State of New Jersey
Department of Education

In the Matter of the Tenure Charges	*	
against	*	ARBITRATION DECISION AND AWARD
MICHAEL MIGNONE (Teacher)	*	
by	*	DOCKET NO. 72-3/14
BELLVILE BOARD OF EDUCATION	*	

Before: Joel M. Weisblatt, Arbitrator

Appearances:

For the Teacher
Oxfeld, Cohen
By: Sanford R. Oxfeld, Esquire
Samuel B. Wenocur, Esquire

For the Board of Education
Schwartz, Simon, Edelstein & Celso
By: Nicholas Celso, III, Esquire
Ari D. Schneider, Esquire

D E C I S I O N

Introduction

On March 21, 2014, the New Jersey Department of Education, Bureau of Controversies and Disputes, (the "DOE") received the filing of tenure charges [Exhibit J-1] against Michael Mignone (the "Respondent" or the "Teacher") filed by the Belleville Board of Education (the "Board" or the "Petitioner"). The Respondent's answer [Exhibit J-2] was received by the DOE on March 28, 2014. Pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L.* 2012, c. 26, the undersigned Arbitrator was appointed to serve, by the DOE, on April 7, 2014.

The arbitration hearing was initially opened on April 30, 2014 and testimony was taken on: May 28, 2014; June 4, 2014; June 10, 2014; June 11, 2014; and July 1, 2014. Both parties were afforded an opportunity to argue orally, present documentary evidence and to examine and cross-examine witnesses. An extensive evidentiary record was established and a stenographic transcript of the proceedings was created. Both parties submitted detailed post-hearing briefs with supporting case law. A written request was made for an extension of time for the issuance

of the award, due to the number of days needed by the parties in order to properly present the case at hearing and the extraordinary volume of evidence they sought to present; the DOE approved the extension of time for the issuance of the award until August 6, 2014.

The Arbitrator has carefully considered the entire record presented by the parties. This evidence has been examined and weighed in light of the charges presented and the statutory standards for the consideration of tenure charges. *N.J.S.A.* 18A: 28-5, as amended by the "TEACHNJ ACT", *P.L.* 2012, c. 26, reads as follows [in pertinent part]:

> The services of all teaching staff members employed prior to the effective date of P.L. 2012, c. 26, in the position of teacher…serving in any school district or under any board of education…shall be under tenure in good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause...

In the dispute at hand, the Board seeks the dismissal of the Teacher charging, "conduct unbecoming and/or other just cause, including but not limited to insubordination warranting dismissal and reduction in salary." The Petitioner bears the burden of proving that there is a proper basis for such a result.

Charges

The following are the charges and specifications raised by the Board against the Teacher. They are delineated in separately numbered charges and counts:

Charge I
UNBECOMING CONDUCT AND/OR OTHER JUST CAUSE

All of the foregoing facts and allegations are incorporated by reference as if fully set forth herein. On or about October 16, 2013, during instructional time when Respondent should have been completing his lesson in accordance with the prescribed curriculum, he instead engaged in a discussion with his students about the possible danger and medical risks allegedly associated with wearing the new security system identification tags for an extended period of time. The discussion approximated some twenty minutes, during which he informed the students, among other things, that the tags could cause cancer and would enable school officials to track the students in and out of school, thereby invading their privacy, or words to that effect. During his comments, he appeared visibly upset about the cost of the security system, and indicated that the money could have been spent on other things. He commented further that if parents were at the Board meeting, there wouldn't be any cameras; they should go complain to the Board. The foregoing comments by Respondent were heard in whole or in part at least by students, J.Cr., G.D., E.C., K.D. and J.B., J.D., A.V., Je.D. (extra letter used to distinguish second student with initials, J.D.) A.D., and S.S. Respondent's conduct not only manifests inordinately poor judgment, but also violates numerous Board Policies, including by way of example without limitation: Policies 3233, 3280, 3281 and 3211 just to name a few.

Count 1 -- (Unauthorized Deviation from the Prescribed Curriculum)

The foregoing comments and actions by Respondent constitute conduct unbecoming a teaching staff member and/or other just cause for dismissal, in that, Respondent deviated from the prescribed curriculum, without prior authorization, to discuss a matter completely unrelated to

his instructional responsibilities as a mathematics teacher.

Count 2 -- (Using Instructional Time to Discuss a Labor/Union Issue with Students)

The foregoing comments and actions by Respondent constitute conduct unbecoming a teaching staff member and/or other just cause for dismissal, in that, Respondent exploited his position as a classroom teacher to attempt to promote a union/labor cause, inappropriately utilizing students as a means by which to motivate parents to voice their opposition to the Board's security system and/or expenditures related thereto.

Count 3 -- (Inappropriate Expression of Personal Opinion to Students about Health Risks)

The foregoing comments and actions by Respondent constitute conduct unbecoming a teaching staff member and/or other just cause for dismissal, in that, Respondent willfully and with reckless disregard for the truth, expressed his opinion, position and/or views to students concerning possible medical risks associated with the identification tags and/or security system, namely that they could cause cancer, causing the students to be troubled.

Count 4 -- (Inappropriate Expression of Personal Opinion to Students about Invasion of Privacy)

The foregoing comments and actions by Respondent constitute conduct unbecoming a teaching staff member and/or other just cause for dismissal, in that, Respondent willfully and with reckless disregard for the truth, expressed his opinion, position and/or views to students concerning the possible invasion of their privacy associated with the identification tags and/or security system, causing the students to be troubled.

