with an incident of inappropriate and assaultive contact with a student S. G., on April 3, 2014. The conduct demonstrated on 5/7/12, 5/31/12 and 4/3/14 demonstrate an inability to comport herself in a rational, non-confrontational and non-aggressive, non-violent or non-assaultive manner.

Respondent

Respondent has taught Social Studies in the Hackensack Middle School for 11 years. Prior to the incident at issue herein, Respondent received two letters of reprimand; a letter dated May 7, 2012 for deliberately impeding the path of a student in the hallway and a letter dated June 4, 2012 for announcing to her class that certain students had not done their project and were "failing the class at this time."

Stipulation Relating to Past Discipline

The parties stipulated that the references in the Charge to letters of reprimand directed to Respondent regarding incidents on May 7, 2012 and May 31, 2012 are relevant to the instant tenure charge matter only for purposes of potentially showing progressive discipline.

Events of April 3, 2014

Middle School Principal Corey Jones testified that he was contacted by one of the school's guidance counselors on April 3, 2014 and informed that SG, a fifth grade student in Respondent's home room and social studies class, had complained to a school counselor that Respondent had grabbed the student's arm. At the time of the report, SG was in the School nurse's office. When SG returned to the counselor's office principal Jones called the student to his office and asked the student what had happened.

According to Jones, SG stated that she was "grabbed by the wrist" by Respondent when Respondent was escorting SG from the restroom back into the classroom. SG explained to Jones that at the time of the incident the student and Respondent were talking about the student's bathroom trips. Jones testified that while speaking to SG he noticed a red mark on the student's right arm.

After meeting with SG, Jones contacted the student's counselor and, as SG is a "classified" student, the student's case manager, and instructed the counselors to contact the student's mother. Jones then reviewed the school's video record to determine if the incident was recorded. The school principal reviewed video of the incident and concluded that it showed Respondent and SG walking up the hallway and that as the two were at the doorway to Respondent's classroom Respondent grabbed SG's wrist and SG then pulled her arm away from the teacher.

Jones also had Assistant Principal Avery ask the Para-professional assigned to Respondent's classroom (there were four or five classified students in the class at the time of the incident) if she had witnessed the incident and was told that the Para had neither seen nor heard anything.

Jones also reviewed the school nurse's notes and called Respondent and her union representative to his office. Jones, vice principal Avery, Respondent and her union representative thereafter met and, Jones testified, he gave Respondent his report of the SG incident and explained what he saw on the video. Respondent stated that as SG passed her, Respondent "touched" the student's wrist. According to Jones he reported the incident to the District's superintendent within an hour of the incident occurring.

Principal Jones testified that at the time he was looking into the matter he was not aware of any recent discipline of SG by Respondent and that any such discipline would not have been relevant to his investigation as he based his conclusions on what he observed in the video record of the incident.

Principal Jones issued Respondent a "Letter of Reprimand" dated April 4, 2014 providing:

On the morning of April 4, 2014, I was informed by a guidance counselor that a student reported you had "grabbed" her by the arm. The student was sent to the nurse and was provided with an ice pack to apply to the area above her left wrist where her skin was slightly red with scratch mark that did not penetrate the skin. I encountered the student in route to the guidance office as she was dismissed from the Health Office. I observed her wrist as she explained what had taken place at the beginning of 1st period. The student indicated that during a verbal exchange regarding her need to go to the bathroom you stated that she was being "overly dramatic" and as she walked by you to enter the classroom door you grabbed her arm just above the wrist. I directed the student to return to the guidance office and remain there until I arrived. I returned to my office and observed surveillance footage for the incident which confirmed that you reached out and made contact with her arm as she was entering the classroom. I contacted the student's mother by phone and informed her of the situation. She was advised that the contact did not appear to be hostile or malicious in nature, but was inappropriate. The mother expressed concerns of an ongoing pattern of conflict between you and her daughter while acknowledging her daughter's

behavioral challenges. A schedule change was made to remove the student from your homeroom and first period class which went into effect on the following day of school.

During a subsequent meeting with you in my office you acknowledged touching the student as she entered the door. You also discussed the pattern of conduct with this student that required ongoing communication with the parent and at time disciplinary consequences. As I stated during the meeting the student's past behavior is an entirely separate issue from the report of inappropriate physical contact.

The investigation report of this incident confirmed that you did make inappropriate contact with this student. You are directed to discontinue physical contact with students. Be advised that any continuation of this type of conduct will result in disciplinary action.

