Agency Docket No.299-10/14

IN THE MATTER OF TENURE CHARGES

AGAINST

RESOPONDENT DARLENE BARNES

BY

STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY

Appearances before Arbitrator David L. Gregory:

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Arbitration Hearing Dates: February 10, 13, 24, 26, and 27, 2015
Date of Arbitrator's Completion of Receipt of Post Hearing Briefs: March 18, 2015
Date of Arbitrator's Completion of Receipt of Reply Briefs: March 24, 2015
Date of Arbitrator's Decision: March 24, 2015

INTRODUCTION, PROCEDURAL HISTORY, AND FINDINGS OF FACT

On September 3, 2014, James Smith, the District's Executive Director for School Security, timely filed the Charges with Dr. Donnie W. Evans, the State District Superintendent. I was appointed the Arbitrator. The transcribed hearings occurred in a conference room at the District offices on February 10, 13, 24, 26 and 27, 2015. The parties filed extensive interim briefs on sophisticated issues of justiciability. The parties were superbly represented, and had full opportunity to be heard. All witnesses testified under direct and cross examination. At the parties' mutual request, they filed briefs and reply briefs. I completed receipt of post-hearing briefs on Wednesday, March 18, 2015 and of reply briefs on Tuesday , March 24, 2015. Upon my December 19, 2014 letter request to the Office of the Commissioner of the Department of Education on behalf of the parties' attorneys' extensive trial commitments, the due date for my Award was extended to Friday, March 27, 2015.

There are 19 Charges consuming three dozen pages in the record, on the theme of "conduct unbecoming." The spirit of the legislative intent favors prudential economy in these arbitration proceedings. Ergo, rather than retype the Charges verbatim herein, the Charges are incorporated by reference in their entirety into my Decision.

The Charges span a kaleidoscopic spectrum. They portray Respondent as an accomplished, congenital liar who uses her elusive and calculating prevarications to shrewdly facilitate and enhance her ominous multiple identities for illicit, fraudulent financial gain.

Respondent's lawyer finds the District's malicious profile of Respondent pernicious and wholly ludicrous.

The heart of the matter in this Arbitration involves Respondent's deeply problematic interactions with Teacher Albania Fermin on February 11, 2014 and, especially, with the minor/infant/juvenile 13 year old female student "NC" on February 21, 2014.

The student returned to the computer room in Public School 20 to retrieve her book bag. Respondent was the only other person present at the beginning of the incident at issue. Respondent inquired of NC to present some identifying item from the bag to Respondent before taking the book bag. NC did not comply and, instead, bolted for the door, only to be impeded in her desired egress by Respondent. Within the next few minutes, NC and Respondent were punching and slapping one another. Other than the two pugilist combatants, there were no eyewitnesses to the entire contretemps a la fisticuffs.

Security Officer Gena Warren arrived on the scene within a few minutes. She very credibly testified that she witnessed Respondent repeatedly push NC a distance of approximately fifteen feet backwards to, and ultimately downwards onto the top of, the table. Instructional Aide Ovid Armstrong also credibly testified that he, like Officer Warren, also saw Respondent repeatedly push NC backwards onto the table by restraining NC's arms. Officer Warren and Aide Armstrong are the closest anyone other than Respondent or NC came to being an eyewitness to the entire episode. I find Ms. Warren and Mr. Armstrong were both very credible witnesses.

NC's primary objective was to flee the computer room with book bag in hand, whereas Respondent's primary objective was even more immediate---to grasp NC's wrists in order to restrain NC from landing any further slaps or punches.

NC testified at the Arbitration hearing. I found her relatively forthright, but not entirely credible. She apparently does well in math, science, and computer classes, with B grades in some of these favorite subjects some of the time. NC regrettably is not a novice in the de facto "Fight Club," having herself been twice suspended for earlier indulgence in/resort to the "sweet science." I find it more likely than not that NC indeed told Respondent that NC's mother would be coming to the school for the express purpose of "beating [Respondent's] ass." To date, the mother has yet to appear, and NC remains living with her grandmother. Until the events at issue in February of 2014, Respondent, with the better part of a decade of service, had no labor relations disciplinary history of record with the District.

ANALYSIS AND DISCUSSION

On February 27, 2015, Mr. Albert C. Buglione, Esq., representing the District, conducted one of the more effective cross-examinations I have observed in my thirty two years as a labor and employment arbitrator. Respondent initially and untruthfully contended "I never touched her [NC] at all."(Tr/193, 218/Feb. 27)

I find Respondent's testimony to the contrary. She steadfastly adhered to her own directly opposite, and internally mutually exclusive, testimony---unless, of course, it was not

opportune for Respondent to do so. Her absolute testimony that she "never touched NC at all" was completely inconsistent with her claims of self defense, including her endeavor to pin NC's wrists to the surface of the large wooden utility table perhaps 7 to 10 feet inside the doorway of the school's computer room. Respondent surmises that NC collapsed onto the table due to gravitational inexorability, and not due to any push from Respondent.

By her own testimony on cross-examination, Respondent admitted the essence of Charges 1-4: e.g., Charge 2: "CONDUCT UNBECOMING A TEACHING STAFF MEMBER (Inappropriate Physical Contact/Assault upon a student [NC] on February 21, 2014 in the classroom.)"

