SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003406-23T2

TIMOTHY CAPONE,	**CIVIL ACTION**
Plaintiff-Appellant,	**ON APPEAL FROM DENIAL OF ORDER TO SHOW CAUSE TO VACATE ARBITRATION AWARD**
vs.	**SUPERIOR COURT CHANCERY DIVISION SUSSEX COUNTY**
MONTAGUE TOWNSHIP BOARD OF EDUCATION,	**Honorable Frank J. DeAngelis, P.J.Ch.**
Defendant-Respondent.	**Sat below**

BRIEF OF PLAINTIFF-APPELLANT TIMOTHY CAPONE

GREEN SAVITS, LLC
Laura M. LoGiudice, Esq.
BAR ID #022721999
Glen D. Savits, Esq.
BAR ID #029921982
25B Vreeland Road, Suite 207
Florham Park, New Jersey 07932
Telephone: (973) 695-7777
Facsimile: (973) 695-7788
Attorneys for Plaintiff-Appellant Timothy Capone

Dated: September 27, 2024

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PRELIMINARY STATEMENT

The arbitrator's award to discharge Plaintiff, Timothy Capone, from his position as Chief School Administrator for Defendant Montague Township Board of Education, that has resulted in the total destruction of his career in education, must be vacated due to the egregious failures of the arbitrator which fundamentally constitute undue means, a violation of due process and exceeding her authority. Contrary to the requirements of the relevant statute, the arbitrator allowed the admission of a multitude of new and serious allegations by Defendant during the hearing, essentially manufactured testimony to "justify" her findings, failed to apply long-standing accepted legal standards when determining discharge was warranted, and ignored Plaintiff's contractual rights.

The egregious and blatant violation of law by the arbitrator in allowing Defendant to present an onslaught of new allegations during the hearing that were not remotely included within the Tenure Charges denied Plaintiff due process and demands the remedy of vacating the arbitrator's award. Failure to do so will render the law meaningless.

The arbitrator allowed a myriad of uncharged allegations to be admitted during the hearing. Although she claimed to have rejected these new allegations it is apparent that they poisoned the well. She based her findings on allegations about conversations that happened at unspecified times, and at unspecified places, and

which had absolutely no impact on the administration of the school. When making her "findings," the arbitrator needed to – and did - misstate the testimony of the witnesses, ignored inconsistent testimony provided by the very witnesses she credited, picking the version that best allowed her to justify her findings. She relied upon hearsay, while ignoring direct testimony that discredited the hearsay, and ignored the only documentary evidence presented on those issues which undeniably discredited the testimony she found credible.

Equally as egregious is the arbitrator's failure to apply well-settled legal standards to her decision, *i.e.*, ignoring decades of law as to the seven just cause factors and the well-established "*Fulcomer*" factors. Any analysis under either of these legal standards rejects the remedy of discharge.

When making her decision to discharge the Plaintiff, as opposed to imposing a lesser discipline, the arbitrator determined it was unimportant that 1) the allegations she "found" had never been raised to anyone, including Plaintiff, prior to issuance of the Tenure Charges; 2) the Charges themselves were issued over a year after Plaintiff was dubiously placed on administrative leave after a new Board was instituted; 3) that Plaintiff's leave was instituted clandestinely with no documented evidence of a Board meeting or vote and with the intentional exclusion of two Board members; and 4) that the "investigation" which led to the Tenure Charges was not even begun until months **after** Plaintiff had been placed on leave. In deciding to

discharge Plaintiff, the arbitrator found unimportant the undisputed evidence that Plaintiff had an exemplary record, brought numerous programs to the school, created efficiency that increased the budgetary reserves, and had never been disciplined prior to being placed on administrative leave. none of the "findings" established cruel or vicious acts, and none had any impact on the overall administration of the school or maintenance of discipline, and she gave no consideration to the impact of her decision on Plaintiff's career. Instead, she claimed discharge was warranted because – based upon her perception that Plaintiff did not show remorse for conduct which **he denied** committing – corrective action would be futile. The punishment of discharge is nothing less than shocking and is disproportionate to the findings made by the arbitrator given the totality of the circumstances.

Finally, the arbitrator's award must also be vacated because she exceeded her authority by violating the unambiguous contractual terms between Plaintiff and Defendant that prohibit Plaintiff from being disciplined unless he is first given written notice and an opportunity to address any alleged performance issues. It is that Plaintiff received no notice of any of the allegations before being placed on leave or at any time before the Tenure Charges were issued over a year later. The arbitrator found that she was not bound by those contractual provisions- again exceeding her authority and pronouncing herself unbound.

PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS

Plaintiff was hired by Defendant as the Chief School Administrator on or about July 1, 2017. In August of 2020, Plaintiff executed a renewed contract with Defendant extending his employment to June 30, 2025. **Pa68-69**.

The Board reviewed Plaintiff's performance each year he was there, however, the Defendant somehow failed to maintain copies of any of his annual Performance Evaluations. Fortunately, former Board President, Glen Plotsky, maintained copies which demonstrate Plaintiff's stellar performance. **Pa160-194; and 6T11:20-6T12:6[1]; 6T16:14-6T18:16; 6T39:10-14; 6T51:18-6T52:5**. *See also* **Pa159 and Pa195-200**.

Mr. Plotsky testified extensively concerning Plaintiff's exemplary performance, including, *inter alia*, fixing deficiencies noted by the District, creating a Spanish program, establishing a STEM program, establishing an agricultural program, addressing deficiencies in IEP's and bringing students to the least restrictive environment, establishing policies that allowed funds to be available to make necessary repairs to the physical structure of the building, and obtaining a grant for a preschool program. **6T13:18-6T74:6**. Mr. Plotsky also testified to his personal observation of Plaintiff's relationship with the students:

> And you could see the interaction between the students and Mr. Capone. You could both see him kind of, you

[1] "6T" refers to the June 13, 2023 Hearing Transcript.

> know, trying to have fun with them in the right circumstance; but also you could tell, you know, the student running down the hall who saw him and just stopped dead in his tracks, you knew that – that there was a level of understanding that there was certain behavior that was okay and certain behavior that wasn't.

6T47:1-6T48:13.

Jennifer VanNess, former board member and parent of a child attending the school, also testified to Plaintiff's stellar performance, testifying in part:

> He did absolutely amazing things. I have never come in contact with an educator that is more compassionate and caring for the students than Mr. Capone. The programs that he brought to the school and the students were unlike nothing they have ever had in Montague.

7T124:16-7T128:6[2]. *See also* **1T256-1T257**[3].

In January 2021, a new Board was seated, including Barbara Holstein and Denise Bogle, who ran on a platform to get rid of Plaintiff and reverse many of the policies of the prior Board. **7T131:20-7T133:8 and 7T137:3-7T138:10**.

Less than four (4) months later, on or about April 26, 2021, with no notice of any unsatisfactory performance provided to Plaintiff, several Board members *allegedly* met in closed session without Plaintiff and without notice to Board members Mr. Plotsky and Ms. VanNess, and apparently decided that Plaintiff would be immediately placed on administrative leave. **Pa87 at ¶10; 6T74:7-6T78:2; and**

[2] "7T" refers to the June 15, 2023 Hearing Transcript.
[3] "1T" refers to the January 20, 2023 Hearing Transcript.

7T134:7-7T136:14. No minutes, agenda or any other document concerning the alleged meeting where Plaintiff was placed on administrative leave have been produced by Defendant and Defendant has not articulated any alleged misconduct on the part of Plaintiff that caused him to be placed on administrative leave, other than simply reciting the Tenure Charges. **Pa211 at Interrogatory No. 5 and Pa215-216**. Neither Mr. Plotsky nor Ms. Van Ness were made aware of why Plaintiff was placed on leave. **6T74:7-6T78:2**; **and 7T134:7-7T136:14**.

Directly after Plaintiff was placed on administrative leave, the Board non-renewed Kelly Edsell, the school psychologist, Danielle LaStarza, the school social worker, Donna Rekovic, Plaintiff's secretary, Kim Hart, a paraprofessional, Tori Rasmov (ph?), and Eric Numestican (ph?) the business administrator. **10T60:25-10T61:19**[4].

On or about June 17, 2021, approximately **two months after** Plaintiff was placed on administrative leave for **no reason**, Defendant's attorneys **began** an investigation of Plaintiff. The investigation itself relied on the direction of John Nittolo, a former employee ***whom Plaintiff had non-renewed***, in part, due to his inappropriate sexual harassment of other employees, and who was appointed acting CSA when Plaintiff was put on leave. **Pa210 at Interrogatory No. 2; and 9T134:7-**

[4] "10T" refers to the August 18, 2023 Hearing Transcript.

9T136:21[5]. The Board was made aware of Mr. Nittolo's misconduct during a *Donaldson* hearing for Ms. La Starza shortly after Plaintiff was placed on leave but opted to keep Mr. Nittolo on as acting CSA and allow him to direct the investigation into Plaintiff. **8T228:22-8T231:12**[6]**.**

On April 22, 2022, almost a year to the day that Plaintiff was placed on administrative leave, Defendant's attorney issued a one hundred and eighty (180) page single spaced report, recommending against the issuance of Tenure Proceedings due to the lack of substantive evidence to support the allegations. **Pa137-140.**

Tenure Charges were issued on or about August 31, 2022. The Tenure Charges included a myriad of broad and non-specific allegations and even where specific allegations were made, they rarely included any date and often referred generically to "staff members." **Pa85-116.**

Plaintiff filed his Answer to the Tenure Charges on September 16, 2022. **Pa141-158**.

The Tenure Charges were referred to the Arbitrator on September 21, 2022, and the first meeting with the Arbitrator occurred on October 11, 2022.

The tenure hearing began approximately **one year and nine months after**

[5] "9T" refers to the August 14, 2023 Hearing Transcript.
[6] "8T" refers to the August 7, 2023 Hearing Transcript.

Plaintiff was placed on administrative leave. Defendant presented its case on hearing dates January 20, 2023, January 25, 2023, February 17, 2023, February 22, 2023 and February 23, 2023. During Defendant's presentation, a significant amount of time was spent on alleged conduct which was **not included** either generally or specifically in the Tenure Charges and had no relevance to those acts alleged in the Tenure Charges. *See* Point I, *infra*.

On March 14, 2023, Plaintiff moved for summary disposition as to all counts and included a specific request that the arbitrator at the very least exclude all non-specific allegations within the Tenure Charges and any issues raised during the hearing that were not contained within the Tenure Charges. **Pa258-267**.

On May 18, 2023, the arbitrator submitted her "decision" on Plaintiff's motion via an email stating simply: "I find that the motion is premature and there is at least sufficient evidence to consider the charges and specifications in this case after the whole case is completed." **Pa67**.

The hearing continued on June 13, 2023, June 15, 2023, August 7, 2023, August 14, 2023 and August 18, 2023. After the conclusion of the hearing, the parties submitted written closing arguments simultaneously on September 15, 2023. **Pa268-373**. Plaintiff noted that due to the expansive nature of the testimony, including that which was outside the scope of the Tenure Charges, Plaintiff could only hope that he had addressed all relevant claims. Plaintiff specifically requested

that "[i]n the event the Board presents allegations which we have not addressed, Mr. Capone would respectfully request permission to supplement his Closing Argument." **Pa272**.

On January 7, 2024, the arbitrator issued her Opinion and Award, concluding that the Defendant had demonstrated just cause for discharge, even though Plaintiff had never been disciplined or documented for poor performance. **Pa58-65**.

On April 4, 2024, Plaintiff filed a Verified Complaint and Order to Show Cause in the Chancery Division seeking to vacate the arbitrator's award. **Pa374-383**.

The trial court issued the Order to Show Cause on April 8, 2024, compelling Defendant to appear on May 21, 2024 to show cause as to why the arbitrator's award should not be vacated. **Pa389-392**. On April 16, 2024 the trial court adjourned the return date on the Order to Show Cause to May 31, 2024. **Pa393**.

On May 16, 2024, Defendant filed an Answer to the Verified Complaint and opposition to the Order to Show Cause. **Pa394-410**.

On May 31, 2024, the trial court heard oral argument on the Order to Show Cause and thereafter entered an Order denying Plaintiff's summary action to vacate the arbitration award. **Pa1-20**. The trial court held that 1) Plaintiff had not demonstrated an "entitlement to receiving notice and an opportunity to respond in relation to the decision made to place him on administrative leave"; 2) Plaintiff "had notice of the Tenure Charges and was provided an opportunity to respond and defend

against the Tenure Charges"; 3) Plaintiff had not provided a basis to vacate the arbitration award based upon the failure of the arbitrator to consider the seven "just cause" or *Fulcomer* factors, finding that the arbitrator carefully explained the basis for her decision; and 4) even though the arbitrator allowed new allegations to be brought during the hearing, the arbitrator made no findings as to those allegations. **Pa19-20.**

STANDARD OF REVIEW

This Court's review of the trial court's decision on Plaintiff's motion to vacate the arbitration award is *de novo*. *Yarborough v. State Operated Sch. Dist. of Newark*, 455 N.J. Super. 136, 139 (App. Div. 2018). This Court owes "no special deference to the trial court's interpretation of the law and the legal consequences that flow from the established facts." *Id.* (citations omitted).

An arbitrator's award may be vacated where "the award was procured by . . . undue means"; or the arbitrator "exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." *N.J.S.A.* 2A:24-8.

Undue means "ordinarily encompasses a situation in which the arbitrator has made an acknowledged **mistake of fact or law** or a mistake that is apparent on the face of the record." *Taylor v. Bd. of Educ.*, Docket No. A-1867-16T3 at *8-9 (App. Div. Aug. 14, 2018) (quoting *Borough of Rutherford v. E. Rutherford PBA Local*

275, 213 N.J. 190, 203 (2013)) (emphasis added) **Pa418-419**; *In re Arbitration Between Mary William Harris*, 140 N.J. Super. 10, 14 (App. Div. 1976).

Judicial review also extends to "consideration of whether the [arbitration] award is supported by substantial credible evidence." *Taylor,* Docket No. A-1867-16T3 at *9-10 (quoting *Amalgamated Transit Union v. Mercer Cty. Improvement Auth.*, 76 N.J. 245, 254 (1978)). **Pa419**.

LEGAL ARGUMENT

POINT I

PLAINTIFF WAS DENIED DUE PROCESS WHEN THE ARBITITRATOR EXCEEDED HER AUTHORITY ALLOWING THE INTRODUCTION OF MULTIPLE NEW ALLEGATIONS BY DEFENDANT DURING THE HEARING AND BASED UPON SUBSTANTIAL DELAY IN BRINGING TENURE CHARGES (Pa19-20, Pa49-50; and Pa67).

Plaintiff was denied due process when the arbitrator exceeded her authority first by improperly permitting the Defendant to present multiple very serious allegations for the **first** time during the tenure hearing and **second** by refusing to dismiss those allegations, and the non-specific allegations within the Tenure Charges, at the close of Defendant's case. Plaintiff was then required to respond to an onslaught of new allegations, while trying to discern the non-specific allegations within the Tenure Charges, resulting in Plaintiff never addressing two of the findings made by the arbitrator to support his discharge. *See infra* at Point II.

