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In the Matter of Tenure Hearing of Dr. Audrey Cuff:

CUMBERLAND REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION

Case No. 71-3/14

and

OPINION
and AWARD

DR. AUDREY CUFF

Before:

Edmund Gerber, Arbitrator

Appearances:

For the Cumberland Regional School District
Board of Education:
John G. Geppert, Jr., Esq.
Schwartz, Simon, Edelstein & Celso, LLC

For the Respondent:
Keith Waldman, Esq.
Stephen B. Walton, Esq.
Selikoff & Cohen, P.A.

The Cumberland Regional Board of Education brought tenure charges against Dr. Audrey Cuff (Respondent) a member of its teaching staff. I was designated arbitrator pursuant to the procedures of the State of New Jersey, Department of Education. Hearings were conducted on May 21, May 29 and June 2, 2014 at the offices of the Cumberland Regional Board of Education. Both parties introduced evidence, examined and cross-examined witnesses and made argument. Post-hearing briefs were submitted by both parties and were received by June 23, 2014.

ISSUE

Did Dr. Audrey Cuff engage in acts or omissions constituting inefficiency, incompetence, insubordination, conduct unbecoming or other just cause

for dismissal? If so, does the conduct warrant dismissal from the Board or some lesser penalty?

BACKGROUND

Dr. Audrey Cuff was first employed by the District as a substitute teacher in 1998 and was hired as a full-time teacher for the 2003-2004 school year. She taught Psychology and Earth Sciences and, in the past, coached the high school cross country team as well as track. She received satisfactory ratings on her annual performance reviews and accompanying pay increments for the school years 2010-2011 and 2011-2012.

On March 19, 2011, the Cumberland Regional School District Board of Education filed tenure charges against Dr. Audrey Cuff. The charges were:

Charge 1

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency and/or other just cause for dismissal related to failure to comply with directives to post lesson objectives and use measurable objectives. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than January 14, 2011, and continuing throughout March 16, 2011, repeatedly later warned, directed, admonished, instructed or otherwise advised her that the Board required that she post on a daily basis the objectives of that day's lesson and use measurable objectives in her lessons and class. Dr. Cuff repeatedly failed to adhere to and/or adequately heed the administrators' directives, admonishments, instructions, commands and advice, both verbal and written.

Charge 2

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency and/or other just cause for dismissal related to failure to comply with directives regarding structure of lessons and to prepare, maintain, submit and/or implement appropriate lesson plans. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than October 5, 2010 and continuing through March 16, 2011, repeatedly warned, directed, admonished, instructed or otherwise advised Dr. Cuff that the Board required her to timely prepare, maintain, submit, and carry out appropriate lesson plans, during which time Dr. Cuff repeatedly failed to adhere to and/or adequately heed the administrators' directives,

admonishments, instructions, command and advice, both verbal and written.

Charge 3

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency, and/or other just cause for dismissal relating to failing to comply with directives to post a focus activity and/or use a focus activity of appropriate length. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than October 5, 2010 and continuing throughout January 14, 2011, repeatedly warned, directed, admonished, instructed or otherwise advised Dr. Cuff that the Board required her to post a focus activity and/or use a focus activity of appropriate length, during which time Dr. Cuff repeatedly failed to adhere to and/or adequately heed the administration's directives, admonishments, instructions, command and advice, both verbal and written.

Charge 4

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency, and/or other just cause for dismissal for failure to comply with directives to not repeat objectives and activities in lesson plans. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than February 24, 2011 and continuing throughout March 9, 2011, repeatedly warned, directed, admonished, instructed or otherwise advised Dr. Cuff that the Board required her to not repeat objectives in lesson plans numerous days in a row, during which time Dr. Cuff repeatedly failed to adhere to and/or adequately heed the administration's directives, admonishments, instructions, commands and advice, both verbal and written.

Charge 5

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency, and/or other just cause for dismissal for failure to comply with directives to use closure activities that assess the progress of each student and their mastery of the objective. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than February 25, 2011 and continuing throughout March 18, 2011, repeatedly warned, directed, admonished, instructed or otherwise advised Dr. Cuff that the Board

required her to use closure activities that assess the progress of each student and their mastery of the objective, during which time Dr. Cuff repeatedly failed to adhere to and/or adequately heed the administration's directives, admonishments, instructions, commands and advice, both verbal and written.

Charge 6

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency, and/or other just cause for dismissal related to failure to comply with directives to use class time effectively. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than March 18, 2011 and continuing throughout March 28, 2011, repeatedly warned, directed, admonished, instructed or otherwise advised Dr. Cuff that the Board required her to use class time effectively, during which time Dr. Cuff repeatedly failed to adhere to and/or adequately heed her supervisors' directives, admonishments, instructions, commands and advice, both verbal and written.

Charge 7

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency, and/or other just cause for dismissal for failure to comply with directives to cooperate and participate appropriately in mandatory conferences and/or answer administrators' questions. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than March 22, 2011 and continuing throughout June 7, 2013, repeatedly warned, directed, admonished, instructed or otherwise advised Dr. Cuff that she was required to follow directives, including to cooperate, participate in mandatory conferences and/or answer administrators' questions, during which time Dr. Cuff repeatedly failed to adhere to and/or adequately heed her supervisors' directions suggestions and concerns, both verbal and written.

Charge 8

Conduct unbecoming a teaching staff member, incompetence, insubordination, inefficiency, and/or other just cause for dismissal related to failure to post grades in a timely manner. Throughout her employment with the Board, Dr. Cuff's supervisors, pursuant to Board policy and regulation, beginning not later than March 16, 2012 and continuing

throughout September 26, 2013, repeatedly warned, directed, admonished, instructed or otherwise advised Dr. Cuff that the Board required her to post her grades in a timely manner, during which time Dr. Cuff repeatedly failed to adhere to and/or adequately heed her supervisors' directions suggestions and concerns, both verbal and written.

Charge 9

Failure to improve despite repeated evaluations noting incompetency. Despite numerous admonitions, evaluations, cautions and citations informing her of the need to improve and to live up to District standards, Dr. Cuff has failed over a period of hears to demonstrate either the desire or the ability to do so.

Dr. Cuff submitted an answer to the tenure charges denying each allegation contained therein and raised separate defenses, including: The Board failed to state a claim upon which relief can be granted, The Board has failed to comply with the procedures of TEACHNJ at P.L. 2012, c. 26. Charge 9 is not a statutory basis for discipline increment withholding or discharge. The Board's separate charges allege the same conduct and should be merged.

TESTIMONY

Board witnesses' testimony as to Charge 1 - Cuff's failure to post lesson objectives on the blackboard and use measureable objectives.

During the school year 2010-2011, Cuff's immediate supervisor was Amy Draggoo, the Director of the Child Study Team. As part of her supervisory duties, Draggoo conducted numerous walk-throughs, short unscheduled visits to the classrooms of teachers. Draggoo would submit a written summary of her observations and recommendations following such walk-throughs. Following a January 14, 2011 walk-through, Draggoo noted that Cuff failed to place the lesson's objective on the blackboard. It was only when Draggoo sat down for a few minutes in the classroom that Dr. Cuff wrote on the board the objective "what is the earth science review?" Draggoo noted that this was not an acceptable or measurable objective, nor was it the objective that was written and submitted in the week's lesson plan. Similarly, Draggoo conducted walk-throughs on February 25, 2011 (P-18) and March 16, 2011 (P-33) and noted on the observation summaries that Dr. Cuff failed to write the objective of the lesson on the board and posted objectives that were not measureable. In addition, on walk-throughs on March 18, 2011 (P-2), December 7, 2011 (P-4), September 25, 2012 (P-5), October 3, 2012 (P-6), October 22, 2012 (P-7), September 26, 2013 (P-8), October 11, 2013 (P-9), on November 15, 2013 (P-13). Draggoo conducted walk-through observations and

noted on her written observation summaries that Dr. Cuff either failed to have an objective on the board or have an objective that was measurable on the board.

