

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

In the matter of:

The Tenure Hearing of Nicholas Vitelli

:

:

:

**Flemington-Raritan Regional School
District**

: Agency Docket No. 7-1/14

:

:

Hunterdon County

:

Decision and Award

Appearances:

**On behalf of Flemington-Raritan Regional School District,
Hunterdon County:**

John B. Comengo, II, Esquire
Kathryn H. Acosta, Esquire
Comengo Law Group, P.C.
521 Pleasant Valley Avenue
Moorestown, NJ 08057

On behalf of Nicholas Vitelli:

Joseph R. Donahue, Esquire
Brickfield & Donahue
70 Grand Avenue
Rivers Edge, NJ 07661

Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against Nicholas Vitelli, (Respondent) by the Flemington-Raritan Regional School District, Hunterdon County (the District) and a February 17, 2014 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to N.J.S.A. 18A:6-16 as amended by *P.L. 2112, c. 26*.

The hearing in this matter was conducted on March 18, 24 and 28, and April 2, 2014 in Flemington, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent was present for the entire hearing and testified on his own behalf. At the close of the hearing on April 2, 2014, the parties agreed to present written closing briefs, upon the receipt of which by the arbitrator on April 18, 2014 the dispute was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter including all relevant exhibits, arguments and my observations of the demeanor of each witness.

Issues

I find that this matter presents the following issues:

- (1) Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and, if so, do the proven charges warrant dismissal?

The Tenure Charges

On January 13, 2014 the District's Board Secretary certified tenure charges against Respondent. The supporting Statement of Charges Filed Under Oath by the District's Superintendent are dated October 31, 2013 and identify 8 Specifications in support of the tenure charges. Specifications I through VI and Specification VIII refer to a May 3, 2013 incident where Respondent, a Physical Education and Health teacher, was "play-fighting" with student JM during a warm-up exercise period and slapped JM causing a red mark on the student's cheek. In general terms the Specifications citing the May 3, 2013 slap provide:

Specification I asserts that Respondent violated the District's Policy Code #2262 "Civility" when he committed an assault upon a student and that such constitutes conduct unbecoming a staff member and other just cause for Respondent's removal from his public office.¹

¹In its Specification 1 the District quoted the following language of Code # 2262:

The Flemington-Raritan Regional School District believes that a safe, civil environment is essential to student and staff achievement, to the free exchange of ideas central to a quality educational process and to the development of youth as thoughtful participants in our democracy. Conversely, uncivil conduct, like other forms of disruptive behavior, interferes with student's ability to learn and a school's ability to educate its students... The Board refuses to condone uncivil conduct on school grounds or at school-sponsored activities, whether by staff, students, parents, volunteers, or other District visitors.

The basic purpose of this policy is threefold: (1) To promote a work and learning environment that is safe, productive, and nurturing for all staff and students, and to encourage the free flow of ideas without fear or intimidation; (2) To provide our students with appropriate models for

Specification II asserts that Respondent violated the District's Policy Code #3281 "Inappropriate Staff Conduct" when he committed an assault upon a student causing pain and that such constitutes conduct unbecoming a staff member and other just cause for Respondent's removal from his public office.²

Specification III asserts that Respondent again violated the District's Policy Code #2262 "Civility" when he engaged in "play fighting" with the student, and that such constitutes conduct unbecoming a staff member and other just cause for Respondent's removal from his public office.

Specification IV asserts that Respondent again violated the District's Policy Code #3281 "Inappropriate Staff Conduct" when

respectful problem-solving; and (3) To reduce the potential triggers for violent conduct....

For the purposes of this policy, "uncivil conduct" includes the following:....gesturing in a manner that puts another in fear for his personal safety... or other similar disruptive conduct.

² In its Specification 2, the District quoted the following language of Code # 3281: [T]he Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a staff member will not be tolerated in this school district....School staff's conduct in completing their professional responsibilities shall be appropriate at all times....School staff shall not engage in inappropriate conduct toward or with pupils....A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils....Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education and/or appropriate courts to be inappropriate conduct or conduct unbecoming a staff member.

he engaged in “play fighting” with the student, and that such constitutes conduct unbecoming a staff member and other just cause for Respondent’s removal from his public office.

Specification V asserts that Respondent violated N.J.S.A. 2C: 12-1.b(5)(d) (an aggravated assault upon a teacher) and the District’s Policy Code #5612 when he encouraged the student to “hit him back” thereby exposing the student to potential criminal charges and administrative action, and that such constitutes conduct unbecoming a staff member and other just cause for Respondent’s removal from his public office.³

Specification VI asserts that Respondent violated the District’s Policy Code #4217 when he touched the student in an offensive manner and failed to report either the play fighting or the slapping incident to the school’s administration and that such constitutes conduct unbecoming a staff member and other just cause for Respondent’s removal from his public office.⁴

³ In its Specification V, the District quoted the following language of Code # 5612:
a. Any pupil who commits an assault, as defined under N.J.S.A. 2 C: 12-1 (a) 1, not involving the use of a weapon or firearm, upon a Board member or any district employee in the performance of his or her duties and in a situation where his or her authority to act is apparent, or as a result of the victim's relationship to the school district, according to the requirements of N.J.S.A. 18A: 37-2.1, will be immediately suspended from school consistent with due process procedures, pending suspension or expulsion hearings before the Board.