Plaintiff was also denied due process when he was placed on administrative leave for no stated reason without the knowledge of two Board members or a vote by the Board and was then left hanging for **more than a year,** while the Board attempted to dig up dirt on Plaintiff from anyone who may have had a gripe against him, after which Defendant issued non-specific Tenure Charges related to stale events of which Plaintiff had no prior notice, severely prejudicing Plaintiff's ability to effectively respond to those allegations.

A. ***At Least Fifty Percent Of The Allegations To Which Plaintiff Was Required To Respond Were Raised For The First Time During The Hearing.***

Tenure Charges must "be stated **with specificity as to the action or behavior underlying the charges** . . . ." *N.J.A.C.* 6A:3-5.1(b)(1) (emphasis added). "**Upon referral of the case for arbitration**, the employing board of education **shall** provide **all** evidence including, but not limited to, documents, electronic evidence, statements of witnesses with a complete summary of their testimony to the employee or the employee's representative. The employing board ***shall* be *precluded* from presenting *any* additional evidence at the hearing** except for the purpose of impeachment of witnesses" *N.J.S.A.* 18A:6-17.1(b)(3) (emphasis added).

During a disciplinary hearing of a firefighter, under an analogous statutory scheme, the New Jersey Supreme Court stated:

> Properly stated charges are a *sine qua non* of a valid disciplinary proceeding. It is elementary that an employee

> cannot legally ***be tried*** or found guilty on charges of which he has not been given plain notice by the appointing authority.

West New York v. Bock, 38 N.J. 500, 522 (1962) (emphasis added). *See also Crystal Saylor v. School District of West New York*, DKT No. 236-12/21 April 12, 2022 (Arbitrator concluded that the Board failed to comply with *N.J.S.A.* 18A:6-17.1(b)(3) and stated that "[t]he consequences of non-compliance … are mandatory.") **Pa445-450**; and *Atlantic City BoE v. Toland DOE*, DKT. No. 167-8/20 (October 13, 2021) ("The language in question is specific not general and must be given its full force and effect.") **Pa457**. An employer is presumed to know the reasons for termination at the time the termination decision is made. Reasons added thereafter, that were known or available at the time the decision was made, are evidence that the original reasons for termination were not sufficient. *Tenure Hearing of Alix Gillespie and Glouster County Special School District and Vocational School District*, Docket No. 241-12/21 (May 11, 2022) **Pa520**.

In her Opinion, the arbitrator acknowledged that the charges were drafted broadly without the requisite specification as required by tenure law, stating: "I concur with [Plaintiff] that the charges have been drafted in a manner that makes them difficult to address specifically because many of the paragraphs of the charging document contain assertions or statements that are not in fact "specifications." **Pa49**. The arbitrator also admitted that she allowed great latitude to Defendant to present

evidence, claiming she did so because it "was not initially clear whether it related to the sworn tenure charges." **Pa50**. This is a substantial understatement of the uncharged conduct she permitted during the hearing. In addition, this statement by the arbitrator emphasizes that the charges were not specific enough under the law.

Defendant placed Plaintiff on administrative leave for no specific reason. It then took fifteen (15) months to formulate Tenure Charges against Plaintiff, and close to two (2) years to present its evidence to Plaintiff. Nonetheless, during the hearing, Defendant was permitted to elicit testimony concerning serious and substantial allegations that were **not** contained within the Tenure Charges, including, without limitation:

- Mr. Capone misused the All Call system and CSA Facebook page to convey votes of Board members during public Board meetings. *e.g.* **1T227:9-1T228:25**.
- IEP placements were not appropriate. *e.g.* **1T69:12-1T73:3; 1T154:4-19; 2T376:19-2T381:3**[7]**; 2T384:14-22; 3T194:17-196:19**[8].
- Children were allowed to skip grades and they should not have been. *e.g.* **1T89:16-1T93:3; 5T108:21-5T110:24**[9].
- Children with IEP's were brought back to the district who should not have been. *e.g.* **2T466:23-2T476:20; 2T471:3-24**.
- Issues concerning a 2019 altercation where a student physically attacked Mr. Capone. Defendant's witnesses alleged that the child should not have been allowed to attend Montague School, suggested that proper follow-up was not made concerning the student and insinuated that Plaintiff was

[7] "2T" refers to the January 25, 2023 Hearing Transcript.
[8] "3T" refers to the February 17, 2023 Hearing Transcript.
[9] "5T" refers to the February 23, 2023 Hearing Transcript.

somehow responsible for that child's later suicide. *e.g.* **2T382:23-2T395:25; 2T400:15-2T401:6**.

- Mr. Capone allegedly sent a racist text message to Rachel Van Gorden. *e.g.* **1T177:21-1T180:25**.

- Mr. Capone failed to discipline Mr. Andriac for inappropriate text messages. *e.g.* **9T:319:13-9T321:17**.

- Some children were put in classrooms with special education children instead of in the "smart" class because Mr. Capone didn't like the parents, and the classrooms were not properly divided. *e.g.* **2T403:7-22; 2T405:13-2T407:8; 3T55:19-T57:10**.

- Ms. Marion was put on medical leave and terminated in retaliation for comments she made to the Board in 2019. *e.g.* **1T29:2-1T32:16; 1T33:6-1T35:16; 1T37:10-1T47:7; 1T50:4-13; 1T54:1-1T58:5**.

- Mr. Andriac did all the staff evaluations and illegally signed Mr. Capone's name to the summative evaluations. *e.g.* **4T38:2-4T39:20[10]; 4T161:11-16**.

- Ms. Lehmkhul disagreed with changes made to the Math program. *e.g.* **2T425:21-2T426:23**.

- Mr. Capone created two stipend positions for Danielle LaStarza which were not proper but which the Union never grieved. *e.g.* **3T36:9-3T37:20; 3T170:25-3T171:9**.

- Danielle LaStarza was paid at the rate of Master's plus 15, but did not have the proper credits for that pay. *e.g.* **3T41:6-23**.

- Ms. Lehmkuhl claims there was no official policy on where she could pump breast milk at school, and she was switched between Mr. Andriac's office, a conference room and her classroom. *e.g.* **2T431:6-2T433:1**.

Approximately fifty (50%) of Plaintiff's closing argument needed to address allegations **not** included in the Tenure Charges. **Compare Pa275-291; and Pa289-**

[10] "4T" refers to the February 22, 2023 Hearing Transcript.

291 with Pa85-116. Likewise, more than fifty percent (50%) of the "statement of facts" recited in the Defendant's closing argument - approximately 328 (¶¶16, 18-25, 38-39, 51, 54, 61, 79, 81-86, 88, 90-98, 113-124, 138, 144-150, 160-180, 182-184, 187-196, 202-204, 212, 214, 219-221, 226, 230-231, 233-235, 237-240, 244-246, 253, 256-259, 262-264, 266-269, 275, 279-282, 284-292, 295, 297, 300, 303-307, 309-313, 317, 335-342, 346-347, 349-355, 362-364, 370-372, 389-390, 396-428, 430-457, 464-475, 479, 482-485, 496-503, 510, 512, 516, 518, 526, 530-531, 533-544, 549-559, 569, 572, 577-580, and 582-584) out of the 585 statements of fact - related to alleged conduct that was **not** included in the Tenure Charges. **Compare Pa297-373 with Pa85-116**.

At the end of Defendant's case, Plaintiff moved, *inter alia*, to have all non-specific allegations within the Tenure Charges and all new allegations presented for the first time at the hearing, dismissed. **Pa258-Pa267**. The arbitrator failed to address Plaintiff's motion in any substantive way, simply stating the motion was premature. **Pa67**. This was a clear and obvious failure of her statutory obligations and severely prejudiced Plaintiff by requiring that he then respond to multiple allegations of which he had no notice and were not even tangentially set forth in the already improperly non-specific Tenure Charges. The hearing was essentially a real-life game of whack-a-mole, with Plaintiff's entire career on the line.

N.J.S.A. 18A:6-17.1(b)(3) prohibited Defendant from raising any new allegations during the hearing. It cannot be disputed that the Defendant flagrantly violated this law and its misconduct was condoned by the arbitrator. Regardless of whether the arbitrator ultimately made findings against Plaintiff as to the new allegations is of no moment when assessing the harm caused to Plaintiff in having to defend those allegations.

Nor can this Court determine to what extent those uncharged allegations influenced the arbitrator's findings or the discipline the arbitrator imposed upon Plaintiff. This is particularly so based upon the arbitrator's statement in rendering her decision to discharge Plaintiff: "Certainly, the school board failed in many ways to exercise oversight over Respondent." **Pa65**. The arbitrator failed to provide any basis for this bald assertion, and completely ignored the testimony of former Board President Plotsky and former Board Member, Ms. Van Ness as to Plaintiff's stellar performance and his outstanding performance evaluations.

To allow the arbitrator's award to stand after such egregious and blatant violations of the law would thwart the meaning and purpose of due process and condone the return of the "wild west" to tenure proceedings. There must be remedies for an arbitrator's willful violation of the law. If not, one can imagine the many boards that will use this arbitrator's opinion to justify introduction of new allegations during the hearing and continued violations of the law.

B. ***Plaintiff Was Placed On Administrative Leave For No Reason And Then Required To Respond To Tenure Charges Brought More Than A Year Later***.

While the Board certainly has the authority to place Plaintiff on administrative leave, it cannot do so for **no reason**. To this date, Defendant has not stated why Plaintiff was placed on administrative leave, and the arbitrator acknowledged that "[t]he exact reasons for the [sic] placing [Plaintiff] on administrative leave were not made clear through testimony at the hearing." **Pa24**. Nonetheless, without any evidence, the arbitrator concluded that there was some unidentified "incident" which warranted placing Plaintiff on leave and conducting an investigation:

> While I note the District did not specifically provide an explanation for the impetus of placing respondent on leave, my review of the investigation report convinces me that there was information obtained in April 2021 that indicated Respondent may have engaged in inappropriate conduct which would have warranted placing him on administrative leave to investigate. (J-5)[**Pa83**]. I note the investigation did not result in any findings regarding the incident.

Pa49.

After being placed on administrative leave in April of 2021, Plaintiff sat without answers for more than a year, until August of 2022, when non-specific Tenure Charges were belatedly issued making allegations dating back to 2018, and as to conduct which was condoned by the prior Board. *See e.g.* **2T382:23-2T395:25; 2T400:15-2T401:6; 6T84:18-6T86:2; 6T108:19-6T110:18; and Pa159**.

"Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party" *Fox v. Millman*, 210 N.J. 401, 417 (2012). "The length of delay, reasons for the delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs…The length of the delay alone or in conjunction with the other elements may result in laches." *Lavin v. Board of Education*, 90 N.J. 145, 152 (1982).

In this matter the witnesses inexcusably and inexplicably failed to timely raise any objections concerning Plaintiff's alleged conduct. Not one witness testified to having made a complaint about the conduct which forms the basis of the Tenure Charges prior to being questioned by Defendant's attorney **after** Mr. Capone had already been placed on administrative leave. Most of the testimony is vague as to timing and/or details and relates to some events that happened close to two years prior to Plaintiff being placed on administrative leave, *i.e.* **4-5 years ago**. If for some reason, Plaintiff's actions were illegal, in violation of Board rules or policies, or improper, the staff could have raised the issues to the Board or the Commissioner of Education, or the MEA could have grieved the issue and taken it to arbitration. But none of that happened.

These unexplained delays by the witnesses and the Defendant were extremely prejudicial to Plaintiff. Failure to raise the complaints in a timely manner has completely deprived Plaintiff of the ability to respond effectively to the allegations. For example, Plaintiff no longer had access to his work phone or emails or contact with employees, and due to the time that elapsed had difficulty recalling details of alleged conversations. He also lost access to his documented performance issues of Mr. Nitollo, who directed the investigation, and Mr. Andriac, who made claims against him. **9T321:15-25**.

These egregious and blatant denials of due process compel the arbitrator's award to be vacated.

POINT II

THE ARBITRATOR'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE AND WAS PRODUCED THROUGH UNDUE MEANS (Pa19-20; Pa57-Pa64).

It is not a stretch to state that the arbitrator manufactured facts to support her findings. The arbitrator literally made findings that witnesses testified to things that are simply nowhere in their testimonies. The arbitrator failed to identify or explain internal inconsistencies in witnesses' testimonies – simply adopting the version that supported her finding. The arbitrator also ignored inconsistencies between the testimonies of witnesses she credited, adopted hearsay about witnesses when those

witnesses direct testimonies contradicted the hearsay, and failed to reconcile contradictions between documentary evidence and witness testimony.

"[A] determination of credibility contemplates an overall assessment of the story of a witness in light of its context in – its rationality and internal consistency as well as the manner in which it hangs together with other evidence to the testimony..." *Clark v. Trenton Housing Authority*, OAL Dkt. No. CSV8248-97 at p. 9 (May 18, 1998)) **Pa545**.

"In an administrative proceeding, testimony may be disbelieved but it may not be disregarded." *Clark v. Trenton Housing Authority*, OAL Dkt. No. CSV8248-97 (1998) at p. 9 (citing *Middletown Tp. v. Murdock*, 73 N.J. Super. 511 (App. Div. 1962)) **Pa545**.

A. *Finding One (Unbecoming Conduct and Other Just Cause: Inappropriate & Unprofessional Conduct Toward Staff)*

Finding one related to Count 1 at ¶¶29(iii) and (iv), and 30. **Pa92-93**.

i. *Tenure Charges at ¶29 (iii) (non-communication with staff)*

To support ¶29 (iii), the arbitrator relied upon the testimony of Mr. Stewart, Ms. Battikha, Ms. Howard and Mr. Andriac, whom she *claims* testified that Plaintiff would "stop speaking to them when they had certain types of disagreements." She then claimed to credit these witnesses because "they detailed the issues involved, and their fears of reprisals." **Pa58**. The arbitrator also found that Plaintiff's behavior

was unprofessional and somehow thwarted communication necessary to run the school. **Pa58**.

However, neither Ms. Howard nor Ms. Battikha testified that Plaintiff allegedly stopped speaking to them after a disagreement, and Mr. Stewart's testimony completely contradicted the finding made by the arbitrator.

Mr. Stewart, the school custodian, testified that when he and Plaintiff butted heads Plaintiff would refrain from speaking with him for a day or two. He testified that he had a good relationship with Plaintiff, and that Plaintiff, even after "butting heads" with him, remained cordial saying good morning and such, and that Plaintiff always responded timely relating to work issues. In other words, Mr. Stewart had no complaint about Plaintiff's behavior. 6T183:21-6T184:3 ("I had a decent relationship with him, with Mr. Capone. I didn't have a problem with him, you know."); 6T184:7-22 ("there was couple times there was a couple things, you know, he wanted me to do one thing and I went, kind of got upset."); 6T196:5-13 and 6T200:5-20 (when asked if Mr. Capone remained cordial, he stated "Oh, yeah, he -- I said good morning; and he would say hi, you know."). Mr. Stewart **never** testified to fearing reprisals, nor did he state that there was ever a lack of communication that affected the school.