In addition, High School Assistant Principal Ralph Aiello conducted a walk-through on May 5, 2011 (P-3) and noted in his observation summary that Dr. Cuff used an objective that was not measurable. On December 6, 2013, Dr. Cuff had a meeting with supervisors Draggoo and Aiello and was cited for having objectives written on the board that were not measurable. (P-16 & P-46). Nonetheless, on December 18, 2013, High School Principal John Mitchell, in a short observation of Dr. Cuff's class observed, among other issues, that the objective written on the board was poorly written and contained grammatical errors and errors in punctuation. Further, it only partially aligned to the learning activities.

Board witnesses' testimony as to Charge 2 – failure to comply with directives concerning the structure of lessons and failure to prepare appropriate lesson plans.

On October 5, 2010, Draggoo sent a note to Dr. Cuff stating that her lesson plans needed to be much more specific; they must explain what the lesson's focus activity is and what the students will be doing. Her lesson plan as written was much too vague. (P-10). On January 14, 2011, Draggoo noted in her observation summary that the objective posted on the board did not coincide with the weekly lesson plan Dr. Cuff had submitted. Draggoo also testified that on February 25, 2011, Dr. Cuff showed a movie as a main activity with no instruction given on her objective.

Dr. Cuff had a meeting with School Superintendent William Stonis on September 27, 2011 to discuss her Annual Performance Review of March 20, 2011 and reviewed those areas of her where she was rated as not meeting standard. One area was her lesson plans. Cuff was advised to include more detail and assessments into her lesson plans. (P-52). Subsequently, in a walk-through observation on October 7, 2011, Vice Principal Aiello found that the objectives written on the board did not correspond to anything in Dr. Cuff's lesson plans. Aiello testified that it was very unusual for a supervisor to have to cite a teacher three times consecutively about the same performance deficiency.

On December 18, 2011, Mitchell criticized Dr. Cuff's lesson plans for being ineffective. (P-17). On December 20, 2013, Dr. Cuff left an unacceptable lesson plan for a full length feature film lasting two hours to be shown during class and students to write a 5 page essay all during an 80 minute class (P-25).

On March 9, 2012, Dr. Cuff took medical leave from the school for three months and failed to leave lesson plans for her classes in her absence. (P-21 & P-22).

Board witnesses' testimony as to Charge 3 – Cuff failed to comply with directives to post a focus activity and to use a focus activity of appropriate length.

Draggoc directed Cuff to have better explanations of the focus activity written on her blackboard on October 5, 2010. (P-10). Nevertheless, Cuff was cited for failing to have a focus activity posted or having one that was inappropriate on March 28, 2011 by Mitchell (P-26), and by Draggoc on February 24, 2012 (P-27), October 3, 2012 (P-6), November 30, 2012 (P-28) September 5, 2013 (P-29), September 26, 2013 (P-8), September 27, 2013 (P-30), October 11, 2013 (P-9), December 6, 2013 (P-16), and December 9, 2013 (P-31),. Each time Draggoc noted in an observation report that Cuff either failed to have a focus activity posted or the focus activity posted was incorrect or insufficient.

On December 11, 2013, Draggoc and Mitchell met with Cuff about actions she had to take pursuant to a 90 day Corrective Action Plan issued to Cuff (This was Cuff's second consecutive 90 day Corrective Action Plan [P-29]). Cuff asked for a list of focus activities and was reminded that a list of focus activities had been in her action plan the entire time. According to Mitchell, one week later, on December 18, 2013, Cuff used questions on her focus activities that did not focus on the objective of the lesson nor did they show that the students mastered the objective. On January 24, 2014, Draggoc again cited Cuff for inadequate focus activities (P-32).

Board witnesses' testimony as to Charge 4 – Cuff failed to comply with directives to not repeat objectives and activities in lesson plans.

Draggoc testified that she repeatedly advised Cuff not to repeat her lesson plans. She did so on February 24, 2011 (P-19) and February 25, 2011 (P-18). Draggoc testified that on approximately 12 days in that February, Cuff used identical or almost identical objectives. Draggoc cited her for these repetitive objectives in an email on March 16, 2011. (P-33). On March 22, 2011, in Cuff's annual performance report, Draggoc again noted that lesson plans were not to be repeated from day to day. (P-34). Nevertheless, on January 24, 2014, Cuff continued to list the same focus and closure activities on a daily basis. (P-32).

Board witnesses' testimony as to Charge 5 – Respondent failed to comply with directives to use closure activities that assess the progress of each student and their mastery of the objective.

Draggoc criticized Cuff for failing to give assessments as a closure activity that assess the progress of students on the lesson's objectives on February 25, 2011 (P-18), March 18, 2011 (P-2), March 20, 2011 and March 28, 2011 (P-34). Draggoc criticized Cuff for failing to use closure activities that would enable her to assess the progress of

each student to ensure they had mastered the class' objective (P-34). Similarly, Cuff was cited for failing to have a proper closure activity on February 12, 2012 (P-27). Cuff was cited in her formal evaluations of March 20 2011 (P-35) and February 24, 2012 (P-28) for failure to use proper closure assessments. Nonetheless Cuff failed to give proper assessments on: September 25, 2012 (P-25), October 3, 2012 (P-6), October 11, 2012 (P-35), October 22, 2012 (P-7), October 26, 2012 (P-36), November 30, 2012 (P-28), June 1, 2013 (P-16), December 6 (P-31), and December 9, 2013 (P-36, P-60) December 8, 2013 (P-17), January 16, 2014 (P-38) and January 28, 2014 (P-32).

Board witnesses' testimony as to Charge 6 – Respondent failed to comply with directives to use class time effectively.

Draggoo had noted in her walk-through observation summary on March 18, 2011 (P-2), and Cuff's Annual Performance Report of March 20, 2011 (P-34) that Cuff had students copy word for word as Cuff read aloud from the textbook. Similarly, in an Observation Instrument by Mitchell on March 28, 2011 (P-26) Cuff was criticized for having students copy word for word from a text book. Mitchell testified that this activity has "no educational use" and criticized Cuff for failing to employ reading strategies to take advantage of teachable moments. In spite of being advised to cease such activity On February 24, 2012, Draggoo observed Cuff's classroom where students spent an hour and ten minutes copying lab steps from a textbook onto a lab sheet word for word. (P-27).

On September 14, 2012, Draggoo advised Cuff that she needed to improve her planning so she could better use class time with no down time. (P-40). On February 13, 2012, in an email to Cuff, Draggoo noted that three students on separate occasions expressed concerns over Cuff's classroom and asked to have their schedules changed. (P-41). Draggoo noted on October 26, 2012, Cuff ran a video in her classroom but three students had their heads down and eyes closed, yet Cuff failed to address those students (P-36). Draggoo met with Cuff on June 1, 2013 and explained that Cuff needed to improve her planning and effective use of class time. (P-37 & P-40). On September 13, 2013, there were three students in Cuff's classroom who had finished with their assessments five minutes into the class and were sitting with nothing to do (P-42). On November 15, 2013, Cuff had students watch a video but did not have any questions for them to answer or any activity for them to complete, according to Draggoo's walk-through observation summary. (P-13). On December 18, 2013, Mitchell observed a class wherein Cuff used a video that did not align with the class objective. He noted that no students took notes and one student was asleep during the video. (P-17).

As previously indicated, Mitchell testified that on December 20, 2013, Cuff's lesson plan called for a film lasting more than two hours and it did not relate to the topic

that Cuff was teaching. On January 16, 2014, Draggoo observed 70% of Cuff's classroom sitting for 15 minutes with no activity to complete. (P-38).

Aiello testified that in April 2011, he observed Cuff sitting in a classroom while a fellow teacher conducted a course where three students were sleeping. (P-39).

Board witnesses' testimony as to Charge 7 – Cuff failed to comply with directives and failed to participate appropriately with mandatory conferences and/or answer administrators' questions.