⁴ In its Specification VI, the District quoted the following language of Code # 4217:

Specification VIII asserts that Respondent violated the District's Policy Code #3211 when his "play fighting" with J.M resulted in a physical assault of the student and that such not only amounted to a failure on Respondent's part to make reasonable efforts to protect J.M but actually create an educational environment that resulted in harm and embarrassment to the student.⁵

Specification VII asserts that Respondent violated Policy Code # 3281 by engaging in a "continuing course of conduct that demonstrates his inability to respect the boundaries of his professional responsibility" by his conduct of hosting an unauthorized Christmas Cookie party for six sixth-grade girl students in violation of Policy Code # 8505, and notwithstanding receiving discipline for hosting the Cookie Party continued to exercise poor judgment by engaging in the play fighting and slapping of a student and then failing to report such conduct, and that such constitutes conduct unbecoming a staff member and other just cause for Respondent's removal from his public office.⁶

a. A staff member who: 2. Touches a pupil in an offensive way even though no physical harm is intended;... Will be subject to discipline by this Board and may be dismissed.

⁵ In its Specification VIII, the District quoted the following language of Code # 3211:
a. In fulfillment of the obligation to the student, the educator... (4) shall make reasonable effort to protect the student from conditions harmful to learning or to health and safety... (5) Shall not intentionally expose the student to embarrassment or disparagement.

⁶ In its Specification VII, the District quoted the following language of Code # 3281:
a. A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils.... Inappropriate conduct or conduct unbecoming a staff member may also include content not specifically listed in this policy, but conduct determined by the New Jersey State Board of Education, the New Jersey

Facts

Respondent is a certified teaching staff member employed by the District as a Physical Education and Health teacher at the District's Reading-Fleming Intermediate School (known as RFIS). He first began working for the District in 2002 as a Teaching Assistant to a special needs student. In 2003 he began his employment with the District as a PE/Health teacher and taught 6th, 7th and 8th Grade students from 2003 until 2005 (when the current RFIS building housed the District's Middle School), and 5th and 6th Grade students from 2005 (when the building began to house the intermediate school) until he was placed on suspension as a result of the instant Tenure charges. Respondent has always worked for the District in the same building.

Throughout his tenure with the District Respondent has been formally observed by a number of school administrators and his "Observation Reports" have always been marked as "[t]his has been an effective lesson." Prior to the May 2, 2013 incident at issue herein, Respondent's disciplinary record contained one action; a withholding of his 2013-2014 increment because he conducted an unauthorized December 21, 2012 "cookie exchange" party with six sixth-grade female students in a basement PE teacher Lounge with no other adults present and in violation of school and District policies.⁷ In this

Commissioner of Education and/or appropriate courts to be inappropriate conduct or conduct unbecoming a staff member.

⁷ In this regard, by memorandum to Respondent dated February 5, 2013, RFIS Principal Kathleen Suchorsky wrote:

Dear Nick,
This correspondence is to summarize our February 5, 2013 meeting identifying of your professional responsibilities and making decisions for and interacting with students as a Flemington Raritan Teacher.

On December 21, 2012, it has been identified that you and six 6th grade female students held a Christmas Cookie Party in the lower gym of the Reading–Fleming Intermediate School. The decision to hold such an event during the school day was an unprofessional disregard for the safety of students and Flemington Raritan Board of Education Policies. My specific concerns are listed below:

1. It is expected of all staff members to be consciously aware of personal behaviors that may suggest any inappropriate interactions with students that place their personal and professional reputation as well as the FRSD reputation as a whole to be tarnished.
 - a. One male teacher, hosting a cooking party with six female students, in a secluded area of the school building is unacceptable. This preplanned and secret event violated a number of BOE Policies.
 - i. Inappropriate Staff Conduct Policy 3281–“The BOE recognizes there is a professional responsibility for all school staff to protect a pupil's health, safety and welfare.” This activity neglected to honor student's health, safety and welfare displayed through the violation of district policies and ignoring of professional boundaries between teacher and student(s).
 - ii. Inappropriate Staff Conduct Policy 3281–“School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities.” The planning, implementation and execution of this event do not fall under any teaching staff member's responsibilities. These events clearly overstepped professional boundaries.
 - iii. Violation of the Classroom Teacher job responsibilities #7–“Set high expectations for student achievement and behavior.” It is essential for teachers to model the positive adherence to school policies. In this situation, students experienced a teacher complete disregard for BOE policies and school procedures.
 - iv. Civility Policy 2262– (1) “To promote a work and learning environment that is safe, productive and nurturing for all staff and students...”
Orchestrating an opportunity for a small number of students to engage in an activity that is not an acceptable learning experience directly undermines the safe learning environment for all students and staff members.
 - v. Civility Policy 2262.– (2) Orchestrating an “well hidden” activity with impressionable and vulnerable students (11 and 12 years old) does not meet our professional responsibility, “To provide our students with appropriate models for respectful problem–solving.”
 - vi. Complete disregard of the Wellness Policy.
 - vii. Violation of the “Celebration” procedures at RFIS.
2. As well as the policy violation discussion, I reminded you that you are not in your own home. The decision to orchestrate such an inappropriate event is clearly contrary to the cultural mores expected between teacher and students in our community today.
3. At this time, it will be recommended to the Flemington Raritan Board of Education to withhold your increment for the 2013–14 school year. Please understand, the BOE may choose to discuss and impose a discipline response beyond the increment withholding.