Therefore, the arbitrator made a clear mistake of fact in relying upon non-existent testimonies of Mr. Stewart, Ms. Battikha, and Ms. Howard. A finding,

allegedly based upon the testimony of four (4) witnesses, was supported only by the testimony of Mr. Andriac. However, it is not clear the arbitrator would have made the same finding based solely on Mr. Andriac's testimony, because he testified to multiple "versions" of alleged events with Plaintiff, and his testimony is contradicted by documentary evidence.

While Mr. Andriac did testify that Plaintiff stopped communicating with him, the arbitrator failed to identify the alleged testimony of Mr. Andriac which she credited. Mr. Andriac testified to several different versions of when and why Plaintiff allegedly stopped communicating with him. In one version, Plaintiff started treating him differently in August 2020 after Mr. Andriac's parents told Plaintiff he could not hunt on their property anymore. In another version, Plaintiff stopped speaking with him in November 2020, when Mr. Andriac allegedly declared to Plaintiff that he would no longer call into Board meetings. In the third version, Plaintiff stopped speaking with him in January 2021 after issuing Mr. Andriac a less than stellar mid-year performance review. **4T13:16-T14:11; 4T28:13-22; 4T48:13-T49:13; and 4T189:3-14; and 5T54:16-22**.

Furthermore, in apparently crediting Mr. Andriac's testimony over Plaintiff's denials, the arbitrator never even mentioned text messages produced by Plaintiff from his personal cell phone between September 2020 through December 2020,

which in complete contradiction to Mr. Andriac's claims, show normal friendly communications between the two. **Pa218-256; 9T126:21-9T130:22**.

Between October 9-12, 2020 Plaintiff and Mr. Andriac texted about getting together with their families. Throughout the exchanges, Plaintiff stated, *inter alia*: "What are you guys doing this weekend?"; "I reached out to your dad and haven't heard back. Let him know to stop by too."; "I dropped off flowers and I had a conversation with your mother." **Pa223-224**.

On November 25, 2020 Mr. Andriac texted: "OMG I'm friends with a Superintendent on Facebook!!!" in response to which Plaintiff texted: "I'm going to screenshot that and send it to your wife", after which Mr. Andriac sent an emoji of a hand giving Plaintiff the middle finger. **Pa225**.

On December 3, Mr. Andriac texted Plaintiff a picture of a post by someone complaining about the school's food program adding "I really can't stand this woman." Plaintiff responded telling Mr. Andriac to **call his work phone**. **Pa225-226**. There are also text messages between the two wishing each other a Merry Christmas in December of 2020. **Pa227**.

These text messages completely contradict Mr. Andriac's testimony, yet the arbitrator made no reference to them in her decision.

Finally, Mr. Andriac did not testify to a single specific instance where this alleged non-communication affected the running of the school. Nor did Defendant

produce any emails or text messages of Mr. Andriac to which Plaintiff allegedly failed to respond, even though Defendant had Plaintiff's work cell phone and access to all emails.

ii. Tenure Charges at ¶¶29 (iv) and 30 (verbally and emotionally demeaning staff)

To support paragraphs 29(iv) and 30 of the Tenure Charges the arbitrator relied upon the testimony of Mr. Andriac and Ms. Van Gorden. Specifically, the arbitrator found that Plaintiff referred to Mr. Andriac as "Nancy" and "little girl" in front of other staff members **and in text messages** and that Ms. Van Gorden believed it was a form of hazing. The arbitrator credited Mr. Runne when he testified that the term "Nancy" was used to compare Mr. Andriac to a teacher who often complained. The arbitrator also noted that Mr. Andriac claims to have felt belittled by these actions, and she found them to be verbally and emotionally demeaning. **Pa59**.

Contrary to the arbitrator's findings: 1) there are **no text messages** in which Plaintiff, or anyone else, referred to Mr. Andriac as either "Nancy" or "little girl"**;** 2) there was **no** testimony of any specific time, place or event where Plaintiff allegedly used these words; and 3) Ms. Van Gorden **never testified** that she believed it was a form of hazing. Therefore, the arbitrator's findings are **in contradiction** to the record evidence.

The undisputed text messages demonstrate that Plaintiff, Mr. Andriac, Ms. Van Gorden, Ms. LaStarza and Mr. Runne regularly engaged in joking banter, and

Mr. Andriac was not only a regular participant, but often initiated the banter. For example, in text messages exchanged on June 14, 2020, which were initiated by Mr. Andriac the following exchanges occurred:

Mr. Andriac -	"BTW the last time it rained, I wanted to keep working. Daryl wanted to stop."
	"God damn rat telling my dad."
Plaintiff:	Sent a laughing, crying emoji, and a meme with the word "RIGHT …."
	"I'm going to add Jim o [sic] this thread."
Ms. VanGorden:	Sent a meme of Mr. Andriac's face in a woman's head with the words: "I can't be out in this rain . . . sugar melts."
Mr. Andriac:	"I feel like we need professional development on intimidation and bullying."
Plaintiff:	Sent contact information for Danielle LaStarza stating "This is the HIB Coordinator/Guidance Counselor/Social Worker."
Mr. Andriac:	"Lmfao"
Plaintiff:	Sent a picture of Ms. Van Gorden looking at the fallen chicken coop with the words "Caption: why am I so bad at this."
Mr. Andriac:	"Did it fall again?"
Ms. VanGorden:	"yeah jimmy and tim said you have to build it by yourself this time."
Mr. Andriac:	"I thought Tim said he was going to show us how it's done? Meaning he's doing it."
Plaintiff:	"You will do anything not to work."
Mr. Andriac:	"Everything I've ever been asked to do is complete besides that fucking chicken run."
	"I'm not a fan of chicken meat, eggs and certainly not building them a home. With that said it will be done by Friday."
Plaintiff:	"Jimmy taking charge."
Mr. Andriac:	"Rachel [Ms. Van Gorden] put your big girl pants on we finishing this shit."

"Danielle [Ms. LaStarza] is coming this week to help also"

Ms. VanGorden: "finally, I guess your dad really gave you a good talk little jimmy."

Followed by a crying laughing emoji.

Mr. Andriac: "Lmfao. I'm going to have fun doing your observations this year."

Pa231-236.

Mr. Andriac admitted that he never expressed to anyone that he felt belittled or emotionally abused by anything that Mr. Capone stated to him, and claimed he played along to "deflect" and because he was fearful of not being part of Plaintiff's "in-crowd." **5T20:24-5T22:16**; **and 4T64:24-4T65:16; and 4T72:3-13;4T132:7-4T133:14**.

B. Finding Two (Unbecoming Conduct and Other Just Cause: Inappropriate Conduct Towards District Parents)

Finding two related to Count 4 at ¶¶85, 86, and 87. **Pa104 and Pa61**.

i. Tenure Charges at ¶¶86 and 87 (soccer permission slip)

There was no evidence or testimony that there was a complaint made by the parent or student, and neither the student nor the student's parent was ever identified by name, nor was a date provided as to when this allegedly occurred – making it virtually impossible for Plaintiff to respond to the allegation. Furthermore, Ms. Van Gorden's testimony did not indicate confidence in what she was saying. She testified that she "guessed" the student hadn't gotten a permission slip and she "believed" the student missed part of the season. **1T184:16-1T186:14**. **No evidence**

or testimony was introduced to establish whether the child missed part of the season, and if so, why. This allegation was not addressed by Plaintiff in his Closing Argument. **Pa268-296**.

ii. *Tenure Charges at ¶85 (FFA officer)*

The arbitrator found that Plaintiff advised Ms. Van Gorden not to appoint a student to be an officer in the agricultural program because one of the student's parents did not support the program. **Pa61**. No date, time or place were given for this alleged discussion.

There was no evidence of any complaint by the student or parents about this alleged event, and Plaintiff did not address it in his Closing Argument. **Pa268-296**.

C. *Finding Three (Unbecoming Conduct: Abuse of Position and Authority)*

Finding three related to Count 6 at ¶¶121, 123, 124, 125, 126, 127, 128, 129, 130 and 131. **Pa111-113; and Pa62-64**.

i. *Tenure Charges at ¶¶121, 123-126 (calling into the Board)*

The arbitrator relied upon the testimonies of Mr. Andriac, Ms. Van Gorden, Ms. Lehmkuhl and Ms. Howard to support the allegation that Plaintiff requested teachers to call into school board meetings to "say positive things about [Plaintiff] and the programs within the school" and that they felt pressured to do so and felt Plaintiff would be disappointed if they did not. **Pa62-63**. The arbitrator also relied upon the testimony of former Board President Glen Plotsky that "it would not be

appropriate for a school administrator to request staff to speak positively on his behalf." **Pa62-63**. She did not credit Plaintiff who she *claimed* testified "that he only wanted staff to be able to develop and express their positive feelings." **Pa63**.

The arbitrator's findings are **riddled** with misstatements of testimony and omit relevant contrary testimony.

First, while former Board President, Glen Plotsky, testified that it would be inappropriate for Plaintiff to ask teachers to say positive things about him to the Board, he testified that there was **nothing inappropriate about Plaintiff asking non-tenured teachers to speak to the Board about programs in the school**. **6T178:19-23**.

Second, the arbitrator also mischaracterized Plaintiff's testimony. Plaintiff did **not** testify that he asked teachers to call into the Board to "develop and express their positive feelings." **Pa63**. Plaintiff testified that at staff meetings he would generally encourage teachers to speak to the Board about the things they were engaged in. He spoke to people individually who were the faces of certain programs, such as STEM and the agricultural program, about presenting to the Board so that he could "garner support from the board about those programs." **9T37:5-9T40:12**.

Third, the testimonies of Ms. Van Gorden, Ms. Lehmkuhl and Ms. Howard do not support the arbitrator's finding that Plaintiff requested them to call into the Board to speak about him, as opposed to the programs at the school.

Van Gorden

Ms. Van Gorden testified that Plaintiff wanted her to call into the Board to speak about the programs in the school, **not to say positive things about Plaintiff**. 1T182:5-25 ("He asked me to talk about all the good things going on at the school. The programs that we had.); and **T215:7-20**. Furthermore, Ms. Van Gorden never testified that she feared retaliation from Plaintiff if she did not call into the Board.

Howard

Ms. Howard did **not** testify that she was asked to speak positively about Plaintiff. Rather, she testified that Plaintiff asked her to call into the Board to speak about other staff members. **2T283:6-2T284:3** ("He asked me to speak on behalf of other staff members."). Ms. Howard **never** spoke to the Board. **2T284:11-13**.

Lehmkuhl

Ms. Lehmkuhl testified that the **one** time she was asked to speak to the Board about Plaintiff, as opposed to the programs at the school, it was Mr. Andriac who made the request, and she also confirmed Plaintiff had **never** made such a request to her. **3T228:7-13; and 3T229:7-3T230:4** ("Tim never asked me to say it. Jim asked me to call and talk up Tim.").

Fourth, the arbitrator did not address or even mention Mr. Andriac's text messages and his own testimony indicating that he wanted to call into Board meetings unprompted by Plaintiff, including to defend Plaintiff when he was "let

go." **4T21:12-25 ("I mean, it was a conversation about -- about Tim being let go and how we should call and defend him"**); **4T23:1-12**; **and Pa253-256**. On June 8, 2020, as the Board elections were underway, Mr. Andriac and Ms. LaStarza communicated via text about calling into the Board (which Plaintiff was not a part of), with Mr. Andriac stating, in part: "I would to like to say . . . how there was nothing for kids in the school when I was there and how much Tim brought to the school." **Pa253**.[11]

Importantly, there was no evidence presented as to any single time that Mr. Andriac allegedly spoke at a Board meeting, even though the Board Minutes would denote his comments and the Defendant had full access to the Board Minutes and the alleged dates that Mr. Andriac claimed to have spoken to the Board. [12]

ii. *Tenure Charges at ¶¶127-128 (facebook page regarding Holstein)*

The arbitrator found that Plaintiff asked staff members Ms. Van Gorden, Mr. Runne, and Mr. Andriac to create a Facebook page to post "information regarding school board candidates Holstein and Bogle." **Pa63**.

[11] Mr. Andriac testified that this text exchange was related to when Plaintiff was put on leave, however, the text message was from June 2020.

[12] Former Board member, Ms. Van Ness testified that the teachers she recalled speaking to the Board were "Linda Willeford, Miss Visco, Mrs. Banghart, Mr. Runne, Mrs. Runne at the time." **7T126:19-7T127:18**. She recalled Mr. Andriac speaking towards the tail end of the year, as opposed to when the others were frequently present.

All of these individuals denied creating the requested Facebook page for Plaintiff, but **none** testified to any retaliation by Plaintiff for their non-compliance with his supposed request.

iii. *Tenure Charges at ¶¶129-131 (enlisting candidates and calling voters)*

To support this allegation the arbitrator credited Mr. Andriac's testimony that he was tasked during the school day to canvass "the community to find potential candidates to run against Ms. Holstein and Ms. Bogle," and that Plaintiff provided him with a list of voters to call regarding the upcoming Board election. **Pa63**.

Mr. Andriac's testimony was internally inconsistent with the arbitrator's findings. Mr. Andriac first testified that in July Plaintiff wanted him to reach out to his contacts in his cell phone for candidates to run for the Board. Mr. Andriac claimed that his personal phone was not working, but because of Plaintiff's desire to have him reach out to his contacts in his cell phone, he allowed Mr. Andriac to incorporate his personal cell phone into his work cell phone. **4T28:23-4T33:20**. Mr. Andriac also testified that Plaintiff provided him with a list of registered voters which ***included phone numbers*** and wanted him to call all the voters that Mr. Andriac knew. However, after being shown the list of registered voters, Mr. Andriac realized it did ***not include phone numbers***. **4T31:4-4T33:1; and Pa257**.

After a lunch break, Mr. Andriac was then questioned again about the list of registered voters, and Mr. Andriac then abandoned his claim concerning using his

cell phone to contact candidates and instead testified that Plaintiff wanted him to leave the building during the workday to canvas for candidates. He claimed that instead of canvassing he would just go to his mother's house. **4T51:11-4T54:6** ("But I just kind of went to my mom's house").

POINT III

THE ARBITRATOR EXCEEDED HER POWERS IN VIOLATION OF *N.J.S.A.* 2A:24-8(d) WHEN SHE ORDERED PLAINTIFF TO BE DISMISSED IN CONTRAVENTION OF THE TERMS OF HIS CONTRACT REQUIRING THAT HE BE GIVEN NOTICE AND AN OPPORTUNITY TO CURE ANY PERFORMANCE ISSUES (Pa19-20; Pa51).

The arbitrator exceeded her authority when she failed to enforce unambiguous provisions contained within Plaintiff's contract:

> An arbitrator exceeds her authority where she ignores "the clear and unambiguous language of the agreement . . . ." ... It is fundamental, "an arbitrator may not disregard the terms of the parties' agreement, nor may he [or she] rewrite the contract for the parties… Moreover, "the arbitrator may not contradict the express language of the contract . . . ."