Draggoo testified that Cuff would act inappropriately and uncooperatively during conferences. Specifically, on March 22, 2011, Draggoo asked Cuff to clarify an earlier statement but Cuff responded "I do not have a comment." Stonis admonished Cuff for her refusal to answer his questions on September 27, 2011. Her only comment on that and other occasions was that "she was advised not to respond." Stonis testified that he considered such actions insubordinate. On June 7, 2013, while Cuff was on medical leave, Draggoo requested an APR meeting. Cuff replied that she would not be able to attend any work related meetings or issues until she returned to work in September. When Draggoo requested a conference by phone or email, Cuff responded that she "will have it back to you by the end of August." On December 16, 2013, during a meeting with supervisors, Respondent laughed out loud and refused to follow along or even pick up the action plan which is a seven page document. When the issue of the Board curriculum was brought up, Cuff again laughed out loud. In response to a comment by Draggoo, Cuff said, "I've got something to help both of us too." When asked to clarify, Cuff only stated "everything will be in writing," but Cuff never did give a written response.

According to Draggoo, when she discussed Cuff's failure to follow the approved curriculum for the psychology course, Cuff laughed out loud. Aiello testified that it was unusual for teachers to snicker at supervisors.

Draggoo noted that Cuff did not teach those portions of a Psychology text book which were part of the curriculum. Cuff responded that she would teach the entire book from beginning to end. According to Draggoo, the textbook was not specific to State standards and should not be taught from beginning to end. Further, contrary to the curriculum, in teaching Psychology, the students like to study psychological disorders but Cuff was teaching these at the beginning of the course and, according to the curriculum, this topic should be saved until the end of the course in order to maintain students' interest.

On December 11, 2013, Cuff arrived late for a meeting with Draggoo and Stonis and, after some discussion kept repeating only, "I was required to ask." Cuff's

statements were of concern to Stonis. Cuff left the meeting early and asked to reschedule it.

On December 16, 2013, according to Aiello and Draggoo, Cuff refused to take part in a meeting that she requested, including answering questions that were posed to her by Aiello. When Draggoo asked her to sit down to discuss her lesson plans, Cuff refused and stated that she was advised to "send your questions to me." When asked who was advising her, Cuff walked out and refused to discuss her plans.

Mitchell prepared a memorandum on January 7, 2014 concerning a post-observation conference with Cuff. According to Mitchell, Cuff was supposed to have completed and filed a response before the conference to be combined with the observation. Cuff failed to produce a response claiming she could not access it and further, she was unable to remember or provide her personal goal for the 2013-2014 school year, which she was required to do to satisfy her corrective action plan.

On December 11, 2013, Cuff requested her professional development certificates from the curriculum office for a third time. She had previously received copies of certificates on two other occasions, even though staff members have a responsibility to maintain their original PD certificates.

Board witnesses' testimony as to Charge 8 – Cuff failed to post grades in a timely manner.

Cuff was admonished on March 16, 2012 for failing to record her grades in June 2011 and post her interim grades by the required date of March 8, 2012. Despite having been reminded that two grades must be posted each week for the faculty handbook, as of September 26, 2013, 21 of her students did not have any grades posted and four students had only one grade posted. (P-11, P-22, P-72, P-74). On October 8, 2013, Cuff failed to post her grades on time and was notified that she failed to do so. (P-44, P-63, P-64). On December 18, 2013, Cuff again failed to report grades in a timely manner and recorded only 3 tests and 6 quizzes while the District policy required a minimum of 4 tests and 7 quizzes (P-17, P-72). In a meeting with supervisors in February 2014 to discuss her student growth objective (SGO) scores, Cuff provided a list of scores which she claimed placed her in the highly effective range. However, there was no evidence to support this. A review of the Genesis grade book after the meeting revealed that there were no scores reported except for a final exam average. Nor were there evidence of rubric scores. The final exam scores recorded by Cuff did not match up to those recorded in Genesis, nor was there evidence of non-graded assignments to account for her claimed SGO scores (P-70).

Charge 9 – Cuff failed to improve despite repeated evaluations noting incompetency.

Cuff's overall performance on her February 25, 2011 observation was rated "does not meet District standards and is unacceptable" and "does not meet District standards for instructional planning or instructional interaction." (P-18). Stonis requested a meeting with Cuff to discuss the evaluation and observations during the school year and specifically warn her that her performance did not meet District standards. Again, in an annual performance report of March 20, 2011, Draggoo rated Cuff as performance areas needing improvement. Cuff was instructed to: 1) restructure the focus length activity, 2) utilize closure activities that assess the progress of each student, 3) employ varied reading strategies, 4) create a word wall of vocabulary words, and 5) lesson plans need to show a lesson plan for each day. (P-34).

In the March 28, 2011 Observation Instrument, Mitchell rated Cuff's overall performance as needs improvement to meet all District standards and "does not meet district standards" for "instructional interaction." (P-26). On December 7, 2011, Bonnie Powers rated Cuff in an observation instrument as "does not meet Districts standards and is unacceptable" and "does not meet district standards" in the specific areas of "instructional planning" and "instructional interaction." (P-4). Again on February 24, 2012, Draggoo in an Observation Instrument rated Cuff's overall performance as "does not meet District standards and is unacceptable. Staff member does not meet standards in two or more domains." Cuff was also rates as "does not meet District standards" in "instructional planning, instructional interaction and evaluation of instruction." (P-27). It was at this time that the three students asked to be transferred from Cuff's psychology class. Draggoo testified that it was unusual for so many students to do so.

On March 2, 2012, Draggoo conducted an evaluation of Cuff. During a conversation between Cuff and Draggoo where Draggoo emphasized the need to have an assessment after each class, Cuff stated out loud in front of her students that "they don't get it because of their IEP's." Draggoo rated Cuff's overall evaluation as unacceptable. Draggoo testified that it was very rare to rate an evaluation as unacceptable and had only given out a handful over several years. Draggoo also testified that she would repeat the same criticisms over and over again to Cuff but Cuff never seemed to make any adjustments and learn from the criticisms.

In her September 14, 2012, in a 90 day Correction Action Plan (P-40), Cuff was warned that improvement was necessary with respect to 1) planning of effective use of class time, 2) lesson plans need to contain effective elements of an effective lesson, 3) communicate effectively with learners, and 4) the use of evaluation of student outcomes. (P-40). On October 15, 2013, after a short observation by Stonis, Cuff was

rated as ineffective in using assessment in instruction and partially effective in designing coherent instruction, establishing a culture of learning using questioning and discussion techniques, engaging students in learning and maintaining accurate records.

In a short observation conducted by Mitchell on December 18, 2013, Cuff was rated as ineffective in designing coherent instruction, communicating with students, engaging in students in learning and maintaining accurate records, and partially effective in establishing a culture of learning, using questioning and discussion techniques and using assessment in instruction. Mitchell testified that Cuff had a diagram of the brain on the black board but the parts of the brain were incorrectly labeled. Cuff presented a good video but it was not pertinent to the lesson; it was the poorest lesson he had observed that year and he would not want a student in respondent's class. (P-17). Aiello testified that he would rate Cuff poorly in 2013-2014 during which time her performance continued to deteriorate.

Stonis reviewed the memoranda concerning Cuff's meetings with her supervisors on December 6 and 11, 2013 as well as her action plan and lesson plans since March 2011. He testified that Cuff's poor performance and failure to improve throughout this period together with all of her other deficiencies led Stonis to determine that tenure charges against Cuff were warranted.

Testimony of Respondent's Witnesses

Audrey Cuff testified that she received satisfactory ratings on her APRs and received pay increments in 2010-11 and 2011-2012 school years. Nothing on those documents stated that tenure charges were imminent because of teaching performance.

Cuff received an unsatisfactory rating on her APR for the 2012-2013 school year, dated June 1, 2013 (P-51)' and had her pay increment was withheld. But the stated reason for the denial of the increment was that she for her attendance. She was on medical leave from December 6, 2012 through June 20, 2013. The APR stated she did not qualify for FMLA leave and her continued absences have repeatedly disrupted the learning process for students and created a hardship for the District.

The APR indicated that no observations were made of Cuff for the 2012-13 school year since she left on medical year on December 6, 2012 before a formal evaluation was ever conducted. The evaluation referred to the 90 day Correction Plan that was implemented for Cuff the prior year and stated that the prior plan would be continued into the 2013-2014 school year. The improvement plan addressed: Cuff's need to plan the effective use of class time, lesson plans had to contain "effective elements of an effective lesson, Cuff had to effectively communicate with learners and Cuff had to make use of evaluations of student outcomes.