regard, Respondent was notified by letter dated April 23, 2013 from the District's Board of Education that it had voted to "withhold your adjustment and increment for the 2013-2014 school year..." The Board further wrote that its action was:

...based upon violation of Board Policies 2262, 3281 and 8505. The reasons for this action are more particularly set forth in the attached documents prepared by Dr. ...Suchorsky...

The Incident of May 3, 2013

In the morning of Monday May 6, 2013 four of the five PE/Health teachers employed at the Reading-Fleming Intermediate School (RFIS) met as a group with the school's Principal (Dr. Suchorsky) and Vice Principal (Wanda Quinones) and reported that in the afternoon of May 3, 2013 Respondent had been engaging in "play boxing" with student JM during a joint warm-up time and had slapped JM in the face, causing a red mark. PE/Health teacher Kathryn Sheffels did most of the talking of the teachers present at the meeting and reported that at about 2:00 PM on May 3 she was leading the warm-up exercises for approximately 100 5th and 6th grade students in the school's upper gymnasium before the students split up into their individual classes, and that during the warm-up she observed Respondent playing with JM, one of Respondent's students. The

-
4. Please understand, you are directed;
 - a. Not to engage in any interactions with students that are outside of the common, public, and well supervised instructional areas of the RFIS.
 - b. Orchestrate any event that is not first approved by the principal or vice principal of the school. That final approval will require documentation identifying curriculum alignment, location, student lists, materials and time on task.
 - c. Refrain from any interactions with students (through words, actions or touch) that are not directly linked to teaching a particular skill or safety intervention.
 - d. Make decisions reflective of one's professional relationship with students vs. that of a social relationship or friendship with students.

“play” was shadow boxing or play fighting. Sheffels further reported that the play eventually resulted in a loud contact between Respondent’s left hand and the student’s right cheek. Sheffels also told the administrators that she had previously observed Respondent engage in other conduct with students that caused her concern such as shadow boxing and kicking student’s hands out from under them as they were doing push-ups. According to Principal Suchorsky, in addition to the details offered by Sheffels about the slapping of JM, the four PE teachers also reported they had concerns about Respondent and his lack of professionalism and practice of undermining their instruction.

Following the morning report of the PE teachers, Suchorsky and Quinones began jointly interviewing students. According to Suchorsky, when she told JM that she had heard something happened in gym class on Friday, JM responded that yes something had happened but he “could take it,” that Respondent was just fooling around. Suchorsky testified that when she asked JM if he would like it to happen again, the student said he would not. According to Suchorsky, JM’s description of the May 3 incident was consistent with the description provided by the gym teachers. Thereafter, the two administrators interviewed three or four other students in Respondent’s gym class resulting in one student reporting that Respondent and JM were fooling around, JM got slapped and Respondent told JM to; “come on, come on, push me back.” At least one other student stated that he heard the slap.

Principal Suchorsky reported the matter to District Superintendent Gregory Nolan on May 7, 2013 and the Superintendent instructed Suchorsky to report the matter to the local Borough Police and the New Jersey Department of Children and Families,

Institutional Abuse Unit, which Suchorsky did.⁸ According to Suchorsky, she spoke to Respondent about the slapping incident before she spoke to the police and Department of Children and Families, and that Respondent stated he had been just fooling around with JM and that Respondent did not deny that the slap occurred.

According to Suchorsky's report to the District's Superintendent on the matter, in addition to the descriptions of the May 3, 2013 slapping incident provided by the PE teachers, JM and other students, PE teachers reported the Respondent "routinely...interacts with students by poking, boxing, tripping students during instruction," and that the teachers stated that such conduct is "the way [Respondent] believes he can connect with students." The Principal's report listed various "Professional Concerns" and "policy Infractions" raised by her investigation including unprofessional decision making, behaviors that are unacceptable between teacher and student, lack of professional focus, the District's Civility Policy (#2262) and the District's Inappropriate Staff Conduct Policy (#3281).