West Essex PBA Local 81 v. Fairfield Township, No. A-2853-19 at *13 (App. Div. June 22, 2021) (internal citations omitted) **Pa555-556**. *See also City Ass'n of Sup'rs v. School Dist*, 311 N.J. Super. 300, 312 (App. Div. 1998) ("The arbitration panel exceeded its authority by ignoring the clear and unambiguous language of the agreement concerning the manner in which vacation days were earned."); and

Dumont Custodial Maint. v. Dumont Bd. of Ed., No. C-532-08 at *13-14 (Ch. Div. Feb. 5, 2009) **Pa566-567** (arbitrator exceeded authority in terminating employee in contravention of collective bargaining agreement calling for 15 days suspension for first serious offense).

Several provisions of Plaintiff's contract provide that he was to be given notice of any issues with his performance and an opportunity to address those issues prior to suffering any discipline:

> In the event that the Board determines that the performance of the Superintendent is unsatisfactory **in any respect**, it shall describe in writing, and in reasonable detail, the specific recommendations for improvement in all instances where the Board deems performance to be unsatisfactory. The Superintendent shall have the right to respond in writing to the evaluation; this response shall become a permanent attachment to the evaluation in question.

Ex. 2 at Article V(A) (emphasis added).

> The parties also agree that the Board **shall not hold any discussions** regarding the Superintendent's employment, unless the Superintendent is given written notice at least 48 hours in advance and is given the opportunity to address the Board in closed session with a representative of his choosing.

Ex. 2 at Article V(C) (emphasis).

There is no dispute that Plaintiff was not provided any notice of performance issues prior to being placed on leave in April 2021, nor at any time thereafter until the date he was served Tenure Charges in late August 2022. Plaintiff also received

no notice of an intention by the Board to discuss his employment prior to being placed on administrative leave.

There can be no dispute that Tenure Charges charge conduct related to Plaintiff's performance, as four of the seven counts allege "neglect of duty." Tenure Charges

While Plaintiff's contract permits him to be terminated pursuant to tenure proceedings, that does not obviate the terms of the contract which require that Plaintiff be given notice of performance issues and an opportunity to cure.

The arbitrator ignored those provisions of Plaintiff's contract when she determined to terminate Plaintiff without giving him an opportunity to cure, on the alleged basis that corrective action would be futile. **Pa65**. In so doing the arbitrator exceeded her authority, and as such her award must be vacated.

POINT IV

THE ARBITRATOR IGNORED THE SEVEN JUST CAUSE FACTORS AND APPLICATION OF SAME DOES NOT SUPPORT DISCHARGE (Pa19-20; Pa64-66).

The arbitrator failed to apply the seven just cause factors when she determined to discharge Plaintiff for "just cause" – in fact she applied no legal standard to her decision at all. Through case law and prior arbitrations over 60 years seven factors have been established in determining whether a Board has "just cause" to warrant discipline or termination. *See e.g., "The Meaning of Just Cause,"* The Negotiations

Advisor published by the New Jersey School Boards Association (April 2016) **Pa569-573**; *Linden Board of Education v. Linden Education Ass'n,* 202 N.J. 268, 273 and 278 (2010) (affirming arbitrator's award which applied the relevant "just cause" factors); *In the Matter of the Arbitration of the Tenure Charges between Belvidere Board of Education and Daniel Dempsey and Andrew Poyer*, State of New Jersey Commissioner, DOE Docket Nos. 52-3/19; 56-2/19 at *72-74 (January 13, 2020) **Pa645-647**; *In the Matter of: The Tenure Hearing of Joseph Archible and Lenape Regional High School District Board of Education, Burlington County*, Docket No. 281-1019 at *65-66 (January 29, 2021) **Pa723-724**. While the factors are sometimes stated slightly differently or truncated, the factors generally to be considered include the following:

1. Did the employer give the employee fair warning of the possible or probable disciplinary consequences of the employee's conduct?

2. Did the employer's rule or order reasonably relate to the orderly, efficient, and safe operation of the business?

3. Did the employer, before administering discipline to an employee, try to discover whether the employee did in fact violate or disobey a rule or order of management.

4. Was the employer's investigation conducted fairly and objectively?

5. During the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the employer in a particular case reasonably related to a) the seriousness of the employee's proven offense and b) the record of the employee in his service with the employer?

The Meaning of Just Cause at pp. 1-2. **Pa569-570**. A "no" to **any** factor "normally means that just and proper cause did not exist." *See id.* at p. 1.

When termination is imposed the penalty must "fit the infraction and not be disproportionate given the totality of the circumstances, including mitigating factors." *Linden Board of Education*, 202 N.J. at 273. Moreover, progressive discipline is integral to the concept of "just cause":

> [T]he Arbitrator considers progressive/corrective discipline to be an integral part of the just cause concept. In this regard, the termination of the Grievant's employment for a first offense, absent evidence that his misconduct was egregious, is inconsistent with the standards of arbitral jurisprudence.

Id. (quoting the arbitrator's decision with approval).

The arbitrator failed to apply any of these factors in rendering her decision. However, application of these factors demonstrates that the Board failed to establish "just cause" to terminate Plaintiff.

A. Plaintiff Received No Notice, The Investigation Was Biased, And The Investigation Did Not Result In Substantial Proof (Factors 1, 3, 4 and 5).

Plaintiff had no notice of any allegations of misconduct or performance issues prior to being placed on administrative leave and the "investigation" into Plaintiff was a biased fishing expedition.

Plaintiff signed a five (5) year contract in 2020, a new Board was constituted in January 2021, two members of which had campaigned on getting rid of Plaintiff, and just a few months later Plaintiff was placed on administrative leave for no stated reason, during a secret alleged meeting in which two Board members were intentionally excluded, directly after which the Board non-renewed employees who were perceived to support Plaintiff. *See supra* at Statement of Facts.

There were ***no*** complaints made by parents or students concerning any of the conduct for which Plaintiff was found guilty by the arbitrator, and no complaints by staff members were made prior to Plaintiff being placed on administrative leave and the start of an investigation by the Board's attorney.

The investigation itself was guided by John Nittolo, a former employee ***whom Plaintiff had non-renewed***, in part, due to his inappropriate sexual harassment of other employees, and who was appointed acting CSA when Plaintiff was put on leave. **Pa210 at Interrogatory No. 2; and 9T134:7-9T136:21**.

During the year-long investigation and through the hearing, Plaintiff was on administrative leave, providing incentive to witnesses to want to support the newly appointed Board members Holstein and Bogle, who campaigned to terminate Plaintiff. One of the primary witnesses giving testimony against Plaintiff, James Andriac, was appointed acting CSA (after Mr. Nittolo resigned) and received a salary raise from $80,000 to $135,000 per year, which he would lose if Plaintiff was

permitted to return to his position. **5T65:8-5T66:3**. Furthermore, prior to being placed on leave, Plaintiff had expressed to Mr. Andriac that he had performance issues which would result in his non-renewal if he did not improve. **9T130:25-9T134:6; and 4T48:13-4T49:9**.

Despite the year-long investigation, at its conclusion, the investigator did **not** recommend the filing of tenure charges. Rather, the investigator cautioned that there was a lack of documentation to prove the allegations and that none of the witnesses had documented any of their alleged concerns. **Pa135-140**.

Accordingly, Plaintiff received no notice of any alleged misconduct, let alone notice that he could be disciplined, the investigation was not conducted fairly and objectively, and it did not result in substantial evidence (*see* Point II *supra*).

B. The Discipline Of Discharge Is Not Reasonable Based Upon The Proven Offenses And Plaintiff's Record Of Service (Factor 7).

The performance issues found by the arbitrator were not so serious as to warrant discharge as compared to Plaintiff's record. The allegations relate to personal interactions with a handful of employees with whom it is undisputed Plaintiff had a previous strong personal relationship. There was no evidence presented that Plaintiff's conduct had any overall effect on the orderly, efficient, and safe operation of the school. While Plaintiff denied the findings, even if true, they were minor in comparison to the many accomplishments of Plaintiff during his tenure as CSA.

Former Board President Mr. Plotsky and former Board member Ms. Van Ness both testified as to Plaintiff's exemplary performance. *See supra* at Statement of Facts. Plaintiff's annual performance reviews also demonstrate Plaintiff's stellar performance. Plaintiff scored Exemplary in all areas in all years between 2018 and 2020, with the exception of one score of Effective in 2018. **Pa160-172; Pa173-182; and Pa183-194**.

In the matter of *Alix Gillespie and Glouster County Special School District and Vocational School District*, Docket No. 241-12/21 (**Pa470**), the arbitrator found that "just cause" was not established where, like here, the Plaintiff had not previously been disciplined, nor was she given an opportunity to correct her behavior. Arbitrator Brown stated as follows:

> In all but the most egregious cases, discipline in the employment context is primarily intended to be corrective in nature . . . Under the just cause standard, discipline is not a means to punish an employee or gain retribution for an employee's conduct. Only when efforts to correct have failed through reasonable efforts under the circumstances, is discipline justly used to terminate the employment relationship.

Pa533.

There is no dispute that Plaintiff had no record of any disciplinary action prior to being placed on administrative leave. Eight (8) months before his administrative leave started, Defendant renewed Plaintiff's contract for another five (5) years.

Moreover, Plaintiff was not given an opportunity to correct his behavior. While the arbitrator made a conclusory statement that Plaintiff lacked remorse and therefore corrective action would be futile, she provided no further explanation. **Pa65**. It can only be presumed that the arbitrator is attributing a lack of remorse to Plaintiff's denial of events, and if so, that is improper. *See In re Geiger*, No. A-1409-13T2 (App. Div. Nov. 18, 2015) (**Pa728**). In *Geiger*, the Appellate Division reversed the decision of the Administrative Law Judge and Assistant Commissioner dismissing two tenured teachers for referring to students as "Negroes," finding the penalty of dismissal too harsh. *See id.* at *28 (**Pa738**). In its analysis, it made clear that it is not proper to use a teacher's denials of the conduct against them:

> Geiger and Jones should not have been expected to admit something they assert did not occur and insistence on their innocence should not have been weighed against them. Instead, the discipline imposed should have been related to the conduct found to have occurred, as well as Geiger and Jones's past performances as teachers.

Id. at *22 (**Pa736**). Moreover, the arbitrator's conclusory statement is in direct contrast to the record evidence related to uncharged conduct. When the Board changed the rules concerning use of a communication method referred to as the ALL Call system, in response to Plaintiff's use of that system, Plaintiff abided by the new rules despite his disagreement. **1T255:8-11; and 6T74:4-6**.

Hence, discharge is not reasonable considering the relative minor nature of the proven offenses as compared to Plaintiff's performance record.

C. Defendant Has Not Applied Its Penalties Evenhandedly (Factor 6)

Plaintiff is not aware of any other Chief School Administrator for whom the Board filed tenure charges. However, Defendant installed Mr. Nittolo as the acting CSA even though the Board was aware of allegations of sexual harassment against him. Moreover, they installed and maintained Mr. Andriac as acting CSA even though they were aware of text messages that he exchanged with Plaintiff and others, which Defendant attempted to utilize as evidence to support Tenure Charges against Plaintiff. By any objective standard, the text messages sent by Mr. Andriac were far more inappropriate than anything sent by Plaintiff, including, but not limited to, texting Plaintiff and others about testicular atrophy, stating that Plaintiff had a micro penis, sending a picture of a bag of dicks, and telling others to "F---k off." **Pa240, Pa243, Pa237**. Even if Defendant claims that it was not initially aware of Mr. Andriac's behavior, through its investigation, it certainly became aware. As opposed to putting him on administrative leave and considering tenure charges, as it did with Plaintiff, the Board **promoted** Mr. Andriac to replace Plaintiff. To this date, approximately 2 years after Mr. Andriac was promoted and after he testified admitting his inappropriate behavior, the Board has not disciplined him.

Thus, there is no "just cause" to discharge the Plaintiff and the arbitrator's award must be vacated.

POINT V

THE ARBITRATOR FAILED TO PROPERLY APPLY THE *FULCOMER* FACTORS AND A PROPER APPLICATION OF *FULCOMER* DICTATES THAT DISCHARGE IS NOT WARRANTED (Pa19-20; Pa64-66).

While an arbitrator's award is to be treated with deference, it can still be vacated where her discretion is mistakenly exercised. In *In re Geiger*, *supra*, at *20 this Court stated, "… 'the test' to be applied by an appellate court is to determine whether [the]punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (quoting *In re Polk*, 90 N.J. 550 at 578 (1982) (internal quotation marks omitted) (**Pa735**). Plaintiff submits that this is one of those cases.

In this case the arbitrator made no substantive analysis of the *Fulcomer* factors in deciding to discharge Plaintiff. In determining the appropriate discipline, the arbitrator was required to consider the following factors:

1. whether "the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment[,]";
2. "the nature and gravity of the offenses under all of the circumstances involved, any evidence as to provocation, extenuation or aggravation,"
3. the teaching record and ability;
4. the disciplinary record, 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"; and
5. "[C]onsideration should [also] be given to the impact of the penalty on [the teacher's] teaching career, including the difficulty which would

> confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State. . . ."

In re Tenure Hearing of Forman, No. A-0317-12T2 at *10 (App. Div. July 12, 2013) (quoting *In re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967)) (**Pa744**).

The offenses found by the arbitrator were not cruel or vicious, and there is no evidence of an intent to punish.

It is not disputed that during the time of Plaintiff's alleged misconduct, he considered Defendant's witnesses Ms. Van Gorden, Mr. Andriac and Mr. Runne, as his friends, as evidenced by their afterhours text communications. **Pa218-256**.

Even if Plaintiff referred to Mr. Andriac as "Nancy" or "little girl," (which he denies) Defendant's own witness, Mr. Runne, the head of the Union, did not perceive these comments as "cruel or vicious." He claimed that the use of these terms was to tease Mr. Andriac for complaining too much - referencing a teacher perceived to be a complainer. He did not file a grievance on Mr. Andriac's behalf or recommend that Mr. Andriac file a grievance, therefore, he obviously did not see the comments as abusive. **3T76:8-3T77:19**. Furthermore, Mr. Andriac admitted that he never disclosed that he felt "belittled" by Plaintiff. **4T64:24-4T65:16; and 4T72:3-13; 4T132:7-4T133:14**. Rather, Mr. Andriac engaged in teasing banter, leading Plaintiff and the others to believe he was a willing participant, and to have no reason for concern. **7T35:15-7T37:3; and 1T213:3-8**.