Cuff believed her increment was withheld because of her attendance and had nothing to do with her teaching performance. The evaluation does not warn her that she faced possible tenure charges because of her teaching performance. Cuff also testified that her APRs and informal observations contained both negative and positive comments about her teaching performance. (See R-24 through R-30). Even when her teaching performance was subject to criticism, she was never warned that the administrators regarded her teaching performance as to be so substandard as to warrant tenure charges.

Cuff knew that the Board had issues with her teaching performance but, because the administrators had rated her satisfactory in all of her previous APRs, received pay increments every year prior to June, 2013, and since none of her evaluative instruments mentioned tenure charges, Cuff maintained that she never knew that in the eyes of the Board and the administration her performance was so poor that tenure charges were imminent. Cuff acknowledged that she was put on 90 day action plans in both 2011-2012 and 2012-2013 but the Board never served tenure charges with either action plan.

She testified that, pursuant to her improvement plans, she was required to turn her lesson plans in to Draggoo ahead of time before the lesson's implementation so that the Draggoo could review and approve or disapprove her lesson plans. Cuff maintains that the schools administrators, including Mitchell, Aiello and Draggoo, failed in their duty to inform her that any part of her lesson plans was unacceptable before she implemented them. Cuff was assigned by the Board to work with Ms. Hamilton who would review her lesson plans so she could make changes if she felt the changes were necessary. Hamilton would then return the reviewed and amended plans to Cuff indicating the plans were ready to be implemented. Cuff would submit her lesson plans to Draggoo through the On Course system only after Hamilton's review. If she did not hear from Hamilton or Draggoo that her plans were unacceptable, Cuff believed that her plans were acceptable to implement and proceeded to implement them.

Ivy Hall, a psychology and sociology teacher at the high school, repeated lesson plans three times in two weeks and was never cited or critiqued in any way as Cuff was. Tom Lake, a science teacher at the high school, testified that he uses the exact same closure activity, an exit ticket, every day and in all classes every year. Lake was never cited in any year as Cuff was.

On cross-examination, Stonis conceded that the summative evaluation or APR used by the Board to evaluate a teacher's performance over the entire year has no rating categories and fails to comply with the requirements set forth in the TEACHNJ Act and its regulations. Stonis acknowledged that the school district's manual sets forth that the Board and its administration, if it decides to withhold a pay increment, must observe the teacher twice more before an increment can be withheld and said

observations must be done by administrators who did not recommend the increment withholding. (R-20). After Draggoo recommended withholding Cuff's pay increment for 2013-2014, Cuff was not observed again before her increment was withheld.

Cuff filed three civil rights complaints with the New Jersey Division of Civil Rights and a worker's compensation complaint against the district. In addition she successfully filed a complaint that she was not certified to teach an assigned course. The Board paid Cuff \$17,000 for her worker's compensation claim and settled one of the civil rights complaints by paying Cuff \$2,700. The latter complaint concerned the district's alleged failure to pay her salary increase upon obtainment of a PHD degree. The other two complaints were dismissed. One of the complaints centered on Mitchell. Cuff wore a tee shirt to school with "Vote Obama" written across the front. When Mitchell saw the tee shirt he was holding a two way radio in his hand. He told Cuff that she could not wear anything with a partisan campaign message in the school and waved the radio in his hand in the direction of the message on the shirt. Cuff claimed the antenna of the radio brushed her breasts. Cuff also complained to the Administration that she was assigned a windowless, undersized classroom and was assigned to teach a class for which she lacked certification. The District was forced to change her assigned classroom.

In rebuttal to this testimony, Aiello testified that the district attempted to give Cuff her own room rather than have her share a room with another teacher. Cuff had previously claimed that her private property had been pilfered when she shared a classroom. After Cuff complained about her classroom assignment her room was changed. Although the room had been used as the detention room, it was discovered that the room could not be used as a classroom since the buildings original plans designated the room as a closet. Further, Cuff was assigned the class for which Cuff lacked certification because Cuff had submitted a document to the Board in which she indicated that she was "well qualified" in the subject matter. It was only when Cuff complained about the assignment that the district became aware that Cuff lacked proper certification.

Cuff claimed that Aiello and Draggoo ridiculed her by constantly asking her if she was "educated." Cuff also testified that she was acting under the advice of union representation when she requested to end meetings and did not immediately agree to meet with Draggoo when requested to do so.

Cuff maintains that when it was observed that three students were sleeping in her classroom, her co-teacher was teaching in front of the room while she was seated with her back towards the sleeping students and did not know that they were asleep. Cuff did acknowledge that she failed to submit grades on time.

LEGAL ARGUMENT

Board of Education's Arguments

The District argues that it has proven by a preponderance of credible evidence that the Respondent is guilty of insubordination, incompetence, inefficiency, conduct unbecoming and/or other just cause warranting dismissal. Specifically, the Respondent is guilty of incompetence based upon the well established body of school law, principles and precedence. Incompetence has long been regarded and used as an appropriate standard for conduct in judging the conduct of teaching staff members. A tenure charge of incompetence requires proof that the affected employee, regardless of the assistance offered, does not have the ability or capacity to perform effectively. The charge of incompetency as distinguished from the charge of inefficiency presumes that the proofs in support of the charge will demonstrate that the Respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirement of the 90 day improvement period ... would be a useless exercise. [Tenure Hearing of Inez McRae, 1977 S.L.D. 572, 584]. Unlike the inefficiency process, a tenure charge of incompetence has never required a 90 day improvement period. Stated differently, regardless of the assistance offered by certified supervisors, the employee does not have the ability or capacity to be an effective teacher. Notably, after the effective date of TEACHNJ, a 90 day improvement period is no longer necessary, even in inefficiency cases. [Tenure Hearing of Carter, Agency Docket No. 369-12/12].

Incompetence requiring removal from a teaching position has also been found notwithstanding a teacher's prior effective performance and evaluation. [Teaneck Board of Ed. v. Houge, 83 S.L.D. 25 Aff'd, 83 S.L.D. 40 (St. Bd.)]. Here, the Board has proven by a preponderance of the evidence, the truth of the charges of incompetency in its charges of Respondent. Respondent persistently failed to improve her performance despite numerous fair and objective evaluations from 2011 onward which noted her teaching deficiencies and despite extensive assistance offered by the administration including three separate 90 day improvement plans. The evidence demonstrates that the Respondent is "so lacking in competency to perform the responsibilities of classroom teacher that the requirement of the 90 day improvement period would be and in this case on three separate occasions proven to be a useless exercise." Therefore the charge of incompetency must be sustained.

The Respondent is guilty of inefficiency based upon well established body of school law, principles and evidence. Inefficiency of a teaching staff member has long been established by the showing a teacher's failure to effectively perform her duties. (Failure of a tenured teacher to timely submit lesson plans was sufficient to established charges of inefficiency. Rowley v. Manalapan-Englishtown Board of Education, 205 N.J. Super. 65, 70 (App. Div. 1985).) In Tenure Hearing of Secula, 77 S.L.D. 967,

(Comm'r 1977) Aff'd 77 S.L.D. 1975 (St. Bd. 1977) a mathematics teacher accumulated numerous consistently poor evaluations based upon his lack of understanding of the subject areas and incorrect explanations of mathematical terms. Thereafter, he was given notice of these inefficiencies and provided with assistance by the district, but subsequently received additional numerous poor evaluations for nearly identical reasons. It was found that based upon the above facts, the respondent should be dismissed from his teaching position.

Cuff argues that the Board was required to provide a written notice to her with a 90 day improvement prior to the filing of tenure charges. Prior to the enactment of TEACHNJ in August of 2012, a district was required to inform the employee that their performance was deemed inefficient and further inform the employee that unless the inefficiencies are corrected within a minimal 90 day period, it intended to certify charges of inefficiency. N.J.S.A. 18A:6-11 previously read that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency specifying the nature thereto and allow at least 90 days in which to overcome the inefficiency. This section of the statute, pertaining to written notice and a 90 day plan, was removed from the statute by TEACHNJ effective August of 2012 and prior to the institution of this suit. The requirement of a 90 day improvement plan is not applicable to the present case and such an argument must fail.