By letter from the District's Superintendent dated May 9, 2013, Respondent was informed that he was being suspended with pay pending the School Board's consideration of allegations of his misconduct. According to Superintendent Nolan, he made the recommendation to the School Board to institute Tenure Charges against Respondent. Nolan testified he came to such a conclusion after looking at a series of poor decisions by Respondent reflecting a pattern of poor judgment. Such decisions by

⁸ According to the testimony of District Superintendent Nolan, the Borough of Flemington Police Department found no criminal conduct and the NJ Department of Children and Families found no abuse, but did find that JM had been harmed. The NJ Department's report states:

Based upon the interviews and physical observations of the child, JM is not an abused child. However, the information gathered indicates that JM was harmed or placed at risk of harm by virtue of the incident.

Respondent, Nolan testified, related to the December 21, 2012 Cookie Party that resulted in Respondent's loss of increment and the May 3, 2013 slap of JM. According to Nolan these decisions included the decision to have the cookie party in the first place, the decision to have the cookie party in the school's basement in a room with no windows or telephone and without other adults present, the decision to shadow box with a student, the decision to do so in a manner that resulted in his slapping a student and his decision not to report the harm of the student to the administration.

These two incidents, the cookie party and the slap, Nolan asserted, jeopardized the District's important goals of establishing trust and confidence and providing a safe environment for students. According to Nolan, other incidents that came up during the investigation, including Respondent's kicking, poking, tripping, hugging and holding students by their ankles, played a factor in his conclusion that Respondent had a pattern of poor decisions relating to his interaction with students. Considering that the investigation also disclosed that Respondent had been counseled about such conduct by another PE teacher (Sheffels) and Principal Suchorsky and that Respondent had only recently been informed of the decision to withhold his increment due to his conduct relating to the Cookie Party, and considering that Respondent is not a first or second year teacher, Nolan testified, he decided to recommend dismissal of Respondent. Nolan also explained that although he considered suspension rather than dismissal, he concluded that in the event a third incident by Respondent were to occur he simply would not have any way of explaining to either the Board or parents of District students why he had kept Respondent in the schools. Additionally, Nolan maintained, Respondent was beyond the time when an improvement plan would have been an option.

Superintendent Nolan testified on cross examination that he did not report or cite prior alleged incidents of Respondent tripping, poking, kicking, holding upside down or hugging students to the School Board as reasons for dismissal when he presented the question of tenure charges against Respondent. However, on redirect, the Superintendent did point out that such conduct was identified in the “Overview Relating to All Charges” portion of his statement to the Board (his “Statement of Charges Under Oath” containing the “Specifications” cited above). According to Nolan, had he been aware of the allegations of such conduct by Respondent when they occurred, he would have had the incidents documented and had an improvement plan prepared for Respondent.

Evidence Relating to the Cookie Party and Other Incidents

The District offered exhaustive and detailed testimony and documentary evidence relating to the events leading to the December 21, 2012 Cooking Party for which Respondent received his prior discipline, and the District’s investigation and response to the incident, as well as a physical tour of the room involved in the party and its surroundings. Time consumed at the hearing by presentation of evidence of the “cookie party” took the majority of the four days of hearing.

As for other allegations of Respondent’s past conduct, the evidence presented established a conflict as to the actual extent of any physical contact by Respondent with students. Two other PE teachers testified that they observed Respondent play box with students, fist shoulder tap students, kick student’s hands while they were doing pushups, wrestle with students and hug students. PE teacher Sheffels testified that she observed Respondent wrestling students, or picking them up, or giving them a push several dozen

times, maybe a couple of time a week. Sheffels further testified that she did not believe Respondent was ever attempting to hurt any of the students; that it appeared to her it was his way of attempting to connect with the students. She stated that she did not agree with Respondent's conduct and that she spoke to Respondent – raising issues of the appropriateness of his conduct – at least ten times through the years, and never received a real response from him. In any event, she testified, her talking to Respondent did not make a difference in his conduct. Sheffels further testified that she reported such conduct to the school's Principal on two or three occasions over the years but that she has no idea what happened as a result of her reports. As for the May 3, 2013 slap of JM, Sheffels testified that it was inadvertent, that it was not a purposeful slap.

PE/Health teacher Ben Ibach also testified that he has observed Respondent engage in physical contact. He testified that the play fighting, kicking and wrestling with students took place at various intervals, but the hugging of students by Respondent occurred on almost a daily basis since Respondent began working at the school.

Principal Suchorsky testified that she conducted perhaps three formal and at least ten times informal observations of Respondent over the years and that during such observations and other times seeing him in school, she never directly observed Respondent engage in inappropriate contact with students. However, Suchorsky added, she received occasional reports from others about Respondent's inappropriate behavior. Suchorsky further testified that she spoke to Respondent maybe once a year about such behavior, like buying a cookie or cupcake for a single student, and explained that she did not "write-up" Respondent on any such occasion because she viewed them as being small things. On one occasion she wrote a memo to Respondent cautioning about his conduct

of picking up a male student by the student's ankles and causing the student embarrassment when the student's shorts fell down, but did not place the writing in Respondent's file and did not consider the writing discipline.