CHARGE II

UNBECOMING CONDUCT AND/OR OTHER JUST CAUSE

All of the foregoing facts and allegations are incorporated by reference as if fully set forth herein. On or about December 20, 2013, Respondent suggested to J.C.'s guidance counselor, Mariann Moran, that J.C. perhaps should be removed from his class. Mr. C. received a telephone call from Moran who indicated that she was on speaker phone with Respondent who wanted to have a conference with Mrs. C. Although never disclosed to Mrs. C., BEA

representative, Kara Suttora, also was present, listening in on speaker phone and taking notes. The conversation also may have been taped. The foregoing conduct violates the rules and regulations of the State Board of Education, State and Federal laws and a number of Board Policies that protect the rights of Section 504 students and prohibit retaliation, intimidation, discrimination and unwarranted disclosure of confidential student information, including by way of example without limitation, Policies: 5512, 3281, 2330, and 2460.

Count 1 -- (Reprisal Against a Parent, Causing Her Pain by Threatening to Disrupt a Child's Education)

During the course of the above referenced telephone conversation, Respondent, among other things, informed Mrs. C. that he didn't know how he could keep J.C. in his class because, although he didn't have a conflict with J.C., he now had a conflict with her. Moran explained further, that any such change would likely disrupt J.C.'s entire schedule. The foregoing comments and actions by Respondent acting alone and/or in concert with Ms. Moran constitute conduct unbecoming a teaching staff member and/or other just cause for dismissal, in that, Respondent used the occasion to retaliate against Mrs. C. by threatening to interfere with the educational placement of J.C., a student he knew to be experiencing special challenges associated with his disability. Playing upon the parent's obvious concerns for the well-being of her child, Respondent engaged in this most egregious form of reprisal for her comments about him to the Board and Administration which had resulted in his being reprimanded.

Count 2 -- (Threatening and Intimidating a Parent in Order to Secure Personal Gain)

Respondent caused the subject telephone call to be initiated under the pretense of wanting to resolve his perception that Mrs. C. had a conflict with him possibly necessitating the removal of J.C. from his classroom when, in reality, his true motivation for arranging the conference call with his union representative present was to promote his own self-interest by extorting an exculpatory letter from Mrs. C. and having the union representative take notes and/or record the conversation for later use in challenging the reprimand that had been issued to Respondent. During the course of the subject telephone conference, Respondent, among other things, informed Mrs. C. that he had to be careful about what he

said in the classroom, because she might complain about it and that created a conflict, or words to that effect. This statement by Respondent distorts the reality that all teachers, as professionals, are fully accountable for their actions and comments in the classroom; the mere possibility or even likelihood that a child may repeat to his/her parent an untoward comment that may then be reported up the chain of command, hardly constitutes a "conflict." In reality, Respondent sought to manufacture a rationale for reprisal against Mrs. C. for speaking out about his failure to return her telephone call for some six days. Respondent then shamelessly used his knowledge of J.C.'s special needs, the student and parent's desire that he remain in Respondent's class, as well as the parent's concern for her son's general well-being, as a tool to extort from Mrs. C. a letter to the Superintendent indicating that the whole matter had simply been a misunderstanding. Playing upon the parent's obvious concerns for the well-being of her child, Respondent engaged in this most egregious form of conduct in order to secure personal advantage in conjunction with his challenge of the reprimand he had received. Respondent's conduct in this regard constitutes unbecoming conduct and/or other just cause for dismissal.

Count 3 -- (Threatening to Disrupt a Special Needs Child's Schedule)

Respondent knew or should have known that any disruption to J.C.'s educational program would likely or potentially create additional burdens for him in view of his disability. His conduct in suggesting and/or threatening the removal of J.C. from his class constitutes conduct unbecoming a teaching staff member and/or other just cause, in that, it placed Respondent's self-interest above the student's and was fashioned to disrupt the entire schedule of a disabled student.

Count 4 -- (Attempting or Threatening to Modify the Educational Program of a Disabled Student without Following Proper Procedure)

Respondent knew or should have known that any disruption to J.C.'s educational program would likely or potentially create additional burdens for him in view of his disability. His conduct in suggesting and/or threatening the removal of J.C. from his class constitutes conduct unbecoming a teaching staff member and/or other just cause, in that, it was fashioned to modify the educational program of a disabled student without following

the appropriate procedure. Respondent had no authority to effectuate such a change, nor even to suggest and/or threaten it.

Count 5 -- (Inappropriately Involving a Union Representative in a Conference Call in which the Confidential Matter of a Student's Disability was Discussed)

Respondent knew that BEA representative, Kara Suttora, was present and listening during the telephone conversation with Mrs. C. His undisclosed involvement of a union representative in a discussion with a parent concerning a matter involving her disabled son's removal from his classroom constitutes conduct unbecoming a teaching staff member and other just cause for dismissal, in that, the identity of a special needs child was made known to the union representative whose involvement in the call was totally unwarranted and inappropriate in the first instance. Even worse, the union representative took notes and then forwarded them to the NJEA's attorney, and perhaps even tape recorded the conversation.

Count 6 -- (Willfully and Knowing Deceiving a Parent)

Respondent knew that BEA representative, Kara Suttora, was present and listening during the telephone conversation with Mrs. C. His failure to disclose the presence of the union representative in a discussion with a parent concerning a matter involving her disabled son's removal from his classroom constitutes conduct unbecoming a teaching staff member and other just cause for dismissal, in that, Respondent engaged in a course of deceptive and deceitful action unbecoming of a professional.

CHARGE III

UNBECOMING CONDUCT AND/OR OTHER JUST CAUSE, INCLUDING BUT NOT LIMITED TO INSUBORDINATION

All of the foregoing facts and allegations are incorporated by reference as if fully set forth herein. On or about January 2, 2014, Respondent was suspended from his teaching position with pay, pending an investigation into his conduct. In conjunction with his suspension, on January 9, 2014 he was directed by the Superintendent of Schools, Helene Feldman, to refrain from appearing on Board property without her permission, with the sole exception of being permitted to conduct union activity in Superintendent Feldman's office. His failure to comply with her directive as an act of open defiance, constituting unbecoming conduct

and/or other just cause, including but not limited to insubordination.