Furthermore, asking teachers to call into the Board to speak about programs, asking friends to create a Facebook page to communicate information about Ms. Holstein who was campaigning to terminate Plaintiff, asking a friend to call voters to vote, or "find" candidates to run against Ms. Holstein, is not "cruel or vicious" and Plaintiff would have had no way of knowing anyone felt pressured or upset. For example, in September 2020, Mr. Andriac messaged Plaintiff about an open position at his wife's school and Plaintiff asked Mr. Andriac to send him the information. Mr. Andriac's response was "Yeah I'm not going to do that. We need to kick Holstein in her balls and win this election." **Pa220**. Thus, Mr. Andriac was the one promoting winning the election to protect Plaintiff, since Ms. Holstein was running to get rid of Plaintiff. As such, even if Plaintiff had requested Mr. Andriac's assistance to "find" candidates and encourage people to vote, Plaintiff would not have been aware that such conduct would be upsetting to Mr. Andriac.

At most, in two instances with one teacher, Plaintiff suggested that she steer away from choosing one student to hold a leadership position in the agricultural program, and allegedly delay sending a second soccer permission slip home to an unidentified student. While this behavior, if true, is certainly not nice, it is not so awful as to be characterized as "cruel or vicious."

While the arbitrator refers to Plaintiff's "petty punishments" she did not identify to what she was referring. **Ex. 1** at p. 44. There was no evidence or findings

that Plaintiff "punished" anyone. Therefore, there can be no finding that Plaintiff acted with the intent to punish.

As detailed *supra* at Point IV, Plaintiff had an exemplary performance record, had received no discipline and in fact received no notice of any performance issues prior to issuance of the Tenure Charges after he was placed on administrative leave for no reason.

It is not clear what impact the arbitrator believes Plaintiff's conduct allegedly had on the overall administration of the school or maintenance of discipline, and Plaintiff is not aware of any such impact. In fact, Plaintiff's record, as indicated in his evaluations, demonstrates that his administration was remarkable and greatly improved the lives of the students and teachers. There were no complaints from students or parents, and there were no findings that anything Plaintiff did impacted any school business.

Moreover, the arbitrator gave absolutely no consideration to the effect of her decision on Plaintiff's career. There can be no doubt that Plaintiff will likely be unable to obtain new employment as a CSA, or in any educational position for that matter, if the arbitrator's decision is not vacated.

Upon reviewing the offenses ultimately found by the arbitrator, there was no finding of fraud, embezzlement, inappropriate sexual or violent behavior, or discrimination to name a few major offenses. In fact, each claimed offense could

have been easily corrected if Plaintiff was simply notified in any manner, including an evaluation (as required under his contract). This Court should not countenance a penalty so draconian as to destroy a career for offenses that can only be described as minor when compared to offenses in which discharge is warranted.

Accordingly, consideration of the *Fulcomer* factors does not support the discharge of Plaintiff and the arbitrator's award must be vacated.

CONCLUSION

For the foregoing reasons, the arbitrator's award must be vacated and the Plaintiff reinstated. If arbitrators are not required to apply any legal standards to their decisions, the entire Tenure process will be nothing more than a farce – wasting valuable time on hearings to create the illusion of due process, when an arbitrator can essentially make a determination with no more foundation than one determined by playing a game of pin the tail on the donkey – providing no consistency in decisions or notice to accused persons as to the potential penalties to which they may be subjected. In sum, to allow this arbitrator's award to stand would be an abomination, make a mockery of Tenure proceedings, and would result in the undeserved destruction of an individual's career that was dedicated to educating children.

GREEN SAVITS, LLC
Attorneys for Plaintiff, Timothy Capone
By: *s/Laura M. LoGiudice*
Laura M. LoGiudice, Esq.

Dated: September 27, 2024

TIMOTHY CAPONE, Plaintiff-Appellant, v. MONTAGUE TOWNSHIP BOARD OF EDUCATION, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003406-23T2 ON APPEAL FROM ORDER DISMISSING COMPLAINT TO VACATE ARBITRATION AWARD SUPERIOR COURT OF NEW JERSEY SUSSEX COUNTY CHANCERY DIVISION, GENERAL EQUITY PART DOCKET NO.: SSX-C-10-24

RESPONDENT'S BRIEF IN OPPOSITION TO APPEAL

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendant-Respondent
169 Ramapo Valley Road, UL-105
Oakland, New Jersey 07436
Telephone: (973) 845-6700
Facsimile: (201) 644-7601

On the Brief:
Mary Anne Groh, Esq. Atty. No. 030531993

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PRELIMINARY STATEMENT

This matter arises from a school tenure proceeding initiated by the Montague Township Board of Education ("Board") against Plaintiff Timothy Capone, the Board's former Chief School Administrator ("Plaintiff") by the filing and service of sworn tenure charges. Pursuant to applicable law, the contested dismissal of Plaintiff based on written tenure charges deemed sufficient by the New Jersey Board of Education were referred to arbitrator Deborah Gaines, Esq., (hereinafter "the Arbitrator"), who conducted hearings on 10 days and heard testimony from seventeen (17) witnesses including Plaintiff.

On January 8, 2024, after consideration of the testimony and documentary evidence and the parties' post-hearing written submissions, the Arbitrator issued her decision and award sustaining portions of Count One, Count Four, and Count Six of the tenure charges filed against Plaintiff (hereinafter at times referred to as "Award" or "Decision"). The Decision, which comprises 45 pages, includes the Arbitrator's summation of the parties' post-hearing positions, her analysis of the charges filed against Plaintiff, and her determinations based on the evidence presented. Where the Arbitrator sustained charges, she provided explanation for her determination, along with a summary of the evidence.

Upon consideration of Plaintiff's summary action to vacate the Award, the trial court properly determined that there was no basis to vacate the Award. Upon

de novo review, there is no basis for this court to vacate the Award. The Order dated May 31, 2024 should be affirmed.

PROCEDURAL HISTORY

On April 4, 2024, Plaintiff instituted a summary proceeding by filing a Verified Complaint (Pa374) and seeking the entry of an Order to Show Cause ("OTSC") based on the Verified Complaint signed by Plaintiff's counsel, a Certification of Counsel with exhibits (Pa384), and a Brief to vacate an Arbitration Award, pursuant to N.J.S.A. 2A:24-8. Despite the fact that the Complaint was not properly verified by the Plaintiff as required by R. 4:67-2(a), the Court entered an OTSC on April 8, 2024. (Pa389) Defendant opposed the OTSC with an Answer to the Complaint (Pa374), a Brief, and a Certification of Counsel (Pa406) with exhibits, including the transcripts from the arbitration hearings and documents admitted into evidence at the hearings, and asked the Court to confirm the award.

On May 31, 2024, the trial court heard oral argument (1T) and later that day entered an order with a written opinion denying the relief sought by Plaintiff in the Complaint. (Pa1) Plaintiff filed the instant appeal on July 3, 2024. An Amended Notice of Appeal was filed on July 15, 2024. (Pa411) Defendant hereby opposes the appeal.

COUNTERSTATEMENT OF FACTS

On July 1, 2017, the Board hired Plaintiff as the Superintendent/Chief School Administrator of the Montague Township School District (the "District"). (Pa85 at ¶ 1) In his initial and successor employment contract, Plaintiff agreed "to perform faithfully the duties of Superintendent of Schools for the Board and to serve as the Chief School Administrator ("CSA") in accordance with the laws of the State of New Jersey, Rules and Regulations adopted by the State Board of Education, existing Board policies and those which are adopted by the Board in the future." (See Pa69 at Article III (A))

As stated in Board Policy, Plaintiff's primary goals were to inspire, lead, guide, and direct every member of the District's administrative, instructional, and support services staff in setting and achieving the highest standard of excellence. (Pa85&142 at ¶2) Furthermore, as stated in Board Policy, the essential qualities and characteristics of individuals holding the position of CSA include respect for the rights and feelings of others; the ability to communicate well and maintain open lines of dialogue with District stakeholders; the ability to foster and promote a healthy, supportive work and educational environment for staff and students; fairness; and, good judgment. (Pa87&142 at ¶7) Further, as the "face" of the District, the CSA was required to have excellent and ongoing communications with staff, students, and

parents in order to establish the expectations and tenor for the school building and the interactions occurring within it, serve as a model for professionalism and community engagement to subordinate staff members, and function as a source of guidance and mentorship to District staff. (Pa87&142 at ¶9)

Plaintiff's contract contemplated his employment could be terminated. (Pa79) Indeed Article VI recognized that Plaintiff was subject to dismissal in accordance with N.J.S.A. 18A:17-20.2 for, *inter alia*, conduct unbecoming. (Pa80)

During the course of Plaintiff's employment with the District, the Board became aware of improprieties in Plaintiff's conduct in the performance of his duties as its CSA and, as a result, on April 26, 2021, the Board placed Plaintiff on paid administrative leave. (Pa87 at ¶10) Thereafter, the Board authorized its attorneys to conduct a confidential workplace investigation into Plaintiff's conduct. (Pa88 at ¶ 11) *18* current and former staff members were interviewed as part of the investigation into Plaintiff's conduct. (Pa88 at ¶12) Virtually all persons interviewed described Plaintiff as hostile, intimidating, and vindictive and as fostering a work environment rife with divisiveness and distrust that many staff members felt anxious and fearful returning to school each day. Ibid. Further, many of the participants in the investigation expressed their conviction that Plaintiff's leadership of the District was frequently counter to the best interests of the students and community, which the District is bound to serve, and that, if Plaintiff were to return from his paid

administrative leave, his return would cause substantial and irremediable harm to the District and its various stakeholders. Ibid.

Based upon the findings detailed in the investigation report, on August 31, 2022, the Board filed sworn tenure charges against Plaintiff seeking his removal from his position as the District's Chief School Administrator (hereinafter "Tenure Charges"). (Pa85) The Tenure Charges were deemed sufficient by the New Jersey Department of Education, Office of Controversies and Disputes and the matter was referred to the Arbitrator on September 21, 2022.

In the Tenure Charges, the Board charged Plaintiff with the following:

- COUNT ONE - UNBECOMING CONDUCT & OTHER JUST CAUSE; INAPPROPRIATE AND UNPROFESSIONAL CONDUCT TOWARDS DISTRICT STAFF (Pa91-95 at ¶¶25-44);

- COUNT TWO - NEGLECT OF DUTY; FAILURE TO MAINTAIN SCHOOL FACILITIES OR ADDRESS KNOWN HEALTH & SAFETY CONCERNS (Pa96-99 at ¶¶45-59);

- COUNT THREE - NEGLECT OF DUTY & OTHER JUST CAUSE; INTERFERENCE WITH EDUCATIONAL CONTINUITY OF DISTRICT STUDENTS (Pa99-102 at ¶¶60-78);

- COUNT FOUR - UNBECOMING CONDUCT & OTHER JUST CAUSE; INAPPROPRIATE CONDUCT TOWARDS DISTRICT PARENTS (Pa102-106 at ¶¶79-96);

- COUNT FIVE - NEGLECT OF DUTY & OTHER JUST CAUSE; FAILURE TO ENSURE SUFFICIENT STAFF AND MISAPPROPRIATION OF STAFF (Pa106-110 at ¶¶97-118);

- COUNT SIX - UNBECOMING CONDUCT; ABUSE OF POSITION AND AUTHORITY (Pa110-113 at ¶¶119-133); and

- COUNT SEVEN - NEGLECT OF DUTY; LACK OF REGULAR ATTENDANCE IN THE SCHOOL BUILDING AND FAILURE TO RESPOND TO REQUESTS FOR ASSISTANCE (Pa113-116 at ¶¶134-147).

After Plaintiff filed an Answer denying the Charges, the matter proceeded to arbitration. The arbitration hearings were held before the Arbitrator on 10 days on and between January 20, 2023 and August 18, 2023. At the close of the Board's case in chief at the hearing, counsel for Plaintiff filed a motion seeking dismissal of all charges against Plaintiff and a request that the Arbitrator exclude all non-specific allegations within the Tenure Charges and any issues raised during the hearing that were not contained within the Tenure Charges." (Pa258) On May 18, 2023, the Arbitrator denied Plaintiff's motion for summary judgment, finding that there was sufficient evidence to consider the charges against Plaintiff and noted a willingness to reconsider the motion after the parties had presented their proofs. (Pa67) The hearings continued thereafter and were closed on August 18, 2023. The Arbitrator allowed written post-hearing submissions, which were filed on September 15, 2023.

Ultimately, on January 7, 2024, the Arbitrator issued the Award finding that Plaintiff had engaged in conduct unbecoming a CSA that warranted his removal. (Pa21) In her thoughtful and thorough Decision, the Arbitrator recited that the parties' evidence and arguments, whether referenced or not, were fully considered in the issuance of this Opinion and Award, and that Plaintiff's arguments in support of his prior motion to dismiss had also been considered. (Pa22) The Decision also referenced the various provisions of Plaintiff's employment contract that Plaintiff contended warranted dismissal of the charges against him. (Pa23-24) In recounting the positions of the parties, the Arbitrator referenced, *inter alia*, the Board's post-hearing argument that the factors to be included in fashioning an appropriate penalty included the nature and gravity of the offenses, premeditation and aggravating factors, Plaintiff's present attitude, and the impact of Plaintiff's conduct. (Pa35)

Before addressing the substantive issues involved in resolving the tenure charges, the Arbitrator stated as follows:

> I further note that I allowed the District great latitude in presenting its case, which included testimony which that (sic) was not initially clear whether it related to the sworn tenure charges. Given how many specifications were contained in the charges and how broadly they were written I allowed the testimony with the ruling that I would determine if it were relevant to the charges as written. However, after careful review, I find that many of the issues testified about, such as Ms. Marion, Ms. Lehmkuhl, and other testified about matters that were not included in the sworn tenure charges. Because the statute requires the

> charges to state with specificity the allegations, my findings do not address allegations that are not found in the sworn tenure charges. As I noted in the hearing, to the extent that any such testimony relates to credibility, or other facts at issue, I have considered it and refer to where relevant.

(Pa50 (emphasis supplied).) By that ruling, the Arbitrator granted Plaintiff's motion to dismiss any allegations not included in the Tenure Charges. The Arbitrator also agreed with Plaintiff's contention that instances of Plaintiff's conduct that were approved by, known to, or should have been known to the Board at the time such conduct occurred could not constitute unbecoming conduct or neglect of duty on Plaintiff's part. (Pa50-51) The Arbitrator did, however, find that the Board proved certain charges in Counts One, Four and Six of the Tenure Charges, while also finding that there was insufficient proof as to Counts Two, Three, Five and Seven.

With regard to Count One, which charged Plaintiff with unbecoming conduct in connection with his improper interactions with staff members in paragraphs 25 through 44, the Arbitrator found that the Board had proven the specific allegations detailed in paragraphs 29(iii), 29(iv), and 30. (Pa57) In the Decision, the Arbitrator cited testimony by four (4) witnesses that she found credible and established that when they disagreed with Plaintiff he would refuse to speak with or interact with them and they feared reprisal. (Pa58) Based on that testimony, the Arbitrator found that Plaintiff's behavior was unprofessional and antithetical to his responsibility to

communicate with staff. (Ibid.) Furthermore, as to the charges in paragraphs 29(iv) and 30, the Arbitrator found sufficient evidence to establish that plaintiff engaged in verbally and emotionally demeaning conduct towards James Andriac in his admitted use of the term "Nancy" and "little girl" in group conversations. (Pa59) The Arbitrator considered the Plaintiff's explanation and found that whether said to question Mr. Andriac's manhood or to insinuate he was a complainer – as suggested by Plaintiff – such was verbally and emotionally demeaning, especially because it was done in public. (Ibid.)

