

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE
CHARGES AGAINST
BRUCE BASETTI

Opinion and Award

BY

Agency Docket No. 75-4/19

THE PENNS GROVE-CARNEYS POINT
REGIONAL SCHOOL DISTRICT
SALEM COUNTY

x

Peter Adomeit, Esq.
Arbitrator

Appearances: For the Petitioner School District: Jeffrey R. Caccese, Esq.,
Comengo Law Group
For the Respondent Teacher: Keith Waldman, Esq. and
Hop Wechsler, Esq.,
Selikoff & Cohen, P.A.

Dates of Hearings: May 30 and 31, 2019

Briefing Completed: July 17, 2018

Date of Award: August 23, 2019

OPINION

This matter came before the Arbitrator pursuant to P.L. 2012, Chapter 26 of Title 18A, N.J.N.J. The Arbitrator decided a number of pretrial evidentiary motions. The hearings took place on May 30 and 31, 2019 at the District's offices in Penns Grove, NJ. Both parties submitted briefs. Attorney Caccetti requested and received an extension,

without objection, of one day, to July 17, 2019. No reply briefs were provided for. After briefs were submitted, Attorney Wechsler on, behalf of Mr. Bassetti, filed a post-filing motion to strike Charges Two and Three, which the Arbitrator denied. The Arbitrator obtained an extension to file the decision from August 16, 2019 to August 23, 2019.

Both parties were represented by counsel and had a full opportunity to present evidence, to cross-examine each other's witnesses and to make arguments in support of their respective positions. Neither party has raised any objection to the fairness of this proceeding. Whether or not expressly referred to herein, the relevant evidence, the authorities cited and the arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Tenure Charges

Following the statement of facts, the Board's Charges contain these paragraphs.

“Charge One, Conduct Unbecoming” lays out two incidents, incorporated by reference, from the statement of facts, one incident in the classroom, the other during the interview/investigation jointly held by Middle School Assistant Principal Roy Wright, Jr. and Middle School Principal Dr. Luis Amberths. The classroom Charges allege:

“[Statement of Facts] §6. Mr. Bassetti used the word “nigger” in his fifth (5th) period science class comprised of seventh (7th) grade students.

[Statement of Facts] §7. More specifically, the students alleged that Mr. Bassetti **quietly said to himself** something to the effect of “I’m done with these niggers” or “I’m not trying to deal with these niggers” while walking away from certain students who were disruptive in the class.” [Emphasis added]

Referring to the post-incident interview, Charge One alleges:

[Statement of Facts] § 28. “Thereafter , in an effort to cover up his grossly inappropriate conduct, he made the situation worse when he explained that he could not have used the word “nigger” because the student to whom he was referring was white.”

The Arbitrator was puzzled by paragraph§ 28. Assistant Principal Wright strongly reacted to the words he attributed to Mr. Bassetti and abruptly ended the meeting, and this was the source for this Paragraph § 28. It was among the charges relied upon by Superintendent Zenaida Cobian in moving forward these proceedings. Assistant Principal Wright’s explanation as to why he believed Mr. Bassetti’s words to be was an intolerable racial comment will be discuss later.

Charge One goes on to allege:

[Statement of Facts] § 30. “The use of any racial epithet by a teacher is intolerable There is no place in a school district for such conduct. By making such highly sensitive and intolerable comments, Mr. Bassetti has lost all credibility with both students and staff, and, therefore, cannot continue to be employed by the Board.”

Charge Two Incapacity,” incorporates the same facts as Charge One and states in § 34 that “it is impossible for him to effectively return to the District” because it “would cause acrimony with student, staff and community.” Charge Two states [§ 35] that “Mr. Bassetti will not be able to perform the duties of his job if he were to be returned to the District and, therefore, is incapable of continuing his employment with the District.”

“Charge Three, Other Just Cause” incorporates the same facts as Charge One and states that returning Mr. Bassetti back to the classroom “would violate the public

trust to ensure the District students' care and well-being and that they are in a safe environment where they are not subjected to racial slurs by their teachers.”