Count 1 -- (Open Defiance of Superintendent's Directive)

Notwithstanding Superintendent Feldman's verbal directive of January 9, 2014, on or about February 4, 2014, Respondent entered the high School through a stairwell in the Board's Offices, used his key to gain unwarranted access to the High School, traversed a hallway and entered an office designated for union business. Superintendent Feldman was alerted to same by a security guard who was aware that Respondent was not permitted in the High School. Superintendent Feldman located Respondent in the union office and confronted him. She directed Respondent to immediately leave the High School. Respondent was ultimately escorted out of the High School by the school security guard.

Count 2 -- (Disruption Incident During Unauthorized Presence in High School)

While impermissibly inside of the High School, on or about February 4, 2014, Respondent and teacher, Ryan Sheridan engaged in a verbal confrontation in the presence of other staff members, including secretaries Deborah Marino, Sharon Druther, and substance abuse counselor, Courtney McShane. Their interaction became heated and disruptive, creating a commotion during school hours in a place that Respondent was not permitted to be.

CHARGE IV
PATTERN OF UNBECOMIBG CONDUCT MAIFESTING UNFITNESS TO SERVE AS A TEACHING PROFESSIONAL AND ROLE MODEL

All of the foregoing facts and allegations are incorporated by reference as if fully set forth herein. Based on all of the foregoing acts and omissions of Respondent, jointly and severally, it is evident that Michael Mignone has been engaged in a course of unbecoming conduct manifestly demonstrating his unfitness to serve as a teaching professional and role model for youth. Respondent's calculated, retaliatory actions against J.C.'s mother, using her disabled son as a tool to advance his personal interests, is beyond the pale and is so outrageous that it, standing alone, warrants immediate termination. However, when viewed within the context of the overall nature of his misdeeds, drawing his students into an ongoing labor dispute, inciting and/or exacerbating their fears and anxieties about the security system, and using

them as a means to further promote the union's attempts to solicit parental support for the BEA's position, there can be no question that dismissal is the only appropriate remedy.

Positions of the Parties

Position of the Board

The Board contends that the charges against the Teacher "were warranted and have been substantiated." It maintains that the Teacher has exhibited "a pattern of misconduct and shameful disregard of his responsibilities as an employee of the Board and as a member of the teaching profession."

Specifically, the Board claims that On October 16, 2013, the Teacher deviated from the lesson plan for a period of twenty minutes during which time an inappropriate discussion occurred with students about the Board's security system and its expense. The Board suggests that the Teacher voiced expressions of personal opinion in this discussion in order to serve the Teacher's own personal interests. It asserts that the "purpose and nature" of this discussion were inappropriate.

The Board further alleges that the Teacher engaged in "an unprofessional, unethical, manipulative and pre-meditated contrivance to promote his own interest" during a telephone conversation with a parent on December 20, 2013.

It insists that the Teacher held a conference call with the parent and that the undisclosed presence of an Association representative compromised the privacy of the parent and her child. It characterizes this conversation as a "threat" to the parent and child, noting the parent's testimony that she felt threatened.

The Board maintains that On February 4, 2014, the Teacher violated the directive of the Superintendent "that he was no longer permitted on District property, except for her office, with her permission, for the sole purpose of conducting union activity." It contends that the Teacher was present in the High School and engaged in a disruptive "verbal altercation" in front of several other individuals, including three students.

The Board argues that the Teacher's testimony was not credible. It points out that the cross-examination of the Teacher exposed inaccuracies in his answers to interrogatories; it asserts that this reflects a measure of deception that is damning with respect to credibility. The Board suggests that the Teacher "has attempted to achieve personal gains and retribution, with little regard for his students and their parents." Additionally, the Board

points to the Teacher's failure to reveal the presence of the Association representative to the parent during the December 20, 2014 conference call as another example of his "penchant for deceptive conduct."

The Board asserts that it has "proven by the preponderance of credible evidence" that the Teacher has committed the violations charged. It argues that he is "guilty of conduct unbecoming a teaching staff member, insubordination and/or other just cause warranting dismissal." The Board maintains that the Teacher has failed to comply with reasonable rules and regulations. It insists that the Teacher's conduct was "so egregious that it warrants dismissal."

The Board alleges that the Teacher's actions on the December 20, 2013 conference call were manipulative and threatening. It claims that he strong-armed the parent in such a reprehensible manner as to justify his dismissal. The Board suggests that the "touchstone of conduct unbecoming" is fitness for duty and that this "may be based primarily on an implicit standard of good behavior."

The Board argues that the dismissal of the Teacher need not be upheld based on each separate charge "but also for the charges viewed in their totality when they demonstrate a pattern of misconduct over a period of time." It relies on the concept that the dismissal from a tenured position may properly result from a "consideration of the nature of the act, the totality of the circumstances and the impact on the teacher's career." Specifically, it stresses that a dismissal may be warranted by a "pattern of conduct" which is persistent when the individual acts of misconduct might not, standing alone, support the penalty of dismissal.

The Board concludes that it "has highlighted Respondent's pattern of unbecoming behavior throughout the school year, coinciding with his push, on behalf of the Belleville Education Association, to rid the District of the newly implemented security system." It contends that "each charge--standing alone--is sufficient for dismissal" and that the series of events concerning the Teacher's conduct between October 2013 and February 2014 "illustrates a pattern of behavior that cannot be minimized and must ultimately result in Respondent's termination."