Cuff also argues that a defense of discrimination exists under the statute in this matter. However, pursuant to N.J.S.A. 18A:6-17.2 (also known as Section 23), when considering tenure charges of inefficiency, under Section 25 of TEACHNJ, "the arbitrator shall only consider whether or not ... (3) the charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by federal or state law." The reference to Section 25 is specifically limited to filing tenure charges of inefficiency based upon the results of two consecutive years under the new evaluation rubric. Thus the statutory defense of "discrimination" is unavailable in the present case for the reason that by the express terms of the statute, the discrimination defense in N.J.S.A. 18A:6-17.2 is restricted solely to charges brought under N.J.S.A. 18A:6-17.3, after two years of using the new evaluation rubric have elapsed. Even if such a defense were available to Respondent, however, there is no evidence in the record to support it. Respondent's previously filed complaints against the District in the New Jersey Division of Civil Rights concluded with findings of no probable cause or withdrawn by Respondent. The District's administrators testified consistently that the Respondent's complaints had no bearing on their observations and evaluations. Nor is there any evidence that the charges were motivated by an incident in 2008 in which the Respondent was advised of the District's policy regarding political advertisements in the classroom. In accord, Tenure Hearing of Carter, Agency Docket No. 369-12/12 (Simmelkjaer, July 18, 2013), where it was held

that tenure charges of inefficiency filed after TEACHNJ took effect do not require written notice of a deficiency and a 90 day corrective period. [See also Tenure Hearing of Chavez, Agency Docket No. 269-9/12 (Brown, February 6, 2013)]. The record further shows that Respondent was truly an inefficient teacher. Assuming the Respondent had the capacity to perform ably, the record evidence in this case amply demonstrates that she persistently failed to do so. Respondent repeatedly failed to prepare, maintain and implement appropriate lesson plans, not repeat objectives and activities in lesson plans, submit timely grades and successfully respond to the District's exhaustive efforts to assist Respondent including three separate performance improvement plans. These facts alone, which were not materially contradicted by Respondent or any other witnesses, are sufficient to sustain the charge of inefficiency.

Here, the District has proven the charge of insubordination by a preponderance of the evidence in the record, which includes cumulative and unrefuted examples of respondent displaying a willful and deliberate refusal to perform work and disregarding supervisors' legitimate directives. Specifically, Respondent repeatedly refused to comply with directives to post lesson objectives and use measureable objectives, prepare, maintain and/or implement appropriate lesson plans, post a focus activity and/or use an appropriate focus activity of appropriate length, not repeat objectives and activities in lesson plans and use closure activities that assess the progress of each student and their mastery of the objective, use class time efficiently, and post grades in a timely manner. Further, the record reveals that Respondent persistently displayed an attitude of defiance and disrespect towards her supervisors as evidenced by her repeated refusals to cooperate and participate appropriately and mandatory conferences and/or answer administrators' questions by laughing and snickering inappropriately in response to such questions.

Respondent is guilty of conduct unbecoming based upon the well established body of school law, principles and precedence. 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 confidence in the operation of public services. In Lava v. Newark Bd of Ed., 23 N.J. 364, 384 1975, was found that the touchstone of unbecoming conduct is the employee'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 upon implicit standard of good behavior.

In this matter, Respondent has consistently breached the public trust placed in her position as a teacher over the course of four successive school years, failing miserably in numerous instructional areas while simultaneously refusing to communicate with administrators and supervisors. Respondent is supposed to be a professional employee:

To who the people have entrusted the care and custody of ... school children where 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. [Tenure Hearing of William Thomas, OAL DKT. NO. EDU 5908-07 (October 11, 2007)].

The actions of Respondent warrant her dismissal from employment. She has a longstanding pattern of unbecoming behavior first noted as early as October 2010 (deficient lesson plans) and progressively becoming more egregious since then. The record shows that Respondent, despite numerous fair and objective evaluations noting her teaching deficiencies and extensive assistance offered by the administration, persistently failing to comply with directives and improve her performance. These facts demonstrate a longstanding and persistent lack of fitness to discharge her duties which cumulatively breaches the public trust placed in her and rise to the level of conduct unbecoming a public school teacher.

Respondent has exhibited a pattern of conduct establishing "other just cause" and warranting dismissal based upon the well established body of school law, principles and precedence. Prior to the enactment of TEACHNJ, the court and the Commissioner of Education have developed a clear precedent that permits this tribunal to dismiss Respondent, not only for each of the separate charges alleged, but also for the charges viewed in their totality when they demonstrate a pattern of misconduct over a period of time. The sworn tenure charges allege that the acts and omissions of Respondent, jointly and severally, manifest a serious of ongoing infractions over an extended period of time despite prior warning constituting a pattern of conduct unbecoming a teaching staff member. Said pattern of conduct likewise warrants dismissal. In making such a determination, the totality of circumstances and the impact of the teacher's career must be considered, including the nature and gravity of the offense under all the circumstances involves; any mitigating or aggravating factors; impact of the penalty of the teacher's career; and any harm or injurious effect which a teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system. Usually a series of events demonstrating a pattern of behavior is an indication of unbecoming conduct. The Commissioner has confirmed the established principle that an employee may be dismissed where a pattern of conduct persists over a number of years even though each individual charge standing alone would not typically warrant dismissal. [Tenure Hearing of Greg Young, 2010 N.J. AGEN. LEXIS. 511 Aff'd Edu. 9771-09 Comm'r 2010 and Tenure Hearing of Donald Dudley, OAL DKT. No. EDU 1839-11, initial decision December 2, 2011 modified by the Commissioner October 24, 2011; Aff'd 2012 N.J. Super Unpub. LEXIS 1941 App. Div. 2012 (where commissioner held a tenured custodian's pattern of behavior over several years to be deemed to

cumulatively constitute a pattern of neglect, misbehavior and other offenses and warranted his dismissal)]. Additionally, in Dudley, the Commissioner of Education found that a pattern of conduct over numerous years can be sufficient to merit discipline in a tenure matter even if progressive discipline is not imposed. Specifically, the Commissioner held that in tenure matters, there is not "any statutory mandate to impose progressive discipline.") Regardless of how well intentioned a teacher might be, the issue to be decided in tenure cases and specifically cases where a pattern of conduct exists that amounts to just cause warranting termination is whether the Respondent has the temperament and judgment necessary for a teacher and, if so, should be returned to the classroom. Here, the testimony of the Board's witnesses is credible and cumulatively shows a pervasive pattern of a teacher that either could not or would not conform her conduct to meet the legitimate and reasonable expectations of the administration.

Respondent's Arguments

Cuff maintains that she did not receive fair notice that her teaching performance was so unacceptable that tenure charges could be filed against her. She claims that the Board's notice of inefficiency did not satisfy either the TEACHNJ Act or its predecessor, the Tenured Employee's Hearing Law. New Jersey case law specifically finds that in inefficiency cases there is a high threshold for acceptable notice for teachers who are about to face tenure charges. The Board's notice did not satisfy either the two statutes or the requirements of New Jersey case law.