Discussion

This termination is based on a single event, involving a single word – “n” - which the Board alleges and the Respondent denies saying in the course of a rambunctious period five, seventh grade class.

Mr. Bassetti (Respondent) is a tenured teacher employed by the District for fourteen years, since January 8, 2005, as a science teacher at the Penns Grove-Carney's Point Middle School. His record shows no previous discipline of any time, and no previous accusations of the accused of the use of “the N Word,” on the job or off. He testified that when growing up, he used the “n” word, but stopped using it years ago. There is no evidence he makes racist comments to others. He has been a volunteer in the community, assisting minority students. He holds all of his students to the same high standards. Because the “n” word may be distracting in reading this Award, I have shortened to “n”. “N” is, in the African-American community, simply “toxic” or more graphically, as called in the *Amazon.com* review of a book¹ on the word, “‘the nuclear bomb of racial epithets,’ a word that whites have employed to wound and degrade African Americans for three centuries”, and a word that can provoke in some African Americans an immediate, visceral reaction. So when Assistant Vice Principal Wright, during his investigatory interview with Mr. Bassetti, showed such a reaction when just discussing the word, it was understandable when placed in context of “n” long

¹ The 226 page Book, titled “Nigger” and subtitled, “The Strange Career of a Troublesome Word” is by Randall Kennedy, a Professor of Law Harvard Law School.

history of derision and insult. Whether his reactions damaged the investigation is another question, to be discussed later.

On February 27, 2009, Mr. Bassetti was teaching a fifth period, seventh grade science class. His testimony continues:

I was sitting at my desk and the students were returning those corrected tests and I was going through them, and I noticed across the room that [Student 1] was using a Chromebook and it was teetering on top of his stuff. So across the room I said, please keep all Chromebooks flat on the table. And he looked at me and I gave it a minute or two and he refused. *So I walked over to him and I went to take the Chromebook from him and as I was [sic] reached out to take the Chromebook, he slowly slid the Chromebook to his left over to [Student 2] , out of my reach.* [Emphasis added]

Rather than cause any classroom disruption or engage [Student 1] in any way, I returned to my desk and continued with the test papers. And then I waited till the end of the class period and then students were bringing me their Chromebooks to check them back in and I noticed that [Student 1] had gotten up and was walking away from his Chromebook. And I asked him to please, please bring me the Chromebook. And he said, “are you lazy, come get it yourself.”

And that was as the bell had rung and I pretty much just smiled at him as he walked out the door and he did a little double take and I wanted to leave him thinking that maybe there was going to be some discipline action [sic] for his comment. And then that's how I let him to [sic] walk out the door.

Mr. Bassetti's prior written statement from the day of the alleged incident, February 27, 2019, is consistent with this testimony. It states:

Bassetti "asked [Student 1] to please put Chrome book flat on desk. [Student 1] refused. Went to take Chrome book and [Student 1] slid Chrome book to another student. At class end asked [Student 1] to return Chrome book, [Student 1] responded, 'Are you lazy, come get it yourself' “No other communication with [Student 1] during class period.”

The statements of the students varied in length, words used, with differences about time, place, and the comment. A number did write that they heard the word, “n.” One heard “n...a.” Eight students heard nothing. To save hearing time and save these students from testifying that they heard nothing, Attorneys for the parties devised a creative solution.

The students were at the District Office, many with a parent. The attorneys together interviewed them one by one, in the absence of the Arbitrator, immediately before the start of Hearing Two. The attorney's then stipulated that none of them would be called as witnesses because they heard nothing.

Several students noticed details, unnoticed by the others, that solve the mystery of why some students heard 'n' but Mr. Bassetti denied saying it when at the investigation Assistant Principal Wright asked whether he said "n", the grievant's reaction as immediate, visceral, and emotional "No No No, adding words to the effect that made no sense because the student was "white." He has consistently denied saying "n".