Superintendent Karen Lewis testified that she had the final word regarding Respondent's discipline and tenure charges and that when she was notified of the April 3 incident by principal Jones she instructed Jones to investigate the matter and provide her a written report. The resulting written report received from Jones, Lewis testified, was the April 4, 2014 Letter of Reprimand issued to Respondent by Jones. Lewis further testified that she did not participate in the investigation but reviewed Respondent's personnel file, including the two reprimands already contained in the file, the nurse's report of the incident, the written report of principal Jones and the video of the incident, and determined that Respondent should be suspended. The superintendent testified that her review of the video of the incident confirmed the conclusion of Principal Jones that Grievant had grabbed the arm of SG as SG had reported. Lewis met with Respondent and her union representative on Monday April 7, 2014 and informed Respondent that she was being suspended.

Superintendent Lewis testified that when she met with Respondent on April 7 she did not ask Respondent anything about the April 3 incident; the meeting was for the purposes of informing the employee of her suspension. Lewis also testified that students make allegations about teachers all the time and that sometimes students will “get back” at teachers because of discipline the teachers may have issued students. Lewis testified that at the time of her consideration of the April 3, 2014 incident she was not aware that there was any recent discipline of SG.

Respondent

Respondent testified that she had an understanding with SG’s mother that the teacher would escort SG to the bathroom during homeroom. Students are not to roam the halls and SG has had incidents of such in the past, Respondent testified. Respondent recalled that on April 3, 2014 she brought SG to the bathroom, waited outside of the bathroom for the student to complete her business and then walked the student back to class. As they were walking toward the classroom, Respondent testified, SG complained and asked why she always had to be walked to the restroom when the teacher did not have to do so for other students and Respondent replied that they had been through this a number of times. As she was speaking to SG, Respondent explained, she used her hand to “direct” the student through the classroom door and toward the direction of the student’s desk. As she later reported to the school’s principal, she may have lightly touched the student’s arm with her fingers. In any event, Respondent asserted, she did not “grab” SG and SG remained in the classroom for the entire first period and did not complain during that period.

Respondent also testified that just a few days prior to the April 3, 2014 incident she observed SG not paying attention in class and being absorbed by something the student was writing. When Respondent investigated she saw that SG had written statements about the private parts of a male teacher at the school and other male students. Respondent then called an administrator about the matter and SG was taken to the office and eventually suspended from school for two days.

Respondent testified that she was never asked by school administration to provide a written statement about the April 3, 2014 incident, that she taught classes the full day on April 3 and the full day on April 4, and that she was beginning her day on April 7, 2014 when she was called to the superintendent's office.

According to Respondent, other than the two May 2012 reprimands, she had no other discipline in her 11 years of teaching in the school, and that in regard to those two reprimands, she had been told by the principal who issued the letters that they were being issued only to cover all bases and would be removed from her file after six months. Respondent also admitted that she was aware that the letters remained in her file after the six-month anniversaries of their issuance and that she did not pursue grievances to have them removed.

SG

11-year old SG also offered testimony at the hearing. She testified that on April 3, 2014 Respondent would not let her go to the bathroom and that as Respondent was escorting SG back from the bathroom Respondent said SG was acting like a baby and pulled SG's left arm. SG maintained that she always came back from the bathroom on her own, that she had only gotten in trouble once for roaming the halls and admitted that a

couple of days before the April 3 incident Respondent had gotten her in trouble and suspended.

Involvement of Other Authorities

It is undisputed that the April 3, 2014 incident at issue here was reported to the local police and the appropriate New Jersey child protection agency and that neither authority concluded that an investigation into the matter was warranted.

The Nurse Report

The relevant "Visit Report" completed by the school nurse states that SG was seen at 9:40 AM on April 3, 2014 and that she was in the office for five minutes and given ice for her arm. The comments section of the Report provides:

Stud. Brought into H.O. by H. Coleman- stud had requested to call her mother. Stud states she asked MsPerez to go to BR, and was not allowed to go; states teacher "pulled and scratched" her left fore- arm examined in confer rm with HC present – no scratches, sl faint reddened area ~ 1 in diam. Above inside right wrist. Full ROM- no limitations. Stud states no witness. H.Coleman to take stud to L.McCain, mother to be called, Stud denies any other injuries.