Respondent claims that she was acting in her own necessary self defense against the recalcitrant, insubordinate aggressor NC. (Tr/ 195,220/ Feb 27). Respondent sets forth the unusual remedy that she seeks at page 27 of Respondent's post hearing brief : "This is a strange case because Ms. Barnes does not want to return as a teacher for the Paterson School System. She cannot because she has been found to be permanently disabled by the Social Security Administration...Accordingly, Respondent Barnes requests that you issue your award in a manner as if she was seeking to return to teach at the District."

I find relatively little of Respondent's key testimony credible with respect to the salient facts pertaining to Charges 1-4. According to Respondent , things occurred "too fast" for her to consider and formulate a nonproblematic alternative approach.

Furthermore, on Mr. Buglione's cross-examination of Respondent, it is Respondent, not NC, manifesting all of the behaviors of the prototypical aggressor of tort and criminal law :

Q. " Why don't you [Respondent] just run out into the hallway? If she [student NC] is backing up, why aren't you running out into the hallway?

A. It never occurred to me that I needed to run out into the hallway.

Q. But she's backing up and you're walking forward. You had the opportunity to retreat and you didn't; isn't that correct?

A. No."

This colloquy between crossexaminer Buglione and the cross-examined Respondent continues for several more pages of the transcript. Rather than ameliorate or rehabilitate any small part of Respondent's intransigence, Respondent's contradictory testimony infects other major components of Respondent's defense.

I find that the District has met its burden of proving Charges 1-4, 9, 12, and 18 (e.g., CONDUCT UNBECOMING A TEACHING STAFF MEMBER, Inappropriate Physical Contact/Assault upon a student in the classroom , February 21, 2014.)

I find that the District has also met its burden of proving Charge 4, CONDUCT UNBECOMING, in bullying, abuse, harassment, and intimidation of a co-worker. Albania Fermin was a completely credible witness. She testified very credibly about her understandable apprehensions regarding the intimidating, bizarre conduct and statements of

Respondent. Respondent's February 11, 2014 barricading of Ms. Fermin in the restroom while haranguing her throughout, having prefaced the weird episode by stating aloud that Respondent realized Respondent's conduct was indefensible, is far from the friendly meeting of cordial colleagues around the proverbial water cooler.

I find insufficient evidence that the District has met its burden of proving Charges 5-8, 10 -11, and 13-17, and 19. I emphasize that this is not the failure or the fault of the District or any of its employees, administrators, agents, or attorneys. Rather, the governing legislation compels expeditious presentation and conclusion to these proceedings. The District simply did not have enough time available to develop fully these particular Charges. The underlying facts in these Charges demonstrate chronic miscommunications (Charges 6, 7, 8, 11) and a variety of allegations, none of which are central to this case. For some of the Charges (e.g., Charge 10), there is virtually no pertinent fact or legal context whatsoever .

Respondent has due process rights. This compels the District to set forth with specificity the particulars in each of the Charges. Absent such information forthcoming from the District as the custodian of the record from the outset, Respondent's constitutional right to an effective defense may be vitiated. Respondent's lawyer insightfully labels the redundant piling on of the panorama of Charges a variation of the "because the District believes that because they say it is so then it is so" ipso facto." (Respondent posthearing brief at 1) This does not allow the District to dictate where she may live or travel, or to open her interactions with the police ex post facto (e.g.. Charges 13-17) to the searching eye of the District. For decades, the United States Equal Employment Opportunity Commission has been

understandably wary of employers using arrest records or credit histories as purported justifications for adverse preemptive or punitive actions against employees.

Assuming arguendo that the District proved all Charges, Respondent contends nevertheless that her seniority, the principle of progressive discipline, and no prior similar incident in her record preclude a six month suspension, let alone discharge. Respondent cites, inter alia, Paterson v. Vincenti (Arbitrator Howard Edelman, June 11, 2014)(six month suspension without pay imposed a second time rather than discharge, anger management classes, psychiatric examination with return to work clearance imposed for numerous intemperate and vulgar outbursts); and, Perez (Arbitrator Timothy J. Brown, December 11, 2014). (Charges dismissed, when District failed to establish the truth of the "conduct unbecoming" charge re: an equivocal "touching" or "grabbing" of wrist of student by teacher)

Not surprisingly, the District cites several cases sustaining discharge in the first instance of assault. I find the cases cited by the District more to the point than the authorities cited by Respondent. I find that Respondent had every opportunity to walk away from, rather than to hotly pursue, the student, and Respondent did not do so---the classic decision of the aggressive civil tortfeasor and the criminal perpetrator to continue trading punches and slaps. In such circumstances, discharge in the first instance is fully in accord with progressive discipline, due process, and just cause.

AWARD

For all of the reasons set forth above, I find that the District has met its burden of proving Charges 1-4, 9, 12, and 18. Those proven Charges are sustained and shall be added to Respondent's official record.

Respondent is hereby released, and discharged for proven just cause from the tenured teaching staff of the Paterson School District.

For all of the reasons set forth above, I find insufficient evidence necessary to prove Charges 5-8, 10-11, 13-17, and 19. Those Charges are dismissed.

So Ordered,

David L. Gregory, Arbitrator

I, David L. Gregory, affirm that I have executed this document as my Decision and Award in this matter on this 24th of March, 2015.

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