The answer to the puzzle is he doesn't remember saying "n" because he said it "under his breath". He was not speaking to the class. He was speaking to himself. He was "mumbling" "under his breath." Student 3 so wrote on the incident report: "Me and [Student 1] were sitting down. Mr. Bassetti comes over to me and [Student 1] and tells [illegible] to do, me and [Student 1] he'd [said?] a smart remark back and Mr. Bassetti walked away and mumbled under this breath, 'I'm done with these N****'" [Emphasis added].

The Definition of the underline phrase: "If you say something under your breath, you say it in a very quiet voice, often because you do not want other people to hear what you are saying.

Walsh muttered something under his breath." *Collins English Dictionary*²

These fleeting thoughts, self-articulated, are stored in short-term memory.³

Persons reading this opinion will store the start of each sentence in short term memory to understand its meaning. When the parties read this Opinion, they will be using short term memory .

Long term memory stores experiences, which can be retained longer.⁴ Mr.

² COBUILD Advanced English Dictionary. Copyright © HarperCollins Publishers

³ Collins English Dictionary. Copyright © HarperCollins Publishers.

⁴ "That section of the memory storage system in which experiences are stored on a semipermanent basis." Collins English Dictionary. Copyright © HarperCollins Publishers

Bassetti was able to recall what happened in the classroom because he experienced it. He remembered not trying to provoke a confrontation. Not remembering what he said to himself is understandable and hardly unusual.

[Student 3] was sitting right next to Student 1, the provocateur, and Mr. Bassetti, and in a good position to see and hear the incident, and had the experience and vocabulary to describe it as mumbling to himself under his breath.

Other student's observations were similar to [Student 3's] version. These students used their own vocabularies. [Student 3] wrote: "We were doing our work kids where [sic] loud and very quietly Mr. Bassetti [sic] said "nigger" and I thought he did not really say it but my classmates heard him say it." [Emphasis added] [Student 4] wrote that Student 4 and another student were turning off the chrome book and Mr. Bassetti, said the n word very softly." Student 5 wrote [two students] were turning off the chrome book and Mr. Bassetti [sic] said the n word softly. [Emphasis added]

From this I conclude that Mr. Bassetti was not lying when he denied saying "n". Lying is knowing at the time you make it that your statement is false.⁵ He cannot be punished for lying when saying something that he mistakenly believes to be true.

The Petitioner's arguments in favor of disregarding all of the student statements are not persuasive. The Arbitrator has considered the student testimony with great caution. The Arbitrator is not persuaded that the low grades Mr. Bassetti issued to some of these students motivated them to invent their stories.⁶ Some were uncertain about hearing whether he said, "n". They talked about it in the halls after his class: "Did you hear it?" This is not

⁵ See *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* {Perjury defined.}

⁶ Mr. Bassetti assigned a science project to all of his students, setting the same high standards for all of them. Those who did not do the assignment, or could not complete it after extensions, knowing it counting for 30% of the grade, got low grades coincidental with this incident. After submitting the low grades for the project, and after his suspension with pay pending this arbitration, Mr. Bassetti discovered that someone had substituted a new grade: "E" for "Excused." That raised the grades.

the same as a conspiracy to lie about it. (One student, who was out of class, later wrote about hearing it. Two others were considered not credible. None of the three testified.) The student written statements varied widely in some details – time of day, location, words used. Common to the statements of students in a position to hear was the word, “n.”

The Respondent contends, also in the alternative, that the other stated reasons for termination are without merit. They are the subjects of the rest of the Opinion.

Part Two of Charge One is the investigation, which the Petitioner contends was unfair and filled with errors. The Board contends otherwise. The Arbitrator finds that the Petitioner’s contentions have merit. Even without these deficiencies, the part of the charge dealing with Mr. Bassetti’s statements during the meeting are on its face, illogical, and not based on any reasonable interpretation of what Mr. Bassetti said.