Security Video

The video of the incident offered into evidence and relied upon by the District as the primary evidence to support its conclusions in this matter is 10 seconds long. Only the first 5 seconds show conduct relevant. The video begins by showing what turns out to be three people at the end of the hall near and approaching the area of Respondent's classroom door. The individual closest to the camera is a student ahead of SG and Respondent. At one second on the tape one can observe SG begin walking into the classroom doorway with Respondent behind her. At two seconds into the video

Respondent's left arm appears to be extended toward the doorway; close examination does not disclose whether or not there is contact between Respondent and SG. Also, at that time the student in the hallway turns her head back and to her left toward Respondent and SG. At three seconds into the video Respondent is in the doorway of the classroom with her left arm extended. SG is not in view. The student in the hallway is continuing to look toward the classroom doorway. At four to five seconds, Respondent pulls her arm back toward the door's knob and the student in the hallway turns her attention back toward the direction in which she is walking. The remaining five seconds of the video show nothing of relevance.

Position of the School District

The District asserts that the evidence supports its tenure charges. Contrary to the argument of Respondent, the standard to establish sufficient evidence to support the tenure charges here does not require that the District show that it has a specific rule against teaching staff touching students. Rather, the District maintained, it is well established that conduct unbecoming is "any conduct that has a tendency to destroy public respect for government employees and confidence in the operation of public services." Here, the District asserted, when the Department of Education referred this matter to arbitration, it concluded that the District's tenure charges, if true – charges that alleged Respondent put her hands on SG in an inappropriate manner – would meet the standard for conduct unbecoming and would be sufficient to warrant dismissal or a reduction in salary.

According to the District, it is fantasy to believe Respondent's claim that 11 year old special education student SG manufactured her story to "payback" Respondent or that

respondent did not call SG a “baby.” The physical evidence absolutely corroborates the version of events reported by SG. In this regard, the District continued, such includes the fact that: (a) there were red marks on SG’s arm observed by both the school nurse and Principal Jones some thirty minutes after the incident; (b) if observed carefully the video of the incident supports the report of the incident by SG showing Respondent extending her left arm forward and well past the student’s elbow and SG retracting her arm with an animated motion, and (c) the video plainly shows another student reacting to the incident in a substantial way; in a manner wholly inconsistent with a “gentle touching” of an elbow claimed by Respondent and consistent with the violent event reported by SG.

As for remedy, the District wrote:

[i]t believes it has proven the [Respondent] is guilty of unbecoming conduct. We are not adamant in the belief that she should lose her license for this incident or the culmination of the (now) three (3) disciplinary matters....Thus the District places its trust and confident in the arbitrator to fashion an appropriate sanction. We would hope that any potential unpaid suspension would be coupled with an anger management course, paid for by [Respondent]...

Respondent

Similar to the definition proffered by the District, Respondent maintained that unbecoming conduct is broadly defined and can be “any conduct which adversely affects the morale or efficiency of the [government unit] or which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.” Here, Respondent argued, the District did not prove that Respondent engaged in such conduct. In certifying the Charges the District’s superintendent did nothing to determine the merit of this matter other than review a video and rely upon the flawed

investigation of Principal Jones. As for the video, the Respondent continued, even the District's witnesses could not agree upon what it showed as Jones testified that it showed Respondent reaching out and making contact with the arm of SG whereas Superintendent Lewis testified that the video does not show Respondent grabbing the arm of SG. The video does not really show anything, the Respondent opined, and based upon its content, the Respondent asserted, it is clear that Jones either exaggerated when he concluded the video supported his conclusions or speculated as to what the video depicted regarding the incident.

Superintendent Lewis admitted that prior to her making the decision to issue tenure charges against Respondent she did not know whether the classroom paraprofessional, other students in Respondent's classroom or the student appearing in the hallway on the video had been interviewed, she had not interviewed Respondent about the incident, she had not discussed Respondent's prior discipline with the principal who had issued the discipline, she was not aware the Respondent had been involved in the suspension of SG just days before the April 3, 2012 incident and she had not inquired about the discrepancies between SG's report to the school nurse about the circumstances of the alleged grabbing – claiming Respondent would not let her go to the restroom - and the student's report to Principal Jones – that the incident took place as Respondent was walking SG back from the restroom - nor the discrepancies between the nurses report of which arm SG claimed was grabbed and on which arm the nurse observed a red mark or that the nurse did not observe a scratch mark but principal Jones had. The report/discipline issued by Principal Jones contradicts the assertions contained in the tenure charges. Respondent argues. In this regard, although the report/discipline issued by

Jones on April 4, 2012 provided that Respondent's contact with SG "did not appear to be hostile or malicious in nature, but was inappropriate," the tenure charges certified by Superintendent Lewis claim the opposite by stating that the conduct of Respondent on May 7 and 31, 2012 and April 3, 2014; "demonstrates an inability to comport herself in a rational, non-confrontational and non-aggressive, non-violent or non-assaultive manner." There simply is no support for such exaggerated charges, the Respondent maintained.