Vice Principal Quinones testified that she received occasional reports from two PE teachers about Respondent's physical conduct with students. Such reports never identified Respondent by name but, Quinones testified, she knew who the teachers were referencing when they reported; "hey, he's at it again, being physical," or "things are getting a little relaxed" or "he's at it again." According to Quinones, she never personally observed Respondent engage in inappropriate action with students and when she received reports from other PE teachers she would respond "OK." Quinones testified that she did not take any action as the result of the reports she received other than to pass them on to principal Suchorsky.

Respondent

Respondent testified that on May 3, 2013 he was play boxing with JM during warm up; that he and JM were "joking around." He explained that he and the student were pretending to fight in slow motion and that he was narrating what was happening by saying "here comes a right and here's a left." He further explained that on one occasion as he was saying "here comes a left" he expected JM to move his head away from Respondent's swinging left hand, but that JM unexpectedly move toward the oncoming hand resulting in Respondent slapping JM. According to Respondent, he was shocked and JM held his cheek, and when JM eventually removed his hand Respondent observed a red mark on the student's cheek. Respondent asked JM if he was all right and the

student said yes, he was fine. Respondent testified he then (and later) asked JM if he wanted to go to the nurse and JM said no. Respondent further asserted that the slap was not done in anger; it was unintentional.

Respondent admitted his conduct associated with the 2012 “cookie party,” explained that he will “tap” students with his foot if their push-up form is incorrect and that although there is no wrestling in the curriculum at the school he has shown students wrestling moves. He denied that he has ever punched a student or kicked a student or ever attempted to kick a student’s hands away while the student was doing a push-up, and testified that it is common knowledge that a teacher is not to do such things that could harm a student. As for hugs, Respondent testified, they are not uncommon in the school between students and teachers and that he gave and received them from students prior to the cookie swap incident and that thereafter he has neither given them or received them, and has told one student who would previously give him a hug every day that they could only do “high fives” from now on.

Positions of the Parties

Each party presented a post-hearing brief providing its individual, detailed factual and legal arguments relating to this matter, arguments that have been carefully and fully considered by the undersigned, and are only summarized herein.

The District

The School District asserts that the evidence supports its tenure charges. Respondent has established a pattern of unacceptable conduct. He has displayed a pattern

of behavior that demonstrates a flagrant disregard of the District policies and, importantly, the health, safety, welfare, and well-being of the District's students. Respondent's conduct has removed the trust the public must have to retain him in a teacher position.

According to the District, Respondent's pattern of poor choices and decisions, as articulated by Superintendent Nolan, including the choices relating to the "cookie party" and the May 3, 2013 slap of a District student, establishes a pattern of poor decision making that is unlikely to be changed by further discipline short of termination. As superintendent Nolan explained at the arbitration hearing, the District has a legitimate concern that if there was going to be a change in behavior by Respondent, it should have occurred by now.

The district argued that its specification number VII relating to the "cookie exchange" supports, under the totality of the circumstances, his permanent removal from employment with the District. The evidence showed, the District argued, that Respondent hosted a "secret" and unapproved private "cookie party" in a remote, secluded, unprofessional, and inappropriate space with six 6th grade girls without any other adult being present, failed to secure well-known and required preapproval, and blatantly disregarded the District's policies and regulations as well as the school's procedures and protocols, protocols designed to keep students safe and healthy.

As for the Specifications relating to the "slap" incident, the facts are largely admitted by Respondent, the District maintained. He admitted to; play boxing with JM on May 3, 2013; having his hand come into contact with JM's face; placing JM in harm's way; causing JM's face to have a red mark; and that JM could have been hurt worse than

he was. The record further establishes that Respondent did not apologize to the parents of JM nor report the slap to school administration. Thus, the District asserted, Respondent voluntarily and consciously engaged in physical activity with JM that placed JM in danger and was unrelated to the curriculum and/or instruction. Moreover, the District continued, Respondent decided to engage in such behavior less than six months after his secret “cookie exchange” and his having later been instructed by principal Sikorsky to not engage in inappropriate physical contact with students. Respondent's conduct and poor decisions resulted in an assault and harm/injury to a student, the District asserted, and his actions taken together constitute insubordination, conduct unbecoming, and/or just cause sufficient to permanently remove him from employment with the Board.