The Regional School District rules and normal practices required the matter to have been assigned to Affirmative Action, who was Dr. Michael Ostroff, but he was out of town that day on school business. So the matter was assigned to Assistant Principal Wright. There then followed a series of events that the Respondent contends undermined the results. Assistant Principal Wright was not the proper investigator - it should have been assigned to the District’s Affirmative Action Officer, Dr. Michael Ostroff, who signed off on the report based on the student’s written statements obtained by Assistant Principal Wright.

But the two most serious deficiencies in the Assistant Principal’s Investigation was first, when he summoned Mr. Bassetti to an investigatory interview which could lead to (and did lead to) discipline and Mr. Bassetti was denied Union representation. And second, that he did not recuse himself when it became evident that he was so deeply and emotionally involved that it impaired the investigation and his judgment and led to the filing of an illogical complaint about what Mr. Bassetti did not say during the interview, but Mr. Wright claimed he implied.

Charge One states in relevant part:

“Thereafter , in an effort to cover up his grossly inappropriate conduct, he made the situation worse when he explained that he could not have used the word “nigger” because the student to whom he was referring was white.”

This Charge makes no sense. Mr. Bassetti had a right to defend himself. By inferring an unstated and illogical meaning, the Board has interfered with the right to defense. For example, if a teacher denies a charge during an investigatory interview, and is hit with an additional charge of lying, then what purpose would be served with having the interview in the first place? And what if the teacher was not lying? If these were the ground rules, then the purpose of the interview – to allow the employee to have his or her say, so the employer would know both sides - would be defeated.

Mr. Wright claimed that, after informing Mr. Bassetti of the allegations, Mr. Bassetti asked who the student was towards whom he allegedly used the "N" word. Mr. Wright's answer was, “ [Student 1]”. Mr. Bassetti allegedly responded "I couldn't have called him that because he's white." Hearing this, Mr. Wright testified, “I became extremely angry, just put my head down and told. . . Mr. Bassetti that I found his response to my question on its own merits to be offensive. And I said, ‘The meeting will now end.’”

The following explains why the Arbitrator upon reading the Charges, could not understand it. Mr. Wright explained that he interpreted Mr. Bassetti's alleged response to mean that "[using the 'N' word] would have been justifiable had it not been a white student that he said that to or because it was a white student that he couldn't have possibly said the word. And like I said, [that] just didn't put me in a good place."

The argument is absurd and contrary to the rules of logic. Mr. Bassetti never said that he would have used the “n” word if the student were black. Nor did he infer it.

Deconstructing why it is illogical, here is the false syllogism: Mr. Wright has constructed and then laid upon Mr. Bassetti a false argument. “Illogical” means not following the rules of logic. This is why:

Major premise: Mr Bassetti calls African Americans “n”.

Minor premise: [Student 1] is not African American.

Conclusion: Therefore Mr. Bassetti did not call [Student 1] a “n”.

Mr. Wright has constructed the major premise out of whole cloth and attributed it to Mr. Bassetti. It’s a verbal slight of hand, arising out of feelings, creating a denial into an admission. Creative, but not valid. This part of Charge Two is without merit.

And because it found part of the foundation for Principal Cobain’s decision to embrace it and refer it to the Board of Education, it seriously impairs the Principal decision and the Board’s.

Superintendent Cobain accepted Mr. Wright’s implied inference as being an admission by Mr. Bassetti that he would use “n” against African-Americans.

Superintendent Cobain then mischaracterized Mr. Wright's version of his interview with Mr. Bassetti as unfavorable to Mr. Bassetti on direct examination. Referring to "concerns that Mr. Bassetti ha[d] said, if it would have been a white student, I would have not said it [sic], implies that he will not use it against a white [sic], but he will use it against a black [sic]" The Superintendent inserts a newly invented sentence using the subjunctive verb “would have”: “If it would have been a white student.”

The Superintendent attributes to Mr. Bassetti words he did not say to create a conclusion he did not make.