Position of the Teacher

The Teacher contends that the charges presented against him are not proved in the record and they should be dismissed "because there are simply no facts to support any allegation of misconduct." It strongly suggests that the factual underpinnings of the allegations are not only false but appear to be an intentional prevarication.

The Respondent emphasizes that the standard for determination under the revised statute remains that "no individual can be dismissed or reduced in compensation if he is under tenure 'except for inefficiency, incapacity, unbecoming conduct, or other just cause.'" It is urged that there is no conduct proved to rise to the standard of unbecoming conduct or other just cause.

There are procedural defenses raised by the Respondent; they include the assertion that the re-filed charges, with respect to the December 20, 2013 incident, are untimely. This is based on the assertion that the charges certified by the Board (on February 28, 2014) were more than 45 days after the Superintendent's initial sworn charges issued on January 8, 2014. It is urged that this particular count be found to be "out of time." The

Respondent also claims that the Board failed to provide, with respect to its witness list, "a complete summary of their testimony" as required by *N.J.S.A.* 18A:6-17.1(3). Additionally, The Respondent suggests that the Board did not conduct a sufficient investigation of the allegations in that it never interviewed the Teacher to gain his perspective on the events. It claims that this is a fatal deficiency in the requirement that the dismissal be for just cause.

With respect to the substantive elements of the charges, the Teacher argues that the class discussion of October 16, 2013 was handled through a letter of reprimand issued by the Middle School Vice Principal on October 25, 2013 [Exhibit R-25]. He maintains that the failure of the Superintendent to raise this incident in her January 2, 2014 meeting with the Respondent establishes the fact that that event was resolved well in advance of the tenure charges herein. Further, it is asserted that there is not sufficient credible evidence to prove the charges and that the methods of the Board's investigation through the students "should cause the arbitrator to question the validity of the entire process." The Respondent emphasizes that it was clearly established, by the testimony of the

students, that the students, not the Teacher, raised the issue of the surveillance system in class discussion. The Respondent insists that the evidence relating to whether there was a discussion of the danger of cancer, and what was said, was inconclusive at best.

With respect to Charge II, that of unbecoming conduct arising from the telephone conference call of December 20, 2014, the Respondent argues that the facts do not support the allegations. It stresses that the Board's own witness (the parent of JC) "did not support its position" and that even accepting her testimony as true (which Respondent does not) "would not in any fashion support the filing of tenure charges."

The Teacher asserts that the charges of unbecoming conduct, including that of insubordination, set forth in Charge III are based on false allegations and should be dismissed. The Respondent insists that there was no directive, issued by the Superintendent prior to February 4, 2014, denying him access to the Belleville Education Association office, located the floor above the District offices. The testimony of the Superintendent is challenged

for veracity in this regard, noting inconsistencies in the evidence and her testimony.

Further, it is argued that the Teacher never truly entered the High School but used an employee-only entrance and stairwell to go to his office as President of the Association for the purpose of making photocopies. Additionally, the Respondent insists that the charge of a "verbal confrontation" that was "disruptive" is inaccurate and untrue. It is urged that "Charge III has to be dismissed in its entirety."

In conclusion, the Teacher maintains that Charge I should be dismissed because "he has already received a letter of reprimand for that matter and that is the appropriate penalty." The Respondent further argues that Charge II should be dismissed for a lack of evidence, relying on the testimony and affidavit of the parent of JC, that the Board's contentions are unfounded. The Teacher insists that "it is clear that Charge III must be dismissed in its entirety for total lack of evidence"; that there is "absolutely no factual support whatsoever" for this charge. The Teacher seeks to have all charges dismissed noting that they "do not rise to the level of tenure charges."

Discussion and Analysis

The Respondent, Michael Mignone, is a middle school math teacher employed by the Belleville Board of Education since September of 2000. Tenure charges, seeking the dismissal of the Teacher, were certified by the Board and subsequently received by the New Jersey Department of Education on March 21, 2014. The record clearly establishes that, other than the allegations in the charges at issue herein, the Teacher was a very good educator. The testimony of students called by both parties as witnesses in this proceeding was consistently in praise of the Teacher's abilities in the classroom. Additionally, the Parent, who testified, believed that her child was performing well in the Respondent's class and she was clearly in favor of his continuing as her child's teacher. The evaluations of the Teacher's performance over his years of employment [Exhibit R-20] were generally at the highest level of accomplishment and were without any indication of problematic conduct or performance.

The charges filed in this case present serious allegations of misconduct and they must be evaluated in

light of the evidence produced at hearing. The Board seeks the dismissal of the Teacher; it bears the burden of proving that the statutory standard for such action has been met. This analysis shall initially address the procedural questions raised by the Respondent and then shall proceed with a step-by-step substantive review of the charges and the evidence, leading to an overall determination of the issues raised by the charges.

The Respondent argues that the Charge II is "out of time" because it was certified by the Board of Education more than 45 after the first tenure charges [Exhibit R-8] were sworn by the Superintendent of Schools, on January 8, 2014. The initial tenure charges were withdrawn without action by the Board. The Superintendent expressly advised the Teacher, at the time the first charges were withdrawn, of her intent to file further charges against him. The instant tenure charges were certified by the Board more than 45 days from the date of the initial charge but within 45 days from the February 28, 2014 date that the Superintendent re-filed charges against the Teacher.

The statute cited by the Respondent reads as follows:

> 18A:6-13. If the board does not make such a determination within 45 days after receipt of the written charge, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

The Board argues, persuasively, that there is caselaw establishing that the dismissal of the charges, as a result of the failure to act within 45 days, are *without prejudice*. It cites I/M/O The Tenure Hearing of Sabino Valdes, 2007 *N.J. Super*. Unpub. LEXIS 622 *4(App/ Div. 2007) for the following:

> …so long as an employee has not been prejudiced by a re-filing of charges within a reasonable period of time, the passage of the statutory time period from the filing of the initial charges should be viewed as a dismissal without prejudice.