There are two general approaches in New Jersey law to ensure teachers receive fair notice that their performance is so poor as to warrant tenure charges. The first, under the former TEHL, states that in cases of inefficiency, a school board must serve a teacher with a 90 day improvement plan along with the charges. The tenure charges would serve as notice to the teacher that unless the improvement plan was completed, the tenure charges would be certified to the Commissioner of Education. The second approach in inefficiency cases under the TEACHNJ Act calls for two consecutive years of annual summative evaluations where the teacher is rated partially effective or ineffective before the tenure charges can be filed. Furthermore, New Jersey case law states that notice to a teacher and an opportunity for teacher to correct his or her alleged deficiencies is required before a school board can attempt to withhold a pay increment or file tenure charges in cases of alleged inefficiency. The amount of notice required in a withholding case does not rise to that required in a tenure matter. [Sturn v. Board of Education, Borough of South Plainfield, 92 NJAR 661 (1992)]. Given the fact that Cuff did not receive an unsatisfactory rating and/or have a pay increment withheld until the 2012-2013 school year and that was only because of attendance, the Board failed to follow either approach; it failed to give sufficient notice that it considered Cuff's teacher performance so poor that tenure charges were warranted. In Rowley v. Board

of Education Manalapan-Englishtown Regional School District, 205 NJ Super 65 (App Div. 1985) the school board sought to have a fourth grade teacher dismissed on the grounds of inefficiency under the TEHL. In the year prior to the tenure charges being filed, the teacher's increment was withheld due to teaching performance issues. In the next year, 8 one-hour long observations were made of the teacher by different administrative personnel. The school board provided the teacher with tenure charges and a 90 day improvement period to correct his deficiencies. After further observing him five more times during that period, the school board moved forward with the charges. The Appellate Division ruled that because the notice requirements cited in the TEHL were not strictly adhered to, the charge of inefficiency was dismissed. Similarly, In Re Tenure Hearing of Randall N. Cavet, Agency Docket Nos. 339-11/09 and 14-1/10 (August 19, 2010), despite several observations, meetings with administrators about performance, and weekly coaching all spanning several years, the inefficiency charges were dismissed because the school board did not present evidence that the strict notice requirements of the TEHL were satisfied. Significantly, the TEACHNJ case of In Re Tenure Hearing of Lynderia Mansfield, Agency Docket No. 273-9/12 (February 7, 2013), applies this idea of fair notice to cases arises after the passing of TEACHNJ before the adoption of TEACHNJ regulations effective September 2013. Mansfield was charged with inefficiency based around claims that her attendance and teaching performance were poor. Mansfield was put on a CAP and was given notice that the district intended to serve tenure charges. The arbitrator upheld the charges alleging excessive absenteeism but assigned a 90 day suspension without pay as penalty.

The Respondent argues that notice to her that her teaching performance was about to cost Cuff her job was sorely lacking and falls significantly short of the heightened notice requirements under either the TEHL or the TEACHNJ Act. As Respondent testified, she was rated satisfactory and awarded pay increment on her summative evaluations from 2003-2004 until 2009-2010. The 2010-2011 school year, Cuff was again rated satisfactory and was again awarded a pay increment. Similarly, in her February 25, 2011 observation by Draggoo, Cuff was told that she met district standards in three of the five major evaluation categories and was also told that her classroom management was effective. In a second formal evaluation approximately one month later, Cuff was told that she met district standards in approximately four out of five evaluation categories. In the 2011-2012 school year, Cuff once again received mixed feedback about her teaching performance and in December 2011 she was once again rated satisfactory in three of five major categories. Cuff was rated unsatisfactory for the first time in her 2012-2013 APR. However, the reason gave as reason the Board gave for the withholding was that she was on medical leave beginning December 6 through June 12 and did not qualify for FMLA leave. In addition, nowhere in any of Cuff's observations or evaluations for this year does it state that any deficiency was going to lead to tenure charges. Finally, in the overall evaluative instrument for the

entire year, Cuff was not made aware that her teaching performance was so bad that tenure charges were imminent.

In comparing the notice provided by the Board to the notice required by the TEHL and TEACHNJ Act, it is apparent that the Board's notice was severely lacking. At no time did the Board serve Respondent with a 90 day improvement plan with tenure charges as the TEHL provided for inefficiency cases. Additionally Cuff was not rated inefficient or partially inefficient on two consecutive ARPs as is called for in the TEACHNJ Act. No matter which approach is used, under the TEHL or the TEACHNJ Act, firm notice is required that the teach performance is so deficient that tenure charges are imminent.

The Board failed to provide notice to Cuff that her lesson plans were unacceptable before she implemented them. The Board had a duty under Cuff's CAPs to approve lesson plans and inform her of any issues before they were implemented. This duty was undertaken by the Board itself when it stated in the CAPS that Dr. Cuff's lesson plans had to be turned into the administration so the lesson plans could be reviewed and approved by the administration before she implemented them. This applies to all required parts of the lesson plans which form the foundation for the Board's six tenure charges. In addition, the Board, as early as 2010, assigned Ms. Hamilton to work each week with Dr. Cuff reviewing Dr. Cuff's lesson plans making changes to Cuff's lesson plans as needed and letting her know that the plans were ready to implement. The Board established an evaluative cycle where Cuff would submit her plans to Hamilton, have them reviewed or modified by Hamilton, subject to Draggoo's approval or disapproval before implemented her plans. When the board undertook duty to pre-approve Cuff's lesson plans before Cuff implemented them, assigned Hamilton to review and make changes to Cuff's lesson plans but said nothing to her about her plans before she implemented them, Cuff was reasonable in relying on the Board's silence that her plans were acceptable to implement. It is clear that Cuff performed her duty under the CAPs to have her lesson plans written and turned into the administration pre-implementation. Cuff's 2013 CAP states "assessments and lesson plans are to be submitted to the supervisor the last full work day prior to the start of the work week." Cuff's 2013-2014 CAP states the exact same thing. Draggoo, Stonis and Cuff all testified that it was understood that Draggoo was the administrator for reviewing Cuff's plans, approving or disapproving plans and informing Cuff if the plans were acceptable or not. Cuff's uncontradicted testimony that she always turned her plans in to the On Course system on time. The Board made no allegations in the tenure charges or at any time during the hearings that Cuff was not timely submitting her plans. Since Cuff was not notified that the Board had an issue with any aspect of her plans, she believed therefore that her plans were acceptable when she heard nothing from her administrators and implemented the plans. The CAPs also continued to assign

Hamilton to work with Cuff on lesson plans, an arrangement that existed since 2010. In addition, pursuant to the improvement plans since 2010, Hamilton was assigned by the Board to work weekly with Cuff on her lesson plans. She would review all parts of the plans mentioned above and make changes to the plans and discuss how to implement them. Cuff knew she had to meet with Hamilton on a weekly basis so Hamilton could review and make changes to the lesson plans before they were implemented. Hamilton discussed, reviewed and/or made changes to the plans, then indicated they were ready to be implemented. Cuff then uploaded her plans already modified onto On Course for Draggoo to review. As Cuff testified, she believed that if there was an issue with the plans, Draggoo would let her know but Cuff heard nothing. Thinking the plans were acceptable, Cuff implemented the plans. It was only after implementation that she finally heard from Draggoo if there was an issue with her plans.

Cuff's duties were to write lesson plans, get them reviewed, corrected and approved and then implement them. The uncontradicted testimony was that Cuff did write her plans and did meet with Hamilton. Cuff submitted them to the administration before implanting them. In this respect, the uncontradicted testimony is that Cuff fulfilled her duty. However, the Board and its administration undertook a duty to review Dr. Cuff's lesson plans and to let Dr. Cuff know that the plans were acceptable or not before Dr. Cuff implemented them. Though Ms. Hamilton was not responsible for writing the lesson plans, she was assigned by the Board to review and edit the plans, after which Draggoo would give the final approval or disapproval. The uncontradicted testimony is that the Board and the administrators did nothing to fulfill this duty. Therefore, Dr. Cuff did not receive fair notice that her lesson plans were unacceptable as promised by the Board. Consequently, the Board's tenure charges that complained about elements of her lesson plans should be dismissed. Alternatively, Cuff should have the opportunity to implement plans after the Board positively informs her pre-implementation that her plans are acceptable or not.

The Board acted arbitrarily and capriciously by holding Dr. Cuff to a higher, more rigorous standard than other teachers. It is clear that the Board acted arbitrarily and capriciously by having two sets of standards for its teachers. One for Dr. Cuff and one for everyone else. Cuff submitted evidence that other teachers engage in practices the Board criticized Cuff for, but other teachers were never cited by the Board. Specifically, the Board cited Cuff for using repeated closure activities. However, Tom Lake testified that he used the exact same closure activity, an exit ticket, in every single class that he teaches for the entire year. Lake was never cited for using the same closure activity too often as Cuff was. Further, the Board accused Cuff of repeating lesson plans. However, as Draggoo confirmed when confronted with Halls' lesson plans, Hall repeated such plans but the Board never offered any evidence that it cited Hall as it had

Cuff. Cuff raises the question, how many more teachers were doing the same thing that the Board complained that Cuff allegedly did?