Additionally, the District argued, Respondent's history of repeated, inappropriate physical contact with students--contact unrelated to the curriculum and or instruction--and disregard for Board/District policies and regulations compromising the health, safety, and welfare of students and failing to comply with standards of good judgment and performance the Board justifiably requires of its teachers, establishes a continuing course of conduct by Respondent that constitutes insubordination, conduct unbecoming, and other just cause sufficient to permanently remove him from employment. In this regard, the evidence established that Respondent, throughout the course of his employment with the District, would tap students on the shoulders if they were disrespectful, tap his foot on the outside of arms of students doing push-ups, demonstrate wrestling moves with students, pick up students by their ankles, and give student hugs; all conduct that is contrary to the established standards of the District. In this regard, the district explained, when Ms. Sheffels and other members of the PE department met with school

administration on May 6, 2013, she reported that Respondent had repeatedly engaged in inappropriate and unprofessional physical contact with students over the years and that Respondent did not have appropriate boundaries with students. Such behavior, Sheffels reported, included poking students, hugging girls, boxing or shadowboxing, wrestling or roughhousing with boys, tripping students and attempting to knock out the arms and legs of a female student in a push-up position. Sheffels also testified that at least two students had told her that they felt uncomfortable with Respondent's physical contact; one reporting such uncomfortable feelings approximately six to eight years ago, and the other reporting such feelings only a few months prior to the May 3, 2013 "slap." Sheffels also testified, the District noted, that she had observed Respondent wrestle male students on more than 10 occasions, lift students up, including by the ankles, push students on more than 10 occasions, hug students on more than 10 occasions, punch students in the arm on more than 10 occasions, place students in a headlock on more than 2 occasions, and observed Respondent lay on male students on a "few" occasions. Similarly, PE teacher Ibach testified that he observed Respondent shadowbox with students approximately once a week from the start of Respondent's employment, and observed Respondent "horse around" with students, including wrestling headlocks and bumping shoulders two or three times per month since Respondent began working at the school in 2002. Ibach also testified that he observed Respondent hug 5th and 6th grade female students on a daily basis. Although he was repeatedly counseled by his coworker Sheffels to not engage in such conduct on many occasions and by the school's principal on at least one occasion, Respondent's inappropriate conduct continued, the District argued.

The District asserted that it has met its burden of establishing the truth of each and all of its tenure charges against Respondent and has shown that Respondent is not fit to discharge the duties and functions of his teaching position; his conduct threatens public respect for government employees and confidence in the operation of the District. Considering the totality of the circumstances, District concluded, Respondents' conduct should be found to constitute conduct unbecoming, and/or other just cause for dismissal, and Respondent should be permanently removed from employment with the District.

Respondent

Respondent argued that this case boils down to six words: "an unintentional slap with no injuries." Such an isolated incident, although regretful, Respondent argued, does not tend to destroy the public's confidence and respect. Nor does such conduct reflect negatively upon Respondent's fitness to discharge his duties as a teacher. The District has failed to meet its burden to prove the tenure charges at issue, Respondent asserted.

According to Respondent, much of the District's case is based upon evidence that should not be considered by the Arbitrator. In this regard, Respondent maintained, much of the conduct focused upon by the District at the hearing was not charged or identified in the District's specifications. Specifically, Respondent argued, there were three categories of "other conduct" that should not be considered as supporting the District's tenure charges including; the underlying facts relating to the "Christmas cookie party" as they are unrelated to the "slapping" incident the District proffers as the reason for Respondent's discharge and offer nothing for which Respondent has not already been disciplined. Similarly, the alleged past conduct of Respondent involving wrestling with

boys, tripping students, poking students, punching students in the arm, putting students in headlocks, etc. are wholly irrelevant and prejudicial. These alleged incidents were not alleged in the District's charges and were not the basis of prior discipline. Moreover, the testimony offered by the District about these claimed incidents was vague, did not identify the individuals involved and were largely unsubstantiated. Respondent did not have a fair opportunity to prepare to defend against such allegations nor subject the claims to fair inquiry and cross examination.

The fact is, the Respondent asserted, this case essentially involves an incident in which Respondent and the student were play boxing in gym class and Respondent inadvertently slapped the student on his cheek. The student was not hurt. Nor was there evidence that the student was embarrassed by the incident. A single slap, Respondent asserted, an indisputably unintentional and playful act, is not sufficient to warrant dismissal of a teacher with a largely unblemished record.

Termination in these circumstances, involving an unintentional act, amounts to an unduly harsh and unnecessary penalty within both the general understanding of fairness as well as controlling court precedent. Thus, Respondent concluded, the evidence does not support the tenure charges of conduct unbecoming alleged by the District, and even if the Arbitrator were to find support for a finding of conduct unbecoming, termination would not be considered appropriate discipline for such as it would be unduly harsh under the circumstances.

Discussion

Introduction

The District bears the burden of establishing the truth of its charges against Respondent, including its assertions that Respondent's conduct amounts to unbecoming conduct and that such conduct by Respondent is sufficient to support his removal from his public office. Both parties agree that unbecoming conduct is conduct that "...has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." (Citations omitted).

Considering the full record in this matter including all testimony, evidence and argument of the parties, I conclude that although the District has shown unbecoming conduct of Respondent, it has failed to meet its burden of showing that the unbecoming conduct at issue, under the circumstances, is sufficient to support the termination of Respondent.