The record of the case at hand establishes absolutely no prejudice to the Respondent from the re-filing of the charges. The time frame was reasonable and the employee was placed on immediate notice that the charges were to be re-filed. This is not a procedural defect with respect to Charge II and it shall not be dismissed on procedural grounds.

The Arbitrator finds that the Board fulfilled its statutory responsibility to provide a list of witnesses

with a complete summary of their testimony through providing the Respondent with witness statements taken from the prospective witnesses. The Arbitrator shall not dismiss the charges on this procedural ground.

The Teacher assails the investigation performed by the Board with respect to the charges presented. Respondent emphasizes the fact that he was not interviewed nor given a chance to address the factual assumptions made by the Superintendent. The Respondent further challenges the manner in which the students were interviewed and statements taken in support of the Board's case. The Teacher insists that these failures are tantamount to a breach of the just cause requirement under the tenure statutes.

While the Arbitrator finds that the quality of the Board's investigation was lacking, it cannot be found, as a matter of law, that the investigative shortcomings were fatal flaws in the process. There is insufficient evidence, on this record, to establish that the investigation was so unfair or prejudiced as to require dismissal. The employer bears the burden of proof in a just cause proceeding and a flawed investigation alone,

does not establish a basis for dismissal. However, the inability to prove substantial credible facts to support the charges will cause the charges to fail. Therefore, it is the employer that acts at its own peril when it does not conduct an effective investigation.

Charge I

The first of the charges presented addresses an instructional class held on October 16, 2013. Thirteen students, present in the class that day, testified at the hearing. Although there were a number of variations in the testimony, certain elements of the class discussion at issue are quite clear. The discussion topic of the surveillance and security system was raised by a student, not the Teacher. There appears to have been some discussion of the safety of the system, including the question of cancer. The Arbitrator finds that there was no credible evidence that the Teacher voiced the opinion that the system would cause cancer. There also appears to have been some discussion of the option that parents, if so inclined, could raise objections to the system with the Board but absolutely no credible evidence that the Teacher directed students to have them do so. Although there was some discussion of privacy issues, the testimony includes

absolutely no suggestion that the Teacher stated that tracking could occur outside school. The privacy issues appear to have been raised by the students. The discussion at issue took approximately twenty minutes until the Teacher asserted the need to return attention to math. The students universally testified that the Respondent was a good teacher, many indicating more superlative views of his teaching ability.

The Superintendent's conclusions supporting the charge are founded on an exaggerated interpretation of the events including a number of factual allegations that are clearly not established by the evidence. For example: the Superintendent asserts that the Teacher "informed the students, among other things, that the tags could cause cancer and would enable school officials to track the students in and out of school, thereby invading their privacy, or words to that effect." The evidence simply does not prove that claim; indeed, the testimony of the students provides a clear and convincing basis to find that the Teacher made no such statement.

The Superintendent, in Charge I, Count 1, claims that the Respondent's deviation from the prescribed curriculum,

to discuss a topic unrelated to math, constitutes conduct unbecoming and "other just cause for dismissal." The Arbitrator finds that this count of the charge is reflective of a substantial over-reaction to the conduct of the Teacher, as revealed by the evidence. It is alarming to observe that a deviation of 20 minutes from the direct curriculum to discuss a matter, raised by the students in class, could be viewed as the basis for dismissal, even if the conduct were improper. It is important to recall that this involved a Teacher without any record of problems with respect to conduct or classroom performance, as reflected in his annual evaluations [Exhibit R-20]. In fact, the Board addressed the October 16, 2013 classroom incident, in a letter of reprimand, dated October 25, 2013 [Exhibit R-25]. It is significant to note that the matter of a deviation from the curriculum was not identified as a problem in that incident; the letter focused on "inappropriate comments to your class during instructional time." The suggestion that this incident might be supportive of just cause for dismissal is fully at odds with the just cause standard that the penalty imposed must be reasonably related to the severity of the misconduct proved.

The Superintendent's assertions in Charge I, Count 2, also exhibit an exaggerated charge with respect to the evidence. The evidence does support the contention that the Teacher voiced certain opinions about the surveillance and security system that he, as President of the Education Association, opposed. Additionally, although there is no evidence that he "directed" students to have their parents complain to the Board about the matter, it does appear that his discussion of the option for parents so inclined was inappropriate in the setting. The Arbitrator finds that there is evidence that the Teacher showed poor judgment in expressing those views before the class; this qualifies as inappropriate conduct as addressed in the October 25, 2013 letter of reprimand. That document directed the corrective action "to refrain from this conduct in the future." The written reprimand appears to have served its corrective purpose. There is no evidence even suggesting that the Respondent failed to refrain as directed.

Charge I, Count 3, presents an allegation that the Board has failed to prove, by even the preponderance of credible evidence. The record simply does not support the charge that the Grievant "expressed his opinion, position and/or views to students concerning possible medical risks

associated with the identification tags and/or security system, namely that they could cause cancer, causing the students to be troubled." The record appears to establish that the class did engage in some discussion of cancer risk but there is no credible evidence that the Teacher expressed the view that such a risk was real. [Note: among the 13 students who testified there was an isolated opinion that the Teacher expressed views about cancer risk. For a number of reasons, including the consideration of the full body of student testimony, the Arbitrator could not credit such testimony as being worthy of any probative value.] This count must be dismissed for lack of credible proof to support the charge.