The Respondent contends that additional defects in the investigation voided the process, That Assistant Principal Wright was “investigating” was established by credible evidence. Dr. Michael Ostroff, the district's Affirmative Action Officer who wrote the investigation report, but did not conduct the student’s investigatory interviews, as he was out of district on a training session, and was not aware of the situation until after the weekend, and was not present for any of the investigatory interviews with the students or with Mr. Bassetti. Dr. Ostroff stated that "[i]t was a judgment call. By that time . . . the kids had been interviewed by administration. I had received the statements in PDF form from the

Superintendent. I was able to review those and felt at that time that the students' statements, along Dr. Ostroff accepted Mr. Wright's conclusions without questions and without interviewing Mr. Bassetti.

The Respondent contends these are serious defects that call the result into question. The Arbitrator agrees.

The respondent states that the Board denied Mr. Bassetti his right to Union representation at the investigatory interview with Assistant Principal Wright and Principal Amberths. The Arbitrator agrees.

Mr. Bassetti testified that Principal Amberths "told me I did not require union representation for this, I needed to make a statement" and thus slammed shut the Union representation door. And that, when Mr. Wright testified that Mr. Bassetti never asked for and was never denied union representation, Mr. Wright was incorrect. A violation of an employee's *Weingarten* rights "is not harmless error or a formality." On the contrary, it is well-recognized that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates . . . inequality [of bargaining power between employees and employers], and bars recourse to the safeguards the [National Labor Relations] Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *N.L.R.B. v. J Weingarten, Inc.*, 420 U.S. 251, 262 (1975) (quoting *Am. Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 316 (1965)).

The New Jersey Supreme Court extended the *Weingarten* rule to New Jersey public employees, writing:

an investigatory interview of an employee often entails an atmosphere of isolation and intimidation ...In such a setting, employees may be less than articulate in attempting to defend themselves. Employees may not realize that they could exonerate themselves through recounting to the employer certain mitigating circumstances. Thus, ***an employee's defense may be less than compelling, squandering the last chance of exculpation before punishment is delivered.*** *Matter of Univ. of Med. & Dentistry of New Jersey (Sch. of Osteopathic Med.)*, 144 N.J. 511, 528 (1996).

Charge Two Incapacity,” incorporates the same facts as Charge One and states in § 34 that “it is impossible for him to effectively return to the District” because it “would cause acrimony with student, staff and community.” Charge Two states [§ 35] that “Mr. Bassetti will not be able to perform the duties of his job if he were to be returned to the District and, therefore, is incapable of continuing his employment.”

The Charge is without merit. The Arbitrator has found that Mr. Bassetti, while speaking to himself softly under his breath, used “n”. To uphold this termination would create a new common law of teacher termination: “If you so much as breathe to yourself the word “n”, with no intention to communicate it to others, but are overheard by some students, even if you never intended them to hear, even if you have never said “n” to students in 14 years, your intent is irrelevant, and your spotless record is irrelevant, and you shall be terminated for the first offense.”

First, The New Jersey legislature set up a statutory plan to balance the needs of School Districts for competent teachers, and the needs of teachers to be treated fairly, and created a panel of experienced arbitrators to adjudicate these disputes. The Board’s argument here would transfer that power directly to the School Boards or the public, and that their decision, not the arbitrator’s, shall be final and binding.

Second, the Arbitrator is aware of the facts of this case, because of the hearing with witnesses and cross-examination. The public is not so aware. Misinformation, rumor, innuendo can run rampant in any community. Especially where, as here, an individual has tried to influence Board decisions, regularly calling out for the termination of teachers, including Mr. Bassetti. In the Bassetti matter, a parent of a student who came home and reported that Mr. Bassetti said “n”, called a local television station that sent over a reporter, and interviewed the student about this matter. The matter was also reported in local newspapers. The legislature never intended to dispense with an orderly hearing under strict safeguards and turn terminations over to the press and the public.

Charge Two is without merit.