As to Count Four, wherein the District charged Plaintiff with unbecoming conduct in connection with his inappropriate conduct toward District parents, the Arbitrator found that paragraphs 85, 86, and 87 of the written charges had been established through witness testimony. (Pa61) Specifically, a witness testified that after receiving a request from a parent – who Plaintiff felt was " a pain in the ass" to resend a permission slip for her son to participate in soccer, Plaintiff told the witness to wait until after the deadline causing the child to miss approximately one (1) month of the program. (Id.) In addition, the Arbitrator found the same witness' testimony credible to establish that Plaintiff directed her not to appoint a particular student for a leadership position in the District's Future Farmers of America program based upon his perception of the student's parent. (Id.) Plaintiff points to no credible

evidence that contradicts the witness' testimony, which the Arbitrator found established the allegations.

As to Count Six, which charged Plaintiff with unbecoming conduct in connection with his abuse of his supervisory authority over subordinate employees, the Arbitrator specifically credited paragraphs 120, 121, 123, 124, 125, and 126 of the written charges, all of which related to Plaintiff's requests to subordinate, often non-tenured, staff members that they call into Board meetings to speak positively about Plaintiff and school programs. (Pa62) The evidence included testimony by the Board President Glen Plotsky who was called to testify at the hearing by Plaintiff; Mr. Plotsky acknowledged that it would be inappropriate for an administrator to request that staff speak positively on his behalf. (Pa62-63) The Arbitrator did not find Plaintiff credible in his testimony that he merely wanted staff to be able to develop and express their positive feelings given the evidence that Plaintiff would suggest that the employee's pet program might be cut if there was not compliance and one of the employees had his name removed from the District's website after he refused to call in as requested. (Ibid.)

Moreover, the Arbitrator found sufficient evidence in the testimony of at least three (3) witnesses to prove paragraphs 127 and 128 relating to Plaintiff's requests to District staff members that they create a Facebook page for the purpose of posting information concerning two (2) individuals who were, at the time, running for seats

on the Board. (Pa63) Likewise, the Arbitrator found sufficient evidence to sustain the allegations in paragraphs 129, 130, and 131 of the Board's charges in Count Six as to Plaintiff's attempts to influence a Board election by having Mr. Andriac canvas Montague Township residents for individuals who could run against prospective Board members that Plaintiff did not want elected to the Board and by asking Mr. Andriac to call District voters to recommend that they vote in a particular way. (Ibid.) The Arbitrator premised her findings concerning those specific allegations on the testimony of Mr. Andriac and Plaintiff himself, who did not deny that he made the request to Mr. Andriac, but suggested that he did so as Mr. Andriac's friend, rather than as his supervisor. (Id.)

The Arbitrator next discussed the appropriate penalty to be imposed based upon the foregoing sustained unbecoming conduct. The Arbitrator stated as follows:

> The credible record evidence shows Respondent's misconduct constitutes just cause for discharge. Respondent's actions were not isolated moments instances poor judgment (sic). Rather, they were willful actions that destroyed the trust and respect necessary for continued employment. Respondent did not merely make a stray comment about a parent to a teacher. Rather, he directed an inexperienced teacher to thwart student engagement in enrichment activities, based on his personal dislike of the parents. Not only did this negatively impact the student but demonstrated highly inappropriate behavior to the teacher and communicated to her that treatment of students should be linked to how the superintendent feels about their parents.

> Likewise, Respondent's engagement with teachers in school board elections was not an inadvertent lapse of judgment. He attempted to have teachers create a Facebook page under a false name for his political purposes in relation to the school board. His belittlement or petty punishments also created an atmosphere of fear of retaliation.
>
> Certainly, the school board failed in many ways to exercise oversight over Respondent. Where it has charged Respondent with misconduct in areas it had a duty to provide counseling or guidance, I have dismissed those allegations. However, my decision relates only to the specific instances of proven misconduct, which Respondent should have understood the consequences of his actions. These instances are sufficiently serious to warrant termination, even without prior discipline or documented poor performance. Respondent, as the Superintendent is not subject to daily oversight. He must be entrusted to lead with the trust and respect of the school community. Given his actions, and his failure to demonstrate any reflection or remorse, I find that corrective action would be futile and inappropriate in this case.

(Pa64-65)

LEGAL ARGUMENT

POINT I

UPON DE NOVO REVIEW OF THE RECORD ON APPEAL, THE TRIAL COURT'S FINAL ORDER SHOULD BE AFFIRMED BEAUSE THE AWARD IS BASED ON SUBSTANTIAL, CREDIBLE EVIDENCE AND THE ARBITRATOR'S FINDINGS AS TO THE WEIGHT AND SUFFICIENCY OF EVIDENCE ARE ENTITLED TO DEFERENCE.

A. The Record On Appeal.

Plaintiff's appeal was taken as of right from the final order entered by the trial court on May 31, 2024 pursuant to R. 2:2-3(a)(1); it is not a direct appeal from the Arbitrator's Award and Decision. R. 2:5-4(a) stipulates as follows:

> [t]he record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein [the court below], and all papers filed with or entries made on the records of the appellate court. The portions of the record that must be included in the appendix filed by appellant are set forth in Rule 2:6-1(a).

Based on that Rule, the record on appeal includes only the record of the trial court, which includes the an OTSC dated April 8, 2024 (Pa389), the Final Order dated May 31, 2024 (Pa1), the Verified Complaint (Pa374), the Answer to the Verified Complaint (Pa394) and the Certifications filed by the parties in connection with the OTSC with any referenced exhibits, which included a Certification by Plaintiff's Counsel Laura M. LoGuidice, Esq. (Pa384) and Certification by Defendant's Counsel Joseph A. Garcia, Esq. (Pa406). While the Appendix submitted by Plaintiff includes the foregoing documents, it is not in the form filed with the trial court. More particularly, the certifications of counsel do not include the exhibits attached thereto. Instead, Plaintiff has included only some of the exhibits to the LoGuidice

Certification in the Appendix without reference to their inclusion in the certifications, while also including documents that were not in the trial record, namely Pa83-83 and 159. Those documents should not be considered in connection with the appeal as those documents were not part of the record before the trial court and are not properly part of the Appendix.

B. The Standard Of Review Is De Novo.

The Appellate Division reviews an order by a trial court in an action to confirm or vacate an arbitration award *de novo* and does not owe any special deference to the trial court's interpretation of the law and the legal consequences that flow from the established facts. Yarborough v. State Operated School District of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018).

Notwithstanding,

> "Judicial review of an arbitration award is very limited." Bound Brook Bd. of Ed. v. Ciripompa, 228 N.J. 4, 11 (2017) (*quoting* Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010)). "An arbitrator's award is not to be cast aside lightly. It is subject to being vacated only when it has been shown that a statutory basis justifies that action." Ibid. (*quoting* Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)).

Yarborough, supra. Indeed, an arbitration award is usually unassailable, operates as a final and conclusive determination, and is binding on the parties. Creter v. Davies,

30 N.J. Super. 60, 64 (Ch. Div. 1954), aff'd, 31 N.J. Super. 402 (App. Div. 1954). "Every intendment is indulged in favor of an award and it is subject to impeachment only in a clear case." Ibid. "[An] arbitrator's decision shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement [only] as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10." N.J.S.A. 18A:6-17.1(e).

"A party to the arbitration may . . . commence a summary action . . . for the confirmation of the award or for its vacation … . Such confirmation shall be granted unless the award is vacated, modified, or corrected." N.J.S.A. 2A:24-7.

The statutory grounds for vacation of an arbitration award are as follows:

> a. Where the award was procured by corruption, fraud, or undue means;
>
> b. Where there was either evident partiality or corruption in the Arbitrators, or any thereof;
>
> c. Where the Arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party; or
>
> d. Where the Arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

N.J.S.A. 2A:24-8.

In this case, Plaintiff asked the trial court to vacate the Award alleging that the Arbitrator exceeded her powers and that the award was procured by undue means. (Pa374) In its decision, the trial court recognized that courts considering applications to vacate arbitration awards must be mindful of New Jersey's "strong preference for judicial confirmation of arbitration awards." (Pa17 *citing* City College of Morris Staff v. City College of Morris, 100 N.J. 383, 390 (1985); Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 186 (1981)). See also, Middletown Twp. PBA Loc. 124 v. Township of Middletown, 193 N.J. 1, 10 (2007) (*citing* N.J. Tpk. Auth. v. Loc. 196, 190 N.J. 283, 292 (2007)).

> Consistent with the salutary purposes that arbitration as a dispute-resolution mechanism promotes, courts grant arbitration considerable deference. To ensure finality, as well as to secure arbitration's speedy and inexpensive nature, there exists a strong preference for judicial confirmation of arbitration awards. *** Thus, arbitration awards are given a wide berth, with limited bases for a court's interference.

Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 194 (2013) (internal quotations and citations omitted).

As the trial court recognized, "[j]udicial review of an arbitration award is very limited, and 'the arbitrator's decision is not to be cast aside lightly.' " (Pa17 *citing* Linden Bd. of Educ., supra, 202 N.J. at 276 *quoting* Board of Educ. v. Alpha Educ. Ass'n, 190 N.J. 34, 42 (2006)). Furthermore, the trial court noted that where

arbitration is required by statute, "judicial review should extend to consideration of whether the award is supported by substantial credible evidence present in the record." (Ibid *citing* Div. 540, Amalgamated Transit Union AFL-CIO v. Mercer Cty. Improvement Auth., 76 N.J. 245, 254 (1978).

Arbitrators are "granted broad powers to decide issues of fact and law, and their decisions 'are given collateral estoppel effect by reviewing courts.'" Roselle Bd. of Educ. v. Batts, 2021 WL 3701735, at *1 (App. Div. Aug. 20, 2021) (citing Barcon, supra, 86 N.J. at 187) (Da600). As a result, as the trial court recognized, "courts grant arbitration awards considerable deference." (Pa18 *citing* East Rutherford PBA Loc. 275, supra, 213 N.J. at 201.) This is particularly true with regard to an Arbitrator's determinations concerning the credibility, sufficiency, relevance, and weight to be accorded to evidence offered and admitted in the arbitration proceedings. See Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988).

C. The Trial Court Properly Held That The Award Had Not Been Procured By Undue Means.

The trial court recognized that "undue means" "ordinarily encompasses situations where the arbitrator has made a mistake of fact or law that is either apparent on the face of the record or admitted to by the arbitrator." (Pa18-19 *citing* N.J. Highway Auth. v. International Fed'n of Prof'l and Tech. Engrs. Local 193, 274 N.J. Super. 599, 609 (App. Div. 1994)). If there is no acknowledged mistake of fact

or law or a mistake that is apparent on the face of the record, the court may not find undue means and, accordingly, may not vacate an arbitration award. Yarborough, supra, 455 N.J. Super. at 140.

Plaintiff argued to the trial court that the Arbitrator provided minimal reasons to support her findings of fact and supposedly relied on inconsistent testimony. (Pa10) The trial court ruled that Plaintiff had not identified an apparent mistake of fact or law that warrants vacating the decision as required *citing* N.J. Highway Auth., supra, 274 N.J. Super. at 609. (Pa20) The trial court further ruled that "[t]o the contrary, the Arbitrator carefully explained the basis for her decisions, based on substantial evidence, including that any issues that were known, approved or should have been known by the Board do not constitute as unbecoming conduct." (Id.)

D. The Trial Court Properly Held That The Arbitrator Had Not Exceeded Her Authority.

As the trial court noted, Plaintiff argued below that the Arbitrator exceeded her authority by allegedly ignoring the clear and unambiguous language of Plaintiff's contract. (Pa3-4) The trial court further noted Plaintiff argued that several provisions of the contract provide that Plaintiff was to be given notice of any issues with his performance and an opportunity to address those issues prior to suffering any discipline. (Id.) The Contract provides as to annual evaluations as follows:

> In the event that the Board determines that the performance of the Superintendent is unsatisfactory in any respect, it shall describe the in writing, and in reasonable detail, the specific recommendations for improvement in all instances where the Board deems performance to be unsatisfactory. The Superintendent shall have the right to respond in writing to the [annual] evaluation; this response shall become a permanent attachment to the [annual] evaluation in question.
>
> ***
>
> The parties also agree that the Board shall not hold any discussions regarding the Superintendent's employment, unless the superintendent is given written notice at least 48 hours in advance and is given the opportunity to address the Board in closed session with a representative of his choosing.

(Pa10-11)

Plaintiff argued to the trial court that there was no dispute that he was not provided notice of performance issues prior to being placed on leave in April 2021 and that he did not receive notice of an intention by the Board to discuss his employment prior to being placed on administrative leave. (Pa4) The trial court ruled that Plaintiff had not demonstrated an entitlement to receive notice and an opportunity to respond as to the decision to place him on administrative leave as the contract provisions relied upon by Plaintiff related only to annual evaluations. (Pa19) The court recognized that it could not torture the language of the contract to create an ambiguity. Ibid. Furthermore, the trial court properly found that Plaintiff had notice of the Tenure Charges, which he timely disputed, and that he was afforded

due process with an opportunity to present evidence and argument to the Arbitrator in the hearings. (Pa19-20)

Plaintiff also argued to the trial court that he was denied due process because the Arbitrator heard testimony at the hearings regarding certain charges that Plaintiff argued were not included in the Tenure Charges and he had to defend those charges even though the Arbitrator ultimately granted his motion to dismiss. (Pa5) Plaintiff further argued that he was denied due process because of an alleged delay in bringing the Tenure Charges. (Ibid.) He specifically argued that the doctrine of laches precluded the action by the Board and that concerns for retaliation against witnesses was speculative and did not justify the delay. (Pa6-7) The trial court rejected those arguments noting the Arbitrator explicitly ruled that her findings did not address allegations that were not included in the sworn tenure charges. (Pa20)

In sum, the trial court properly determined that the Arbitrator had not exceeded her authority.

POINT II

THE ARBITRATOR PROPERLY APPLIED THE STATUTORY LAW AND TERMS OF THE CONTRACT.

N.J.S.A. 18A:17-20.2 stipulates as follows:

> During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or **conduct unbecoming** a superintendent or other just cause and then only in the manner prescribed by [N.J.S.A. 18A:6-9, et seq.].

Id. (emphasis added).

N.J.S.A. 18A:6-10 provides:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment, during good behavior and efficiency in the public school system of the state . . . except for inefficiency, incapacity, **unbecoming conduct** or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle.

Id. (emphasis added). The Arbitrator properly applied the foregoing statute, which was incorporated by reference in the Plaintiff's contract. As noted by the trial court, the Arbitrator correctly construed the Plaintiff's contract and determined that there was no ambiguity in the contract and the provisions governing annual evaluations did not bar the tenure proceedings for conduct unbecoming.