The Relevance of the December 2012 Cookie Party and Ongoing Conduct of Respondent

Seven of the eight "Specifications" proffered by the District to support its tenure charges focus upon Respondent's May 3, 2013 slap of student JM while the two were play fighting. Conversely, the large majority of evidence offered by the District at the hearing focused upon a single specification referencing a prior incident for which Respondent received discipline (the December 2012 cookie party) and other prior acts of physical interaction with students by Respondent extending back to when he first began teaching PE/Health in the District in 2003. I admitted such evidence over the continuing objection of Respondent because it was relevant to the theory of the case as expressed

and presented by the District – the party with the burden here – and with the understanding that I would determine what, if any, weight would be given such evidence based upon the record as a whole and arguments of the parties. Time consumed at the hearing by the presentation of evidence of the “cookie party” took the majority of the four days of hearing on the matter. Similarly, the District pursued evidence relating to the Respondent’s alleged contact with students since he began his PE/Health teaching position with the District with all but one or two of the witnesses who testified at the hearing.

I find that the evidence relating to the December 2012 “Cookie Party” is not sufficient in and of itself to constitute cause for the termination of Respondent, and that evidence relating to the cooking party is of relevance limited to; (1) its relationship to questions of progressive discipline and (2) its establishment of an implicit acknowledgement by the District of the relatively insubstantial nature of the “slapping” incident to alone support its decision to terminate Respondent. Similarly, the evidence relating to Respondent’s contacting students as a result of horseplay, tapping shoulders, wrestling, hugging, play boxing, etc. is relevant not because it adds weight to support the District’s decision to terminate Respondent, but because it is both an indication of the insufficiency of the primary slap-related reason offered to support the termination of Respondent and because it amounts to a condoning of Respondent’s conduct by the District; an established tolerance of Respondent’s conduct that recommends against the termination of Respondent for engaging in similar conduct on May 3, 2013.

The Corrective Nature of Discipline

It is widely recognized that discipline is corrective in nature; that considerations of fairness and due process require that for all but the most egregious conduct employees should be subject to discipline that places the employee on notice of the rules and encourages the employee to correct his or her bad conduct. Such encouragement usually informs the employee that further incidents of similar conduct in the future will result in progressively harsher discipline or discharge. Although the application of progressive discipline thereby considers the past discipline of an employee, it should not, as I find the District is attempting to do here relating to the December 2012 cookie party, result in repeated discipline of an employee for conduct already the subject of prior discipline.

Lack of Notice to Respondent

Although teacher and administrative witnesses as well as Respondent testified that it is not appropriate to purposefully, physically harm a student, and that it is permissible for a teacher to touch a student for purposes of protecting the student from harm, the evidence establishes no written policy or rule that articulates whether and/or under what circumstances teachers of the District may touch students and what if anything will be the consequence if a teacher has physical contact with a student. Nor does the evidence establish that teachers have received training from the District in such matters.

The District asserts that the prior repeated advice about such behavior offered to Respondent by a co-worker should be considered as notice and counseling for purposes of supporting the District's decision to terminated Respondent. I am not persuaded by the District's argument in this regard. The evidence does not establish that Respondent's PE

department colleagues are responsible to supervise, counsel and/or direct Respondent, nor does the evidence show that they have the authority to discipline Respondent. Rather, such authority and responsibility lies with management.

The District also argues that Respondent's prior cookie-party related discipline placed him on notice that he was not to touch any student when such was not directly linked to teaching or safety and that Respondent's May 3, 2013 slap of JM was: (1) contrary to that policy and the directive, and (2) amounted to insubordination. Contrary to these assertions by the District, I do not find that the written notice provided Respondent was directed toward the type of conduct involved in the May 3, 2013 incident or that Respondent's conduct on that day amounted to insubordination. Respondent's prior discipline of the withholding of incremental wage increases for the 2013-2014 school year was pointedly related to his conduct involving the December 2012 cookie exchange. I acknowledge that in her written warning on the subject, Principal Suchorsky wrote that Respondent should "refrain from any interactions with students (through words, actions or touch) that are not directly linked to teaching a particular skill or safety intervention." However, I find that when considered within the context of the event for which Respondent was being disciplined - an unapproved, secretive cookie party, unrelated to the curriculum that violated the food/allergy-related and other policies of the District - the single word reference to "touch" contained in the multiple page warning about an incident *where no touching of any sort was involved or even alleged*, does not constitute notice that Respondent's long known practice of horsing around with students and engaging in physical play with students could subject him to termination. Consequently, in the application of progressive discipline, I do not find that Respondent was fairly

placed on notice by the written memorialization issued him relating to the cookie party that an incident of his future physical play with students would result in his termination. Nor do I find that the character of Respondent's play fighting conduct with JM was so closely related to the character of the subject of his prior discipline and warning as to evidence an intention of Respondent's part to disobey his superior's directive.

The Focus on Respondent's Ancient Conduct

For a teacher to report a colleague for engaging in questionable or inappropriate physical contact - for a teacher to report such to the school principal - must take some extraordinary effort. Where, as here in regard to Respondent, such reporting takes place over a period of 10 years and the school's administration does nothing about it - other than an occasional conversation with the allegedly inappropriate teacher, conversations that are neither recorded nor remembered by the administrator with any specificity and were viewed by the administrator as minor matters - one would be hard-pressed to find - and I do not do so - that the involved teacher was on fair notice that his conduct could subject him termination.