The Board's evaluation instruments do not comply with New Jersey Law and the Board's evaluation procedures did not comply with its own District policy manual. The TEACHNJ Act which became effective in August 2012 mandates that evaluative rubrics shall include at least four defined annual rating categories: ineffective, partially effective, effective, and highly effective. The manual states that when a recommendation is made for a non renewal of a contract or to withhold an increment, the superintendent or his/her designee excluding the evaluator who made the recommendation shall evaluate the staff member in question a minimum of two more times. In addition, the manual states that each observation should last at the minimum 42 minutes. (R-3). The Board's evaluative instruments do not comply with N.J.S.A. 18A:6-124. The APR forms used by the Board contain no rating categories at all. All of the APRs contain narrative sections which state the ratings as satisfactory or unsatisfactory and whether the increment will be withheld. In addition, individual formal observation forms contain three loosely defined categories. Additionally, the decision to hold Cuff's pay increment was made by Draggoo on December 5, 2013. The manual requires two more observations by people other than Draggoo before the increment could be withheld. Stonis admitted under cross-examination that the required two observations of Cuff did not occur before her increment was withheld. All of the observations done after September 2013 apply to Cuff's 2013-2014 evaluation and had no bearing at all on the decision to withhold the pay increment. It is also argued that none of the Board's walk-through observations of Cuff complied with the 42 minute requirement. The Board maintained that the time requirement only applied to formal evaluations. However, Cuff maintains that the plain language of the manual state that each observation will last 42 minutes and as Draggoo testified, walk-throughs are formal observations.

The Board no longer wants to employ Dr. Cuff because of issues unrelated to teaching. The Board is tired of having to deal with Cuff asserting her legal rights. The Board and its administration's personal frustration with Cuff has colored and tainted the Board's evaluations and personal relations. Cuff has filed three civil rights complaints, a workman's compensation claim a complaint against an Assistant Principal and has requested accommodation for a knee injury. In all of these matters, the Board and/or its administration had to hire lawyers and spend time and money dealing with these issues. The Board paid Cuff a total of \$20,000 to settle one of her civil rights claims and her worker's compensation claim. In addition, Cuff forced Mitchell to deal with a situation where Cuff felt she was inappropriately touched by Mitchell. Furthermore, the administration had to reassign Cuff to a new teaching schedule after Dr. Cuff contacted the State Board of Education and showed the administrators erroneously assigned her

to teach classes that she was not certified to teach. During the hearing, the Board attempted to show that it was not at fault for erroneously assigning the classes, but it does not matter who was at fault. Cuff pointed out the Board's error, causing the Board to utilize more time and resources in correcting its mistake. The Board's administrator, Draggoo, appeared plainly annoyed in testifying about what had happened. In the hearing, the Board went through great effort to show that it was cleared of any wrongdoing. However, it does not matter what the final administrative findings were or even what really happened in those incidents. What matters is that the Board had to deal with these issues at all and had to expend personal and District time and money dealing with these issues. It is clear that the Board and its administrators did not take kindly to having to do this. Significantly, six months after settling her civil rights claim in April 2010, the Board first cited Cuff for issues with her lesson plans and in 2010-2011, the Board moved Cuff from a regular classroom to what was known as a timeout room and assigned her classes she was not certified to teach. Cuff was the only one out of 13 special education teachers moved to a room which was not designated for instruction.

Dr. Cuff's actions were not insubordinate nor do they amount to conduct unbecoming. New Jersey case law requires that insubordination be proven by showing the willful and intentional disregard a lawful order or school policy, directive or regulation. As the testimony and record shows, Dr. Cuff did not willfully or intentionally disobey any directive, order or regulation. Therefore, the Board has failed to show Dr. Cuff was insubordinate and those charges should be dismissed. Insubordination is defined as "the deliberate and willful disobedience by the subordinate of an express direct and lawful order issued by the superior." Imperfect, incomplete or even careless, minimal and thoroughly mediocre unsatisfactory effectuation does not, ipso facto, sink to the depths of insubordination. Insubordination requires proof that the actor knew what he/she was doing and also requires proof of intent. Conduct unbecoming does not have a stated definition; it is determined on a case by case basis that does not require that a specific rule or regulation has been violated but may be based primarily on a violation of an implicit standard of good behavior. The accusations in these charges go to Cuff's teaching performance and not to her willfully intentional disregard of official policies or direct orders. The focus of the definition of conduct unbecoming is on a teacher's behavior in and out of the classroom; nowhere does the Board complain that Cuff's behavior was inappropriate. It became clear in testimony that Cuff did not willfully and intentionally violate an express order. Cuff testified that she relied in good faith on advice given to her by her union representative when dealing with the Board and its administration. Her union told her that she did not have to meet with Draggoo while on leave. When Cuff went ahead anyway and scheduled a meeting with Draggoo, Draggoo cancelled it. (R-6). Additionally, Cuff testified that a union representative told Cuff to end her December 13, 2013 meeting with the administration due to the

administration's disrespect of Cuff. Specifically, when Aiello kept asking Cuff if she "was educated." Furthermore, Draggoo testified under cross-examination that she at no time ordered Dr. Cuff to meet with her nor did she direct Cuff not to leave the meeting. The only thing that was entered into the record was testimony and documents stating that Cuff was told that she had to reply when asked to explain some of her statements. As Draggoo, Mitchell and Cuff testified, Cuff replied every time she was requested to. Any of Cuff's actions complained of by the Board simply do not meet the legal standard for insubordination or conduct unbecoming. At all times Cuff acted in good faith reliance upon the advice of her union representative when she ended meetings or did not immediately agree to meet with Draggoo while Cuff was on approved medical leave. The administration never ordered Cuff not to leave the meeting or to come to a meeting and Cuff always replied when asked to. Cuff in no way willfully and with intent disregarded a supervisor's lawful order.

Cuff argues that certain documents offered into evidence should be stricken from the record since they were not provided to the Union along with a summary of the witnesses' testimony ten days prior to the hearing. Documents dates stamped CUMB086 and higher were not produced in the parties' initial disclosures. The TEACHNJ Act which went into effect in August 2012 precludes a party in a tenure charge case from relying on, using or introducing documents in their case in chief that were not produced in the parties' initial disclosures. N.J.S.A. 18A:6-17.1(3) clearly states that the employing board of education shall be precluded from introducing any evidence except for impeachment that was not turned over to the employee when the case was referred to arbitration. That includes "all evidence", including all documents. The Board turned over documents CUMB0001 through CUMB0885 once the case was referred to this arbitrator and under the terms of the statute, those are the documents the board can rely upon in the case in chief. However, during the hearings, the Board constantly and consistently offered documents stamped CUMB0886 and above and had witnesses testify to the contents of those documents. Since discovery is propounded by the opposing party, the statute does not say deposing party cannot rely on documents produced after referral of the case to the arbitrator. It says the party cannot rely on them, except for impeachment. Therefore the documents that Cuff requested and the board produced in discovery and after could have been used by Dr. Cuff in her case in chief but not by the Board. This immediate disclosure provision was specifically placed into the statute because of the very short timeframes provided by the TEACHNJ Act. Similarly, an employee is not allowed to rely on, use or introduce evidence in its case in chief that the employee did not introduce in his or her disclosures. Since the documents the Board disclosed to Cuff when the case was transferred to the arbitrator were stamped CUMB0001 through CUMB0885, these are the only documents the Board should be allowed to produce or use during the case at trial.

For the reasons stated above, it is urged that the charges against Dr. Cuff be dismissed or, in the alternative, ask that Cuff be given some penalty less than the ultimate penalty, dismissal from her tenured position and possible loss of teaching certificate.

FINDINGS OF FACT AND DISCUSSION

As the parties have acknowledged, this proceeding was initiated before the new procedures of the TEACHNJ Act could be fully implemented. Under TEACHNJ, charges of inefficiency can only be brought where there have been two annual evaluations conducted in accordance with the "rubric adopted by the Board and approved by the Commissioner" See, P.L. 2012, c. 26., N.J.S.A. 18A:6-17(3)(d). Accordingly, until such time as there have been two such annual evaluations, inefficiency cases must be decided upon the old standard. [See Tenure Hearing of Carter, supra and Tenure Hearing of Chavez, supra]. However, the TEACHNJ Act also provided for the immediate elimination the requirement of a written notice of deficiency and a 90 day corrective period before a charge of inefficiency can be brought. Carter and Cavez. Accordingly, even though Cuff claims that a claim of inefficiency must fall due to lack of 90 corrective action notice, no such notice is statutorily required.