Similar to the finding regarding Charge I, Count 3, the allegations in Charge I, Count 4, are not supported by credible evidence in the record. Although the discussion appears to have included student questions about privacy and some further discussion on the topic, the Arbitrator finds there is no credible evidence to prove that the Teacher voiced his personal opinions to the students. This count must be dismissed for lack of credible proof to support the charge.

Charge II

Charge II presents the most serious of the accusations against the Respondent. It relates to a telephone conference call on December 20, 2013, among the Teacher, Guidance Counselor Mariann Moran and the Parent of one of the students in the Respondent's class. Additionally, Kara Suttora, a special education teacher who is also a local representative of the Belleville Education Association was present for the conference call. Her presence was not disclosed to the parent and she took notes of the call in her capacity as an Association representative. The Board alleges that the Respondent engaged in a reprisal against the Parent and that he threatened, deceived and intimidated that Parent. It further claims that the Teacher attempted or threatened to modify the student's educational program.

By way of background to this incident, the record reveals that the Parent complained at a Board of Education meeting that the Teacher (without identifying him by name) had not returned a phone call to the Parent. The Parent had left a message with the Guidance Counselor that she would like to speak with the Teacher about a matter concerning her son ("JC"), a student in his math class. The student was upset about the belief that the Teacher

would not allow JC to make up an assignment. The day following the Board meeting, the Teacher and the Parent had a phone conversation that fully resolved the issue involving JC and the assignment. JC, a student with a 504 Plan accommodation, performed well in the Teacher's class. The Teacher received a letter of reprimand, dated December 20, 2013 [Exhibit P-33], involving the Parent's complaint at the Board meeting that her phone call was not returned in a timely manner.

The evidence [the testimony of all four participants, including the unrevealed note-taker, has been carefully reviewed and analyzed] establishes that the events of December 20, 2014, began with the Guidance Counselor calling the Parent at the request of the Teacher. Belleville Education Association local representative, Kara Suttora, was present and, to reiterate, her presence was never disclosed to the Parent. The Parent explained that the Respondent raised the question of whether a conflict existed between the two of them. It was clearly stated that the Teacher had no problems with the student, JC, and that was in no way the basis of the call. The reason for the call was founded in the issuance of the letter of

reprimand issued that day, despite the fact that the Teacher and Parent had resolved the issues between them.

According to the Parent, the Respondent questioned whether she might complain about future matters due to this possible conflict. He asked whether a change in placement might be better for all concerned. The Guidance Counselor then interjected that such a change might affect JC's schedule as a whole depending on the availability of classes at certain times. The Parent was very concerned about the impact of such a sweeping change on JC, especially in light of his particular educational needs.

All the participants agreed that the Parent and Teacher reached the conclusion that the problem in October was one of communications. It was agreed that there would not be any barrier to the student remaining in the Respondent's class.

The testimony of the Guidance Counselor is of critical importance with respect to this incident. She stressed that the Teacher asked the Parent if the Parent wanted to have the student in a different class. The Teacher did not assert that it was his desire to move the student to a

different class. This was done in the context of a query as to whether the Parent had a conflict with the Respondent. It is significant to emphasize that the Parent testified that she respects and trusts the Guidance Counselor; the Parent raised absolutely no complaints about the Guidance Counselor's role in the conference call. The Guidance Counselor testified, most credibly, that nothing in the conversation was a threat and that there was not any indication that the Parent viewed the conversation as a threat. The Guidance Counselor stressed that, at the end of the call, she thought that everything was fine and that there was no problem. The Guidance Counselor stated that she would not have expected any complaint from the Parent about the conversation.

It is clear that at some time during the conference call, the Parent asked what she could do to help the situation. The Parent believed she was asking in the context of keeping things the same for her child. The Teacher suggested to the Parent that a letter to the Superintendent expressing the same position that she stated, during the call, to the Teacher would be helpful. The two agreed that the prior incident was nothing more than a misunderstanding and the Parent agreed to write the

letter to the Superintendent, as suggested. The Teacher and Parent appeared to be in accord as the conference call ended.

The Parent testified that she later came to believe that she had been threatened by the conference call. The Arbitrator finds that the expression of this personal emotional reaction to the call was credible testimony as to her state of mind. However, the facts of the record do not support a finding that the Teacher, and/or Guidance Counselor, actually engaged in threatening conduct. The Parent may have honestly perceived a threat but the evidence does not establish that such a threat was made or intended. There is absolutely nothing to support the Board's allegation that the Teacher was "extorting an exculpatory letter." The fact that the Respondent initiated a conference call, with the Guidance Counselor [the very problematic presence of the undisclosed third party shall be treated separately], to inquire and discuss if the Parent had a conflict with him is quite appropriate. Note that the evidence does not establish in any way that the Teacher indicated a desire or need to remove the student from his class. The Teacher asked the Parent if that was a result that *she* wanted. The Teacher never

raised the issue of changing JC's entire schedule. It was the Guidance Counselor who pointed out that it was possible that a change in math could cause further schedule revision.

The allegation set forth in Charge II, Count 1, referring to the December 20, 2013 conference call, that the Respondent "used the occasion to retaliate against [the Parent] by threatening to interfere with the placement of JC" is clearly not proved by the evidence. This is a serious charge requiring proof by a preponderance of the evidence. There is absolutely nothing in the record to suggest any retaliation, attempt at retaliation or intent of retaliation by the Teacher during the December 20, 2014 telephone conference call with the Parent. This count of the charge must be dismissed for failure to meet the burden of proving the misconduct alleged.