Respondent engaged in his horseplay and physical-connection with students in a notorious manner and on an ongoing basis since he began working for the District according to PE teachers called to the stand by the District. Having never been formally called to task for such hugging, tapping, and horseplay conduct by the District for that lengthy period, it is inconsistent with reasonable notions of fairness to allow the District to reach back through ten-plus years and use such conduct to add to the weight of an otherwise isolated, inadvertent incident - such as the May 3, 2013 slap at issue here - to

justify a termination. If such conduct by Respondent did not warrant discipline of any sort for over ten years, it is contrary to recognized concepts of fairness for the District to cite such conduct as reason for Respondent's dismissal.

Again, when an employer, as the District has done so here, spends the large majority of its time and energy attempting to focus the arbitrator's attention on conduct that has already resulted in prior discipline or ancient notorious conduct that was not the subject of prior discipline, such should be viewed, as I do here, as an admission by the employer that the primary reason proffered to support the discharge may not be adequate.

The Determinative Issue in this Matter

With these considerations in mind, I find that the merits of this case are determined by the sufficiency of the District's charges relating to the Respondent's May 3, 2013 slap of student JM and whether the discipline issued by the District was appropriate relative to the severity of Respondent's violations of policy. In other words, the determinative question in this matter is whether or not the decision to terminate Respondent was appropriate relative to the gravity of his offense given Respondent's disciplinary record and consideration of principles of progressive discipline.

The May 3, 2013 Slap was Unbecoming Conduct

The Record establishes that the May 3, 2013 slap took place; Respondent has never denied such. The evidence also establishes that although Respondent intentionally engaged in play boxing with JM, his actually making contact with the student's cheek was inadvertent. The slap was an unplanned accident, albeit occurring during the course

of an activity initiated by Respondent based upon poor judgment. Respondent admitted on the witness stand that he made a mistake, he caused harm to a student and he placed the student in a situation that could have resulted in even more serious harm than the slap that occurred. Based upon the record, I find that Respondent's engaging in play fighting with JM and slapping JM - conduct that caused JM physical harm and embarrassment - were acts of unbecoming conduct. Such conduct by a teacher would have a tendency to diminish the public's respect for school employees and confidence in the District's operation of the school.

Factors Relevant to a Determination of Appropriate Discipline

It is widely acknowledged that when reviewing the fairness of discipline in the workplace, particularly where, as here, there is a recognized standard requiring cause for discipline, the punishment imposed upon an employee should bear some reasonable relation to the violation of policy found; in other words the punishment should fit the crime.

In the instant matter I find that the District's decisions to discharge Respondent – a tenured teacher - was excessive and went beyond the limits of fairness as contemplated by the for-cause standard. In reaching this conclusion I rely upon an number of considerations, including that: (a) Respondent is not a short term employee having worked for the District for over ten years; (b) Respondent has ten years of good performance reviews; (c) Respondent has only one prior discipline in his file and has had no prior discipline directly related to the conduct at issue; (d) Respondent was not warned for engaging in like conduct in the past and was implicitly allowed to act in a similar

manner for many years; (e) all witnesses to the slap described it as being unintentional; (f) Respondent did not intend to harm JM; (g) the involved student required no medical attention; (h) the discipline of termination would have a profound affect on the tenured teacher's career; (i) un-contradicted testimony establishes that the cookie-party related warning received by Respondent has been successful in stopping Respondent from violating District policies related to wellness and permissible celebrations; (j) the record evidence persuades that discipline of lesser severity than termination is reasonably likely to cause Respond to correct his conduct relating to contact with students; and (k) with such discipline there is a likelihood that confidence of the public in the school will be repaired and protected.

Although Respondent's May 3, 2013 conduct does not support discharge, the conduct was not a minor infraction of the District's policies. Respondent's conduct was conduct that, I find in agreement with the District, involved poor judgment, placed a student in harms way, and resulted in a student being harmed. Under the circumstances, significant, corrective, discipline is warranted. To that end I issue the following Findings and Order:

Findings and Order

The charges are sustained in part and denied in part.

The District has established the truth of certain of its tenure charges against Respondent, but has failed to satisfy its burden of establishing that the proven charges warrant dismissal.

The District is ORDERED to:

- Rescind its discharge of Respondent and promptly offer him reinstatement to his former position;
- Expunge all references of the discharge of Respondent from the District's disciplinary records;
- Reduce Respondent's discharge to a 60 calendar-day suspension without pay;
- Make Respondent whole for all losses of pay and benefits he may have suffered as the result of his discharge, except such losses associated with his 60-day suspension.

Dated: May 2, 2014



Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 7-1/14 relating to tenure charges against Nicholas Vitelli on Friday, May 2, 2014.



Timothy J Brown