Additionally, the Respondent argued, the District has neither a rule nor policy relating to touching of student's by teachers and may not argue that any and all touching of students by teachers is inappropriate. Finally, Respondent argued, the Arbitrator may not find merit to the tenure charges as the District has already disciplined Respondent for her April 3, 2014 conduct in the form of an April 4, 2014 letter of reprimand and it is fundamentally unfair and contrary to due process to expose Respondent to double jeopardy for the same conduct as the District is here attempting.

The tenure charges should be found unsubstantiated, Respondent concluded.

Discussion

Considering the full record in this matter including all testimony, evidence and argument of the parties, I am not persuaded that the record establishes that Respondent engaged in the inappropriate touching that the District insists occurred, or that Respondent's conduct otherwise warrants her termination, suspension or reduction in salary. I conclude that the District has failed to establish the truth of its unbecoming conduct charge against Respondent.

Based upon the entirety of the case presented by the District, I find that the District primarily relied upon its ten-second video of the April 3, 2014 incident involving

Respondent and SG to conclude that Respondent had engaged in inappropriate touching of SG. In this regard the District; (1) did not consider any potential motive for SG to fabricate or exaggerate her story, including the fact that the student had just returned from a disciplinary suspension caused by Respondent and (2) the District did not consider – nor even attempt to acquire – the recollection of the event by the only non-party witness to the event; the student in the hallway whom the video shows was looking directly at the Respondent and SG for 4 of the 5 seconds of the incident. Rather, as testified to by both Principal Jones and Superintendent Lewis regarding the prior discipline of SG, such did not matter as the video showed that the conduct reported by SG occurred.

Findings Relating to the Video

I find that the video relied upon by the District is inconclusive. Although it shows nothing that is inconsistent with either the version of events offered by SG or the version of events offered by Respondent, the video does not affirmatively establish either version of events. As a consequence and contrary to the assertion of the District, I find that the video does not show Respondent grabbing the wrist or arm of SG.

Other Evidence is Insufficient to Prove the Charges

It is the District's burden to prove the Tenure Charges as made; here charges that effectively claim that Respondent acted in a non-rational, confrontational, aggressive, violent and assaultive manner toward students. Having found the primary evidence relied upon by the District to support its charges does not show inappropriate touching of SG by

Respondent, I find the remaining evidence in the record, when considered as a whole, is insufficient to support a finding that Respondent inappropriately touched SG.

In this regard, I find that contrary to the District's tenure charges the District's April 4, 2014 letter of reprimand amounts to an admission that Respondent's conduct was neither hostile nor malicious in nature. Additionally, I am not persuaded by SG's testimony on the incident and fail to find her testimony sufficient to support the very serious charges proffered by the District here. Although the testimony of an 11-year old student should not be held to a standard that would normally be applied to an adult or adolescent, and even considering SG's recognized challenges, I find too many inconsistencies with established facts to rely upon her testimony as a primary basis to support the District's tenure charges. Such include inconsistencies relating to when the incident occurred - when Respondent would not allow her to go to the restroom or as she returned from the restroom - what arm was involved, and whether the student was grabbed, scratched or grabbed and scratched. When such inconsistencies are combined with the fact that SG had reason to exaggerate as she was upset with Respondent for causing the student's disciplinary suspension only days before and the District's failure to interview the only non-party witness to the event in question - the other student in the hallway - I find that the non-video evidence in the record is insufficient basis upon which to support the tenure charges.

Conclusion

The District has failed to establish the truth of its conduct unbecoming charge against Respondent.

Award

The subject tenure charges against Respondent Karina Perez are dismissed.

The District is ordered to:

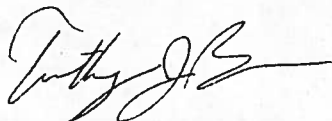
1. Promptly offer Respondent reinstatement to her former position.
2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her suspension from the date of her suspension to the date of her reinstatement by the District.
3. Remove the April 4, 2014 letter of reprimand from Respondent's file and expunge all record of said letter of reprimand as well as her suspension from the District's files.

Dated: December 11, 2014



Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 264-9/14 relating to tenure charges against Karina Perez on Thursday, December 11, 2014.



Timothy J Brown