Similarly, the allegations in Charge II, Count 2, have not been proved by a preponderance of the evidence. The suggestion that the conference call was initiated under a pretense has no factual basis in the record. None of the testimony of the actual call establishes threatening or intimidating actions on the part of the Teacher. The

Arbitrator finds that the Parent testified, honestly and credibly, that, after the fact, she perceived that the call was threatening. However, the evidence does not establish that that perception was an accurate reflection of the Teacher's actions during the incident. The call was a reasonable inquiry as to whether a conflict existed and it was not truly threatening in nature. The discussion as to the Parent writing a letter to the Superintendent was a response to her inquiry as to what could be done to help the situation. There was not even a hint of a *quid pro quo* relating to that suggestion. The Parent and Teacher reached agreement that the prior issue was merely a result of a misunderstanding and that it was fully resolved before any discussion of a letter occurred. Following a prompt from the Parent, the Teacher did suggest that that understanding could be the basis for a letter to the Superintendent. The evidence does not support the allegations of threatening or intimidating conduct.

Charge II, Count 3, and Charge II, Count 4, also relate to charges that are not proved in the record. The Respondent did not threaten to disrupt the student's educational program. The Teacher did not attempt or threaten to modify JC's educational program. The above

discussion of the conference call explains the finding that the evidence does not prove that any threat occurred. To reiterate, the Teacher inquired as to the Parent's preference as to JC staying in the class. It was the Guidance Counselor, and not the Respondent, who raised the issue of the impact of changing one class on the student's entire schedule. It is important to note that none of the events has shaken the Parent's feelings of respect and trust toward the Guidance Counselor.

The Arbitrator finds that the Board proved, with clear and convincing evidence, as alleged in Charge II, Count 5, that the Respondent improperly involved a union representative in a conference call with the Parent. It is particularly troubling that this representative was present for the conference call on December 20, 2013 without any disclosure to the Parent. The surreptitious presence of the local Association representative is, at the very least, an ethical breach on the part of the Teacher and, further, it compromised the privacy of the student and Parent. The fact that there were not any private elements relating to the student actually divulged during the conversation does not reduce the impropriety of the conduct. The potential for breaching the confidentiality of the student's

educational program and 504 Plan details was substantial and makes the undisclosed presence of the representative particularly inappropriate. The Respondent was clearly guilty of the misconduct alleged in this count and that unbecoming conduct warrants an appropriate disciplinary action. The penalty imposed must be reasonably related to the severity of the misconduct proved. In the Matter of the Tenure Hearing of David Fulcomer, *93 NJ Super 404* (App. Div., 1967), the court declared that the independent decision maker should provide:

> …an affirmative decision as to the proper penalty to be imposed. Such penalty should be based on the [Commissioner's] finding as to the nature and gravity of the offenses under all the circumstances involved.

The Teacher's misconduct herein was serious but not nearly sufficiently severe to support dismissal as the penalty. The severity of the misconduct warrants a suspension of one month (thirty calendar days) without pay.

The allegations in Charge II, Count 6, are essentially the same as those of Count 5. The two counts are inseparable and treated together; Count 6 is subsumed in the discussion with respect to Charge II, Count 5, above.

The allegations of the Board with respect to Charge III are that the Teacher engaged in unbecoming conduct, including insubordination, in his presence at the Belleville Education Office on February 4, 2014. [The BEA office is located a flight above the Board offices, in an area of mixed use by the Board and the High School.] The claim is based upon the assertion that the Teacher had been given a directive by the Superintendent "to refrain from appearing on Board property without her permission, with the sole exception of being permitted to conduct union activity in Superintendent Feldman's office." There is also an additional allegation of disruptive conduct with respect to the Teacher's presence on February 4, 2014.

The evidence does not prove the allegation [Charge III, Count 1} that the Respondent engaged in open defiance of a directive from the Superintendent. It is extremely significant to note that there is no written evidence of a directive prior to February 10, 2014 [Exhibit P-18]. The Superintendent testified that, on January 2, 2014, she verbally directed the Respondent that he could conduct Association business only in her office. Exhibit R-10 is the minutes of the January 2, 2014 meeting between the Superintendent and the Respondent [others were present].

These minutes include no reference to the claimed directive although they do make reference to the Respondent's confirming with the Superintendent "that he would continue to act in the capacity of BEA President." Further, the Superintendent's affidavit [Exhibit P-17] states that on January 9, 2014 that "I informed Mr. Mignone that if he needed to conduct any type of union business, he could do so only in my office." This affidavit was dated February 28, 2014. Further, the Tenure Charges [Exhibit J-1] do not make any reference to January 2, 2014, as the Superintendent testified, as the date the directive was given. It sets that date as January 9, 2014.

The Arbitrator finds that the evidence does not credibly establish the specific nature of any directive given to the Teacher prior to his appearance at the BEA office on February 4, 2014. The Board does persuasively argue that the Respondent must have been aware of some restriction as reflected in his affidavit of January 6, 2014 [Exhibit P-20]. That document acknowledges the Respondent's awareness that security had circulated his picture to bar access to district buildings. The Arbitrator finds that such awareness does not prove the

existence of an express directive by the Superintendent to the Teacher.

An on the record tour of the location revealed that on February 4, 2014, the Teacher accessed the Board office building through an "Board Employees Only" doorway and that he proceeded up a restricted stairway to a set of offices that included the BEA office. High School students do have access to this area, but it was not generally a presence in a school setting, it was a limited presence in the Association office for the purpose of making some copies.

The claim of insubordination requires that the Petitioner prove that there was a clear directive with respect to the claimed insubordinate conduct. The record at hand simply does not provide credible evidence that such a directive existed prior to February 10, 2014, the date of the Superintendent's letter placing the directive in writing for the first time [Exhibit P-18]. The testimony and documentary evidence with respect to the claim that a clear directive was verbally issued on January 2, 2014 or January 9, 2014, is simply inconsistent, at best. If there was no clear directive prior to the Teacher's presence on February 4, 2014, there can be no finding that such

presence alone constitutes unbecoming conduct or insubordination. Charge III, Count 1, must be dismissed for lack of credible evidence that the alleged misconduct occurred.