“Charge Three, Other Just Cause” incorporates the same facts as Charge One and states that returning Mr. Bassetti back to the classroom “would violate the public trust to ensure the District students’ care and well-being and that they are in a safe environment where they are not subjected to racial slurs by their teachers.”

Charge Three is without merit.

Mr. Bassetti did not direct his comments outward. He was saying softly under this breath to himself, not the students. Reinstatement would not violate the public trust. No student said he or her was unsafe. Mr. Bassetti.

Under (TEACHNJ Act), L. 2012, c. 26 (N.J.S.A. 18A:6-117 to -129), fact-finder in a tenure hearing involving allegations of misconduct should consider, when determining the appropriate penalty, "the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and . . . any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967) Other factors to be considered include "the impact of the penalty on [the respondent's] teaching career"; the respondent's "teaching record . . . and teaching ability"; and whether the respondent "had . . . been disciplined in any manner by the board prior to the date of the incident[s] involved in [the] charges." *Id.*

The Charges relate to a single incident, not a pattern of misconduct. His conduct will have no harm or serious effect on the maintenance of discipline or the school system. It leaves open the ability of the District to discipline other teachers for direct and open and intentional verbal belittling of students. No student was injured. He did say it to the students. He made the comment under his breath under provocation from a student who refused his request to move the Chrome Book off the pile, challenged his authority, called him “lazy”, and when Mr. Bassetti walked over to take the Chrome Book, the student slid it over to another student. At the same time, Mr. Bassetti was trying to control other students and had to raise his voice. (This was the seventh period of the day. The students had been in school

for a long time.)

The impact on Mr. Bassetti's career would be devastating. He has good teaching ability, has good evaluations, initiates regular contact with parents of struggling students, tries to help the students improve, holds all students to high standards, sets limits and adheres to them, and encourages students to meet the standards, regardless of background. Prior to this event, his record shows no discipline.

The incident was not premeditated. He did not intend for his thoughts expressed to himself be heard by students; he did not intend to communicate to students. He was muttering to himself, under his breath.

The contentions advanced by the Board are not persuasive. I have addressed most of them and need not repeat them. I disagreed with the Board's assessment of the facts and the implications from those facts.

Mr. Bassetti had no obligation to respond at the meeting to the Superintendent. There was nothing left to say. The result had already been reached. His Union representative told him to stay silent.

The Arbitrator rejects the Board's contention that they proved each element of their case against Mr. Bassetti, as discussed previously. The Arbitrator rejects the Board's contention that Mr. Bassetti engaged in unbecoming conduct.

The Arbitrator rejects the Board's argument that Mr. Bassetti lacks credibility, for reasons explained in detail in this Award.

The Arbitrator rejects the Board's contention that Mr. Bassetti cannot continue his employment. He has had a spotless record for 14 years. He has good evaluations.

Balancing all of these factors, discharge is too severe, disproportionate to the offense. Mr. Bassetti did not engage in unbecoming conduct. Mr. Bassetti is not a racist. The Board did not have statutory cause, including just cause, to terminate him.

AWARD AND REMEDY

The District has failed to establish any of the charges as sufficient grounds for termination against the Respondent. Accordingly, the tenure charges are dismissed.

As a remedy, the District is ordered to remove the dismissal from Bruce Bassetti's record. It is further ordered to immediately reinstate him to his former position, or to a comparable position mutually agreeable to the parties, without loss of seniority. It is further ordered to make Bruce Bassetti whole for losses, if any, incurred as a result of his dismissal.

The Arbitrator shall retain jurisdiction of the case for the sole purpose of resolving any dispute over the implementation of the remedy.



Peter Adomeit, Arbitrator 8/23/19

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

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**IN THE MATTER OF THE TENURE
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Agency Docket No. 75-4/19

**THE PENNS GROVE-CARNEYS POINT
REGIONAL SCHOOL DISTRICT
SALEM COUNTY**

_____^x

I, Peter Adomeit, affirm that I am the individual who executed this Decision and Award.



Peter Adomeit, Arbitrator 8/23/19