POINT III

ALLOWING TESTIMONY AT THE HEARINGS THAT THE ARBITRATOR ULTIMATELY DETERMINED WAS BEYOND THE ALLEGATIONS IN THE TENURE CHARGES DID NOT DEPRIVE PLAINTIFF OF HIS DUE PROCESS RIGHTS.

"Arbitrators are vested with broad discretion over discovery and other procedural matters to conduct an arbitration in such manner as the Arbitrator considers appropriate for a fair and expeditious disposition of the proceeding." Petrella v. Hackensack Bd. of Educ., Bergen County, 2021 WL 840756, at *3 (App. Div. March 5, 2021) (internal quotations omitted) (Da590 "The Arbitrator is empowered to determine the admissibility, relevance, materiality, and weight of any evidence." Jesan Construction Group, LLC v. 3125-3129 Summit Avenue, LLC, 2024 WL 1250137 (App. Div. March 25, 2024) (Da592) Likewise, under the American Arbitration Association's rules, which govern resolution of school tenure cases (N.J.S.A. 18A:6-17.1), the Arbitrator is authorized to "determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the Arbitrator to be cumulative or irrelevant . . . ." (Da604)

Plaintiff argues that he was denied due process because the Arbitrator allowed the Board to present allegations during the tenure hearing that were not itemized in the Tenure Charges and by refusing to dismiss the Board's case at the conclusion of

the Board's case in chief. (Pb11) Plaintiff further contends on appeal that the introduction of testimony and evidence relating to those additional charges, which the Arbitrator ultimately disregarded, "result[ed] in Plaintiff never addressing two of the findings made by the arbitrator to support his discharge." Ibid. However, Plaintiff cannot point to any law to excuse his failure to present evidence to dispute allegations in the sworn Tenure Charges. If this court were to accept Plaintiff's argument, such would open the door to challenges to arbitration awards where a party failed to address evidence presented and would effectively add a ground to challenge an arbitration award beyond those set forth by the Legislature in N.J.S.A. 2A: 24-8 to allow for a "do over". Clearly, that is not the court's role and is unsupported by any legal authority.

As to the Arbitrator's alleged failure to address his motion to dismiss the Tenure Charges at the close of Plaintiff's case (Pb16), the Arbitrator clearly did consider the motion and denied it as premature noting in relevant part "[m]y apologies for the amount of time it has taken to complete my review of the motion papers … I find that the motion is premature and there is at least sufficient evidence to consider the charges and specifications in this case after the whole case is completed." (Pa67 (emphasis added).) Plaintiff points to no law to support his claim that the Arbitrator's handling of the motion was a "failure of her statutory obligations" let alone "a clear and obvious failure." (Pb16)

As to the introduction of evidence, as Plaintiff notes, the Arbitrator allowed the introduction of evidence because it "was not initially clear whether it related to the sworn tenure charges" Pb14 *citing* Pa50. Plaintiff cites to certain testimony at the hearings that he argues related to matters ultimately found to be not encompassed in the Tenure Charges. (Pb14-15) He further argues that as a result, he had to address those charges in is post-hearing submission (as did the Board). (Pb 15-16) Plaintiff's failure to address all of the evidence proffered by Plaintiff at the hearings cannot be excused because he chose to focus on only some of the evidence proffered by Plaintiff.

As to the claims that certain testimony was not implicated by the Tenure Charges, the challenged testimony was based on the Tenure Charges themselves or the Investigation Report that was referenced in the Tenure Charges:

- Mr. Capone misused the ALL Call system and CSA Facebook page to convey votes to Board members during public Board meetings. (See Da111-113)

- IEP placements were not appropriate. (See Da15, 22, 39, 53-54, 60-61, 73, 97, 118-119)

- Children were allowed to skip grades and they should not have been. (See Da26, 68-69, 100-101)

- Children with IEP's were brought back to the district who should not have been. (See Da53-54, 130)

- Issues concerning an altercation where a student physically attacked Mr. Capone. Defendant's witnesses alleged that the child should not have been allowed to attend Montague School, suggested that proper follow-up was not

made concerning the student and insinuated that Plaintiff was responsible for that child's suicide. (See Da14, 53-54)

- Ms. Marion was put on medical leave and terminated (and entered into an Agreement with the Board as constituted at the time) in retaliation for comments she made to the Board about, inter alia, the cleanliness of the school building. (See Da11, 26, 36-37, 70, 92-97)

- Mr. Andriac did all the staff evaluations and illegally signed Mr. Capone's name to the summative evaluations. (See Da13, 41)

- Ms. Lehmkhul disagreed with changes made to the Math program. (See Da56)

- Mr. Capone created two stipend positions for Danielle LaStarza which were not proper but which the union never grieved. (See Da27-28)

- Danielle LaStarza was paid at the rate of Master's plus 15, but did not have the proper credits for that pay. (See Da27)

- Ms. Lehmkuhl claims there was no official policy on where she could pump breast milk at school, and she was switched between Mr. Andriac's office, a conference room and her classroom. (See Da62)

The sole exceptions were the testimony regarding racist text messages Plaintiff sent to Ms. Van Gorden and Plaintiff's allocation of students to certain classes based upon his relationship with their parents. However, that testimony provided additional examples of unbecoming conduct described in the written charges in Count One, which included Plaintiff's inappropriate interactions with staff members, and Count Four, which included Plaintiff's inappropriate actions towards students whose parents were persons with whom he did not get along.

The Appellate Division has refused to vacate arbitration awards dismissing school employees from their employment where the employee asserted that the Arbitrator permitted introduction of evidence in violation of N.J.S.A.18A:6-17.1(b)(3). See Allen v. East Orange Bd. of Educ., 2022 WL 332910 (App. Div. Feb. 4, 2022), certif. denied, 252 N.J. 371 (2022) (Da184); Petrella, 2021 WL 840756 (affirming arbitration award where Arbitrator permitted employer to introduce seventeen (17) additional exhibits during arbitration hearings) (Da596) Notably, in affirming the arbitration award, the Petrella court found that the additional exhibits introduced by the employer did not raise new charges or materially expand existing charges listed in the complaint and that the Arbitrator's admission of those exhibits was a proper function of the broad discretion over discovery and procedural matters that Arbitrators are vested with. Petrella, 2021 WL 840756, at *3.

As explained by the Arbitrator in her award, she allowed the Board latitude in presenting its case against Plaintiff and allowed witness testimony "with the ruling that [she] would determine if it were relevant to the charges as written." Pa50. The Arbitrator then dismissed all allegations and removed all evidence from her consideration that did not relate to the Board's specific written charges. (Ibid.) Such was a proper exercise of the Arbitrator's discretion in the tenure proceeding. Most importantly, and as explained by the Arbitrator, none of the above-listed allegations that Plaintiff takes issue with were included in the Arbitrator's analysis of the matter,

in her determination to sustain specific charges against Plaintiff, or in her determination of the appropriate penalty to be imposed. Ibid. Thus, the Award was based solely upon specific allegations included in the Tenure Charges, which were supported by credible evidence in the tenure proceedings, with the Arbitrator providing citations to the specific paragraphs and subparagraphs of the charges that she chose to sustain.

Indeed, Plaintiff concedes that the Arbitrator did not make "any findings with respect to those issues" specifically challenged by Plaintiff, but argues without a basis that, even if those issues were not a part of the basis for the Award, she still "allowed them to influence her decision." The Arbitrator explained that she dismissed all of the allegations that Plaintiff now takes issue with and that she only considered witness testimony on those allegations to the extent that it related to witness credibility or other facts at issue in relation to the specific written charges. (Ibid.) While Plaintiff points to the Arbitrator's discussion of testimony and evidence provided by and in relation to Ms. Marion, a review of the Decision makes clear that she only provided such a recitation in connection with her recounting of the parties' post-hearing arguments and she certainly made no findings concerning Plaintiff's interactions with Ms. Marion. (Pa27-28) Likewise, while the Arbitrator did tangentially discuss Ms. Marion in connection with her determination to sustain Count Six of the charges, she only did so in relation to Mr. Andriac's perception of

possible adverse consequences that would occur if he failed to comply with Plaintiff's directives; i.e., she considered information known to or believed by other staff members regarding Ms. Marion solely as a method of evaluating their credibility and motivations. (Pa 62)

Finally, as to Plaintiff's argument in Point I.B. that laches compels vacation of the arbitration award in this matter. Application of laches is appropriate only where there is an "unexplainable and inexcusable delay" in exercising a right. "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." Lavin v. Bd. of Educ. of City of Hackensack, 90 N.J. 145, 151-52 (1982). Here, as the Arbitrator specifically found Plaintiff's conduct during his employment with the District created a fear amongst subordinate staff members of reprisals and retaliation that would be taken against them if they opposed Plaintiff. (Pa58 & 62-63). The Tenure Charges were made only after a thorough investigation that required time to interview a multitude of witnesses, who confirmed their fear of retaliation. The delay in the filing of the sworn tenure charges was not unexplainable and inexcusable.

POINT IV

THE ARBITRATION AWARD WAS BASED UPON SUBSTANTIAL CREDIBLE EVIDENCE.

A board of education is required to prove by a preponderance of the credible evidence that the factual allegations set forth in the tenure charges are true and that the imposed penalty is proper. See In re Certified Tenure Charges Between the Randolph Board of Education and Jill S. Buglovsky, Agency Docket No. 265-9/12 (Dec. 21, 2012) (Da240) A "preponderance" of the evidence is described as "the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power[.]" Id. (*citing* State v. Lewis, 67 N.J. 47 (1975)).

In a school tenure case alleging unbecoming conduct, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Grossman, supra, 127 N.J. Super at 29. "A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. The phrase "conduct unbecoming" has been described as an "elastic one." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998) (*citing* In Re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The Court has defined unbecoming conduct as conduct "'which adversely affects the morale or efficiency of the [department]' or 'has a tendency to destroy public respect for [government] employees and confidence in

the operation of [public] services.' " In re Young, 202 N.J. 50, 66 (2010). It also focuses on how the public's trust and the school district's morale are harmed by allowing [educators] to behave inappropriately while holding public employment." See Bound Brook Bd. of Ed., supra, 228 N.J. at 14.

> [A] finding of unbecoming conduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

Id. at 13-14; see also Karins, supra, 152 N.J. at 555.

It is not necessary to prove severe or pervasive conduct, such as a hostile educational environment. Bound Brook Bd. of Ed., supra, 228 N.J. at 14. A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. As such, tenure charges may be sustained based on a pattern of unprofessional conduct, or on a single incident if found to be "sufficiently flagrant." In re Tenure Hearing of Craft, 2012 WL 2579497 at *3 (App. Div. 2012) (Da310) (*citing* In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967); In re Riddick, 93 N.J.A.R.2d (EDU) 345 (1993) at 28–29) (internal quotations omitted)

It is well-established that, "[t]eachers are role models and are entrusted with the care and education of minors, the public is entitled to expect that teachers will fulfill their roles with a high degree of responsibility." In re Tenure Hearing of Jill

Kubicki, OAL Dkt. No. EDU 284-10 (Initial Decision Jan. 7, 2011) (Da314) Likewise, they "are professional employees to whom the people have entrusted the care and custody of ... school children," and "[t]his heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." Conway v. NJ State Dept. of Educ., Bd. of Examiners, OAL Dkt. No. EDU 08054-20, at *5 (Initial Decision Aug. 5, 2021) (citations omitted) (Da191) That is why a single incident can warrant dismissal. For example, a tenured school custodian was terminated from his position when he removed a chair from the school for a few days. In the Matter of Tenure Hearing of Gerald Depasquale, OAL Dkt. No. EDU 7744-9192 N.J.A.R.2d at 540, aff'd, Comm'r, Final Decision (August 31, 1992), aff'd, No. A-4236-92 (App. Div. March 31, 1994) (Da586) It was determined that the value of the chair involved in the incident was likely very slight, but the more important consideration was that there was an unlawful taking, however brief that could not be condoned. Id.

"Moreover, if teachers are held to a stringent standard of behavior, the standard for high administrative personnel must be even more stringent. Accordingly, since the superintendent is the highest administrative officer in the District, he must be held to the most stringent standard of behavior." In re Tenure Hearing of John Howard, Jr., Board of Education of the City of East Orange, OAL Dkt. No. EDU 1528-01 (Initial Decision Feb 6, 2002), adopted, No. 140-02 (Comm'r

Apr. 1, 2002), aff'd, No. 23-02 (State Board March 3, 2004) (emphasis supplied) (citations omitted) (Da393)

"Undue means" does "not include situations ... where the Arbitrator bases his decision on one party's version of the facts, finding that version to be credible." Local No. 153, Office & Prof'l Emps. Int'l Union v. Tr. Co. of New Jersey, 105 N.J. 442, 450 n.1 (1987). In any event, the Court must defer to the Arbitrator's credibility findings. Clowes, supra, 109 N.J. at 587. The unreported decisions cited by Plaintiff at page 21 of his Brief do not contradict the foregoing legal standards. Therefore, simply because the Arbitrator found the Board's witnesses to be more credible than Plaintiff's, does not mean that the Award was obtained through undue means. This is especially true since the Arbitrator's findings of unbecoming conduct were supported by extensive, credible testimony and are entitled to deference.

As noted in the Counterstatement of Facts, the Arbitrator found that the Board proved certain charges in Counts One, Four and Six. As to Count One regarding Plaintiff's improper interactions with his subordinate staff members, the Arbitrator found that the Board had proven the specific allegations detailed in paragraphs 29(iii), 29(iv), and 30 of the Tenure Charges. (Pa57) The Arbitrator credited specific testimony by four (4) witnesses – Mr. Stewart, Ms. Battikha, Ms. Howard and Mr. Andriac - that she found credible and established that when they disagreed with Plaintiff he would refuse to speak with or interact with them and/or suffered reprisal.

(Pa58) Based on that testimony, the Arbitrator found that Plaintiff's behavior was unprofessional and antithetical to his responsibility to communicate with staff. (Ibid.) While admitting that Mr. Andriac's testimony supported the charges in Count One, Plaintiff argues that Ms. Howard and Ms. Battikha did not testify as noted by the Arbitrator, but they did. Ms. Howard testified that she was abruptly and unexpectedly transferred from teaching kindergarten to teaching middle school special education. (1/25/23 Tr. 284-4:285-20.) She also testified as to her observations of Plaintiff's treatment of staff depending on whether they were on his good side or bad side. (Id. at 291-21:292-6.) Ms. Battikha testified that Plaintiff would not even acknowledge her when she greeted him and he ignored her emails. (2/23/23 Tr. 75-8:76-9.) As to the custodian Mr. Stewart, he testified that he and Plaintiff butted heads and would not speak for days, although they would eventually be back on speaking terms. The testimony cited by Plaintiff makes the very point that Plaintiff had hot and cold relationships with the staff and he acted unprofessional in his dealings with the staff. Just because the employees who were subordinate to him played along, did not make Plaintiff's conduct acceptable or professional.