Cuff asserts surprise that tenure charges were brought. I find that such a claim disingenuous. In her final evaluation for 2011-2012 the Board served her with a 90 improvement plan. She had an unsatisfactory evaluation in 2012-2013 and was denied an increment. Although the reason stated on the evaluation for the increment denial was for excessive absenteeism, her overall evaluation for her teaching performance was also unsatisfactory and the 90 day corrective action plan from the prior year was repeated. Throughout the 2013-2014 school year, until her suspension, Cuff was repeatedly warned of her unsatisfactory performance after numerous walk-through observations. It is simply strains credulity to believe that Cuff did not know her teaching performance was unacceptable and she had to improve; nor is it realistic to think that if she were actually given notice that she faced tenure charges somehow her performance would significantly improve.

I fully credit the Testimony of Draggoo, Aiello and Stonis concerning Cuff's overall teaching performance. Students have been found sleeping and with their heads down and eyes closed in her classroom, Cuff, although certified to teach Psychology, misidentified the parts of the brain in a diagram on the backboard; she did not follow her own lesson plans; she was repeatedly cited for her failure to write the lesson's objective on the black board to and provide and use measurable objectives. She has failed to comply with directives to post focus activity or to use a focus activity of appropriate length in her classroom. She has not been able to prepare plans which reflect the actual length of the teaching period and in general has failed to use class time

effectively. She failed to use closure activities at the conclusion of her classes. She took extended sick leave but knowingly failed to provide lesson plans for the period of her absence. She has consistently failed to post measurable objectives for the day's class. She failed to post grades in a timely manner.

There is some question as to whether Cuff's supervisors followed Cuff's 90 day Corrective Action Plan for the improvement of Cuff's lesson plans. Draggoo was to approve Cuff's Plans before they were implemented. Cuff testified that she posted them for Draggoo's review as required. Hamilton was also assigned to assist Cuff in the preparation of her lesson plans. Although Cuff testified that she supplied Hamilton her lesson plans, the record indicates that this may not have actually happened on more than a sporadic basis. See email chain R-33. However, whether Draggoo critiqued Cuff's lesson plans before she used them or critiqued them in walk through observations after they were used does not absolve Cuff from the responsibility for preparing proper lesson plans. The fact that Hall, a presumably competent teacher, may have repeated her lesson plans over a two week period does not mean that Cuff was absolved of the responsibility of preparing proper lesson plans. Cuff was a full-time teacher for at least ten years and should have known how to prepare acceptable and appropriate lesson plans. Nevertheless, I am not satisfied that the District satisfied its own responsibilities in assisting Cuff in improving her lesson plans.

The essential facts remain. In spite of repeated critiques by Draggoo and Aiello, Cuff has never grasped what is expected of her. Cuff has been a full time teacher for ten years. At this point in her career one would expect her to understand what is expected of her as a teacher and what must be done to effectively prepare to teach a class. For whatever the reason, Cuff's performance as a teacher is unacceptable and the education of the students in her classroom has suffered.

Cuff attempted to discredit the testimony of the Board's witnesses by citing her civil rights complaints as well as her workers' compensation claim. However, of the three claims with the Division of Civil Rights, one was amicably settled between the parties and the others, including the charge against Mitchell were dismissed by the Division. Significantly, the one that was settled was a claim that Cuff was entitled to a pay increase because she earned a PhD, but the collective negotiations agreement between the district and the teacher's association does not provided for a salary increase upon the attainment of a PhD. Cuff was awarded over \$17,000 on her worker's compensation claim, and she successfully contested the assignment of a class to her on the basis of her not being certified in the subject area. Cuff also complained about an undersized classroom that was assigned and as a result Cuff was re-assigned new classroom. It would be naive to think that her interactions with the administration did not produce some measure of dissatisfaction or discontent with Cuff. On balance however, I

am not satisfied that the Board would not have brought the instant tenure proceeding if Cuff did not file these charges.

Cuff claims that at a December 2013 meeting Aiello repeatedly asked Cuff if, "she were educated." Draggoo and Aiello testified that Aiello never asked Cuff such a question. While such a comments, if they were made, is offensive and demeaning, it does not go to the issue of Cuff's performance as a teacher nor does it show animus towards Cuff for filing assorted charges against the district.

Draggoo also expressed her frustration against Cuff when she testified about all the time and energy she had to expend on observing and meeting with Cuff and writing improvement plans for her in an attempt to help her improve. However such frustration is inevitable and does not prove inappropriate animus toward Cuff.

I find that Cuff did act inappropriately in her interactions with administrative staff. Although Cuff was not obligated to report to school for a conference with Draggoo while on medical leave, Cuff did not have a right to refuse to cooperate with administrators during conferences. According to Draggoo, Cuff asked for a meeting but repeatedly cancelled the meeting and when the meeting was finally convened Cuff would not answer questions. In other meeting with administrative staff Cuff responded by saying that she'd answer in writing, make cryptic responses or laugh and snicker. Employees who are called into a meeting and questioned have a right not to participate without the presence of union representation if it is reasonably believed that discipline may result from the questioning during the meeting (*NLRB v. Weingarten* 420 US 251, [1975]). However, Cuff never claimed she believed that she would be disciplined at her meetings with her supervisors and Draggoo and Aiello conceded that at no time was Cuff ever under orders to attend a meeting or prohibited from leaving a meeting. While Cuff's refusal to cooperate at meetings could be construed as insubordination, it was not so blatant as to by itself warrant the denial of tenure,

Cuff has also argued that the denial of her increment in 2012-2013 was deficient under the Board of Education's own manual because there were no additional evaluations made by other administrators before the denial of increment. However, denial of increment itself was based upon her attendance record and Cuff's absence continued throughout the school year. The manual's requirement of two additional evaluations was never intended for this situation. Rather it was intended for teachers who continue to teach. The handbook provision is simply not applicable here.

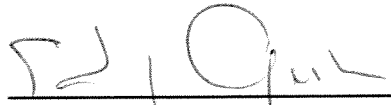
Similarly I do not find persuasive, Cuff's argument, that since the district's manual calls for 42 minute evaluations, the short walk through evaluations were improper. Clearly the prescribed 42 minute evaluations had to be performed but there was nothing inherently inappropriate about the shorter walk throughs.

Cuff has argued that several documents offered into evidence by the Board were not served upon Cuff at the time the matter was referred to arbitration in accordance with the requirements of TEACH NJ. Although the documents were provided to Cuff as part of her discovery request prior to the hearing, the statute is clear. Such documents were not served in compliance with the statute and were not considered part of the evidentiary record in this matter.

In weighing all the factors before me, and given the long history of less than satisfactory evaluations, the denial of increment and two consecutive 90 day improvement plans imposed upon Cuff, Cuff was well aware that her job was in jeopardy. Moreover statutorily the district had no obligation give Cuff advance notice that she faced tenure charges if her performance did not improve. While none of the Board's charges when taken individually may be sufficient grounds for the denial of tenure, collectively they demonstrate a degree of inefficiency that warrants the denial of tenure. I am satisfied that on the basis of the entire record that the Board of Education has, by a preponderance of the evidence, proven its allegation of Audrey Cuff's inefficiency as a teaching staff member and the tenure charges brought by the Cumberland County Regional Board of Education are sustained.

AWARD

The Cumberland County Regional Board of Education has proven, by a preponderance of the evidence, its allegation of Audrey Cuff's inefficiency as a teaching staff member and the tenure charges are sustained.



Edmund Gerber, Arbitrator
June 26, 2014

Dated: June 30, 2014
State of New Jersey:
County of Monmouth:


On this 30th day of June, 2014 Edmund Gerber, who is personally known by me, appeared before me and executed the foregoing instrument and acknowledged to me that he executed the same.

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MADELINE S. GERBER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 12/14/2014