Charge III, Count 2, is simply not supported by credible evidence on the record. The description of the conduct, that took place outside the BEA office, presents an exaggerated and inaccurate account of the actual events. There is absolutely no evidence to prove that a disruption occurred; indeed, there is clear evidence that the conduct was not disruptive or significant. The confidential secretary to the Superintendent, who was present when the Respondent encountered a fellow teacher, testified quite credibly that, although the discussion was with raised voices, it did not interfere with her work. She answered the question of whether the loud conversation was a big deal with the response "not at all, they were having a discussion." The other teacher involved, Ryan Sheridan, testified that he agreed with the confidential secretary that this discussion was not a big deal.

The allegations in Charge III, Count 2, are quite exaggerated and the evidence does not establish that any

disruptive incident occurred on February 4, 2014. This count must be dismissed for lack of proof of any misconduct.

Charge IV alleges a "pattern of unbecoming conduct manifesting unfitness to serve as a teaching professional and role model." The Arbitrator accepts the Board's premise that proving a pattern of unbecoming behavior might establish a basis for dismissal, despite the fact that any single act of misconduct proved might not warrant such a disciplinary penalty. However, the case at hand presents no credible proof of a pattern of unbecoming behavior. Indeed, many of the alleged acts of misconduct were simply not proved or exaggerated beyond the evidence. In the dispute presented there was a relatively minor incident of poor judgment in which the Teacher allowed a discussion to proceed for a twenty-minute duration during which it appears that he expressed personal views that were inappropriate. The Board addressed that incident with a letter of reprimand and the Teacher followed the corrective measure set forth in the letter and refrained from any repetition of such behavior. There is one other, more serious, element of misconduct that was proved by the Board, i.e. the undisclosed presence of an Association

representative during a conference call with a parent. There is no connection between these events and there is no credible evidence of any pattern of misconduct. Charge IV must be dismissed for failure to prove the underlying facts or that the pattern of misconduct charged occurred as alleged.

In conclusion, the Arbitrator finds that, although the class discussion of October 16, 2013 including some relatively minor measure of misconduct on the part of the Teacher, that misconduct was effectively dealt with through a letter of reprimand dated October 25, 2013 [Exhibit R-25]. That letter appears to have successfully resulted in corrective action, as there is absolutely no evidence of a repetition of the problematic behavior. Further, and more significantly, the Board proved its allegations of unbecoming conduct set forth in Charge II, Count 5. Specifically, the evidence proved that the Teacher engaged in substantial misconduct by having an undisclosed BEA representative present during a conference call with the Parent of one of his students and the Guidance Counselor. This surreptitious presence of the representative posed the potential violation of the privacy of the Parent and student despite the fact that nothing detrimental was

revealed in the conversation. It was an ethical violation and clearly unbecoming conduct. All other allegations of misconduct in the charges presented failed to be supported by sufficient credible evidence to meet the burden of proving the charges by a preponderance of the evidence; they must be dismissed.

The Arbitrator finds that the imposition of dismissal for the misconduct proved is not reasonably related to the severity of that misconduct. See: In the Matter of the Tenure Hearing of David Fulcomer, 93 *NJ Super.* 404 (App.Div. 1967). The appropriate penalty for the charge proved is a 30-day suspension without pay. It is important to emphasize that the Respondent has had an excellent record as a teacher in the District and that his abilities in the classroom, except for the single 20-minute discussion with students on October 16, 2013, are without any critical complaint. His record as a teacher is praiseworthy. The Award herein shall order that the Teacher be returned to his former position. He shall be made whole for any loss of compensation beyond the one-month (thirty-day) suspension without pay ordered herein.

A W A R D

With respect to Charge I, IT IS HEREBY DETERMINED that the charges are generally founded on an exaggerated interpretation of the events including a number of factual allegations that are clearly not established by the evidence. To the extent that there is some accuracy in the facts alleged, the Board has effectively dealt with the matter through a letter of reprimand issued October 25, 2013; there has been no repetition of such problematic conduct in the classroom. Those elements proved with respect to Charge I do not support any action beyond the letter of reprimand and certainly do not support tenure charges seeking a dismissal of the Teacher. Therefore, IT IS HEREBY ORDERED that Charge I is dismissed in its entirety.

In accordance with the evidenced established on the record, IT IS HEREBY DETERMINED that the charge set forth in Charge II, Count 5, is sustained. IT IS FURTHER DETERMINED that the charges set forth in Charge II, Counts 1 through 4, are dismissed for failure to prove the alleged misconduct by a preponderance of the evidence. Charge II,

Count 6, is subsumed in the treatment of Count 5, as the two are intertwined and inseparable. IT IS HEREBY ORDERED that the appropriate penalty for the sustained charge in Charge II, Count 5, is a one-month (thirty-day) suspension without pay. IT IS FURTHER ORDERED that Charge II, Counts 1 through 4, are dismissed.

IT IS FURTHER ordered that Charge IV is dismissed for failure to prove a pattern of misconduct as alleged.

In conclusion, IT IS HEREBY ORDERED that the Respondent's misconduct result in a one-month suspension without pay. Additionally, IT IS HEREBY ORDERED that the Respondent be reinstated to his former position and be made whole for the loss of compensation, if any, beyond the one-month suspension without pay, imposed herein.

Dated: July 28, 2014

Skillman, N.J.

Joel M. Weisblatt, Arbitrator

On this 28th day of July 2014, before me personally came and appeared Joel M. Weisblatt, 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 the same.

Attorney-at-law