As to the charge in paragraphs 29(iv) and 30 in Count One, the Arbitrator found sufficient evidence to establish that plaintiff engaged in verbally and emotionally demeaning conduct towards Mr. Andriac in his admitted use of the term "Nancy" and "little girl" in group conversations. Plaintiff argues that his use of those

terms was joking banter. The Arbitrator considered the Plaintiff's explanation and found that whether said to question Mr. Andriac's manhood or to insinuate he was a complainer – as suggested by Plaintiff – such was verbally and emotionally demeaning, especially because it was done in public. (Pa59)

As to Count Four regarding Plaintiff's inappropriate conduct toward District parents, the Arbitrator found that paragraphs 85, 86, and 87 of the written charges had been established through witness testimony. (Pa61) Plaintiff contends that the findings were not supported by evidence because there were no complaints by a parent or student in the record, but such was not required to establish that Plaintiff engaged in unbecoming conduct that negatively impacted the students and parents. There was evidence of such unbecoming conduct. Specifically, Ms. Van Gorden testified that after receiving a request from a parent – who Plaintiff felt was " a pain in the ass" to resend a permission slip for her son to participate in soccer, Plaintiff told the witness to wait until after the deadline causing the child to miss approximately one month of the program. (Id.) Plaintiff does not offer any evidence to refute such happened. Instead he argues that the Board's evidence did not prove those points; however, the testimony by Van Gorden did support those findings. (1/20/23 Tr. 185-4:21.) In addition, the Arbitrator found Ms. Van Gorden's testimony established that Plaintiff directed her not to appoint a particular student for a leadership position in the District's Future Farmers of America program based

upon his perception of the student's parent. (Id.; see also 1/20/23 Tr. 185-22:187-2.) Plaintiff points to no credible evidence that contradicts that testimony.

As to Count Six regarding Plaintiff's abuse of his supervisory authority over subordinate employees, the Arbitrator specifically sustained paragraphs 120, 121, 123, 124, 125, and 126, all of which related to Plaintiff's requests to subordinate staff members that they call into Board meetings to speak positively about Plaintiff and programs he supported; and, on occasion that Plaintiff would suggest that the employee's pet program might be cut if there was not compliance. Also, one of the employees had his name removed from the District's website after he refused to call in. (Pa62) A Board member that was called to testify at the hearing by Plaintiff acknowledged that it would be inappropriate for an administrator to request that staff speak positively on his behalf. (Pa62-63) The Arbitrator did not find Plaintiff credible in his testimony that he merely wanted staff to be able to develop and express their positive feelings. (Pa63)

As to Count Six, the Arbitrator also sustained charges in paragraphs 127 and 128 relating to Plaintiff's requests to staff members that they create a Facebook page for the purpose of posting information concerning two (2) individuals who were, at the time, running for seats on the Board based upon the testimony of at least three (3) witnesses. (Id.) Likewise, the Arbitrator sustained the allegations in paragraphs 129, 130, and 131 of the Board's charges as to Plaintiff's attempts to influence a

Board election by having Mr. Andriac canvas Montague Township residents for individuals who could run against prospective Board members that Plaintiff did not want elected to the Board and by asking Mr. Andriac to call District voters to recommend that they vote in a particular way. Plaintiff points to no evidence contrary to those findings. The Arbitrator premised her finding concerning those specific allegations on the testimony of Mr. Andriac and Plaintiff himself, who did not deny that he made the request to Mr. Andriac, but suggested that he did so as Mr. Andriac's friend, rather than as his supervisor. (Id.)

The Arbitrator's findings that Plaintiff engaged in conduct unbecoming in this matter were supported by testimony by witnesses which the Arbitrator found to be credible despite Plaintiff's proffered excuses. This court cannot exceed its authority in this matter and supplant the Arbitrator's evaluation of testimony and credibility determinations as requested by Plaintiff.

The Arbitrator's findings of unbecoming conduct on the part of Plaintiff under Counts One, Four and Six of the tenure charges were based on witness testimony that the Arbitrator determined to be credible. Since such credibility determinations must be given substantial deference by the Court, the Award was not procured by undue means and must not be disturbed.

POINT V

THE ARBITRATOR CORRECTLY DETERMINED DISMISSAL WAS THE PROPER PENALTY FOR PLAINTIFF'S SUSTAINED UNBECOMING CONDUCT.

Arbitrators have broad discretion to fashion an appropriate remedy when imposing a penalty for tenure charges." Sanjuan v. School Dist. of West New York, Hudson County, 256 N.J. 369, 383 (2024). Determinations as to appropriate discipline are entitled to deference. In Re Hermann, 192 N.J. 19, 28 (2007) Because of the deference owed, an appellate court must determine whether the punishment is so disproportionate to the offense, in light of all the circumstances, to be shocking to one's senses of fairness. In re Polk, 90 N.J. 550, 578 (1982).

Here, Plaintiff suggests that the Arbitrator's determination to terminate his employment was improper because the Arbitrator allegedly failed to consider the language of the contract and/or failed to apply the seven (7) just cause factors listed in a publication issued by the New Jersey School Boards Association ("NJSBA"). As to the contract, the terms support the dismissal of Plaintiff upon the conclusion of the hearings. (See Pa79 at Article VI) As to the "just cause factors", while Plaintiff provides several cases in which such factors were applied in determining the appropriate penalty to be imposed, there are likewise cases in which penalty determinations have been rendered and/or upheld without reference to or

consideration of those factors. See In re Young, and, Sch. Dist. of the Borough of Roselle, OAL DKT No.: EDU 11569-07, 2008 WL 2337579 (May 27, 2008), adopted, 2008 WL 4861476 (Aug. 18, 2008), aff'd, 2009 WL 1789466 (App. Div. June 25, 2009), aff'd, 202 N.J. 50 (2010) (finding employee's conduct constituted just cause for dismissal without reference to just cause factors) (Da539); In re Tenure Hearing of Kevin Harriman, School District of the Borough of Elmwood Park, Bergen County, 2014 WL 940943 (App. Div. Mar. 12, 2014) (affirming finding of just cause for termination without reference to seven just cause factors) (Da451); In re Tenure Hearing of Brett D. Holeman, Freehold Regional High School District Bd. of Ed., Agency Dkt. No. 249-9/16 (Initial Decision May 12, 2017), aff'd, Holeman v. Freehold Regional High School District Bd. of Ed., 2018 WL 6205081 (App. Div. Nov. 29, 2018) (finding employee's conduct constituted just cause for dismissal without reference to just cause factors and affirmed on appeal) (Da198).

The tenure proceedings against Plaintiff were initiated pursuant to and conducted in accordance with New Jersey's Tenure Employee Hearings Law, N.J.S.A. 18A:6-10, et seq ("THEL") and the contract. (See Pa79 at Article VI(E).) Nowhere in the TEHL is there any indication or requirement that Arbitrators sitting in tenure proceedings apply the NJSBA's guidance concerning just cause. Rather, such laws provide that the tenure proceedings and determinations resulting from same should be in accordance with the American Arbitration Association's labor

arbitration rules. N.J.S.A. 18A:6-17.1(c). The American Arbitration Association's labor arbitration rules likewise fail to reference the NJSBA's just cause factors, much less any requirement that same be applied in each case arising under the TEHL. (Da604). Additionally, the NJSBA itself states that the seven (7) just cause factors "are not the only criteria that can be used to define just cause." (See Pa573)

Plaintiff also argues that the Arbitrator failed to properly apply the Fulcomer factors and that proper application did not support discharge as the discipline because the offenses that were sustained were "relatively minor", the supposedly had an exemplary record, he had no prior disciplinary record in the District, the offenses were not "cruel or vicious", and there was no evidence of intent to punish. (Pb43-47) Plaintiff's arguments as to the application of the Fulcomer factors and just cause factors is not tenable if for no other reason than the facts re inconsistent with each other.

Notwithstanding this inconsistency in Plaintiff's contentions, the Arbitrator recognized and applied the Fulcomer factors. In her decision, the Arbitrator specifically referenced the Board's post-hearing argument that the factors to be considered in determining the appropriate penalty included: the nature and gravity of the offense; premeditation and aggravating factors; present attitude; and, the impact of the conduct. (Pa35) See also In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967); In re Grossman, 127 N.J. Super. 13, 30 (App. Div. 1974).

In determining the penalty, the Arbitrator then provided a detailed and well-reasoned explication of the facts and circumstances in support of her finding that Plaintiff's employment should be terminated. To reiterate, the Arbitrator's penalty determination stated:

> The credible record evidence shows Respondent's misconduct constitutes just cause for discharge. Respondent's actions were not isolated moments instances poor judgment (sic). Rather, they were willful actions that destroyed the trust and respect necessary for continued employment. Respondent did not merely make a stray comment about a parent to a teacher. Rather, he directed an inexperienced teacher to thwart student engagement in enrichment activities, based on his personal dislike of the parents. Not only did this negatively impact the student but demonstrated highly inappropriate behavior to the teacher and communicated to her that treatment of students should be linked to how the superintendent feels about their parents.
>
> Likewise, Respondent's engagement with teachers in school board elections was not an inadvertent lapse of judgment. He attempted to have teachers create a Facebook page under a false name for his political purposes in relation to the school board. His belittlement or petty punishments also created an atmosphere of fear of retaliation.
>
> ***
>
> [M]y decision relates only to the specific instances of proven misconduct, which Respondent should have understood the consequences of his actions. These instances are sufficiently serious to warrant termination, even without prior discipline or documented poor performance. Respondent, as the Superintendent is not

> subject to daily oversight. He must be entrusted to lead with the trust and respect of the school community. Given his actions, and his failure to demonstrate any reflection or remorse, I find that corrective action would be futile and inappropriate in this case.

(See Pa64-65)

It is readily apparent that the Arbitrator's decision was closely tied to the Fulcomer factors. The Arbitrator made reference to Plaintiff's conduct as "willful actions that destroyed the trust and respect necessary for continued employment." The Arbitrator made reference to the fact that Plaintiff's conduct did not constitute "isolated" conduct, or "stray comments," or an "inadvertent lapse of judgment." The Arbitrator also discussed the impact that Plaintiff's conduct had on both the District as a whole, as well as its constituent staff members and pupils. The Arbitrator's penalty determination is not improper because she failed to provide a one-to-one comparison or analysis of Plaintiff's conduct vis-à-vis the Fulcomer factors. Moreover, Plaintiff does not and cannot argue that there was no evidence of premeditation; after all he admitted much of the conduct that was the basis for the findings of conduct unbecoming and the evidence clearly and convincingly established his premeditation.

Plaintiff also argues that discipline of discharge was unreasonable based on his record and that his conduct was not "so serious to warrant discharge." (Pb39) Plaintiff recognizes that the Arbitrator concluded that he lacked remorse and, thus,

corrective action would be futile. (Pb41) Plaintiff presumes that the Arbitrator's determination was based on his denial of events. (Ibid.) This court may not set aside such a credibility determination.

Finally, Plaintiff's conduct, as found by the Arbitrator here, was sufficient to warrant his dismissal from his employment in accordance with prior school tenure decisions. As explained by the Commissioner of Education,

> the position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers, and pupils alike. The Respondent, as superintendent of schools, occupies a crucial position within the school district and community. He is entrusted with the responsibility for providing educational leadership and for administering the school district so as [to] ensure proper implementation of board policy with respect to personnel matters as well as educational programming [.]

In re Tenure Hearing of Robert R. Vitacco, OAL Dkt. No. EDU 7871-94 (Initial Decision Feb. 6, 1997), adopted, No. 149-97 (Comm'r Mar. 24, 1997), aff'd, No. 41-97 (State Board Apr. 5, 2000), aff'd, 347 N.J. Super. 337, 344 (App. Div. 2002) (Da513)

Indeed, an employee's inappropriate and unprofessional interactions with fellow staff members, as here, can serve as the basis for their dismissal. For example, in In re Tenure Hearing of Paula Weckesser, School District of the Township of Woodbridge, a cafeteria worker claimed that a staff member said "What the f—k do

you know?" to her. OAL Dkt. No. EDU 09195-12 (Initial Decision June 14, 2013), adopted, No. 280-13+ (Comm'r Sept. 16, 2013) (Da458) The staff member disputed the claim, asserting that she did not use profanity, but rather said "heck." Id. at *38. The ALJ found that "a teacher's rude comments and behavior to colleagues and others constitutes conduct unbecoming, even if the teacher does not use profanity or racist language." Ibid *citing* Morris Sch. Dist. Bd. of Educ. v. Brady, 92 N.J.A.R.2d 410, 423 (1992). As a result, the ALJ found that, regardless of whether the staff member said "f—ck" or "heck," "her comment was obviously rude and disrespectful" and constituted conduct unbecoming a school employee. Ibid. This conduct, coupled with the other sustained unbecoming conduct, constituted just cause for dismissal. Id. at *38, *42.

While a single incident may warrant discharge, Fulcomer, supra, 93 N.J. Super at 421, dismissal may also be based on a pattern of unprofessional conduct that has a negative impact on the internal cohesion of staff members. See In re Holeman, supra, 2018 WL 6205081 at *4-5. (Da198) In upholding an employee's termination, the Appellate Division credited the ALJ's finding that "of particular concern are the repercussions generated by [plaintiff's] behavior. The statements and testimony contained in the hearing record show a breakdown in [plaintiff's] relationship with colleagues and administrators." Ibid (emphasis supplied). This court rejected the employee's argument that the ALJ improperly disregarded concepts of progressive

discipline, holding that dismissal was the appropriate penalty due to the "irrevocable differences between the administration, staff members, and plaintiff," and ruled that there was no requirement that progressive discipline be applied and that it would be "inadvisable to reinstate" the employee so that the department within which he was employed could function free of conflict that might jeopardize the school district's legitimate interests. Ibid.

In Howard, Jr., a superintendent advised his subordinate employee that the employee was not permitted to say that he was not privy to the terms of the superintendent's employment contract, which intimidated the employee because the superintendent and his employing board of education were engaged in litigation over the contract. OAL Dkt. No. EDU 1528-01 (Initial Decision Feb 6, 2002), adopted, No. 140-02 (Comm'r Apr. 1, 2002), aff'd, No. 23-02 (State Board March 3, 2004) (Da393) The school district charged the superintendent with abuse of his supervisory authority over subordinate employees. The ALJ found that the superintendent had engaged in the charged conduct, which made the staff member in question feel uncomfortable and intimidated, and that such conduct constituted unbecoming conduct warranting serious disciplinary action. The Commissioner overturned the ALJ's determination on the abuse-of-authority charge because the school district had not mustered sufficient factual proof that the superintendent's conduct occurred as alleged, but did not disturb the ALJ's finding that such conduct, where found,

constitutes a superintendent's abuse of authority warranting the imposition of serious discipline against them. The Commissioner's decision was subsequently adopted by the State Board of Education.

The Arbitrator here determined that Plaintiff engaged in unbecoming conduct by, *inter alia,* thwarting student engagement based on his dislike of their parents, making inappropriate requests of staff to affect board proceedings and elections, belittling staff and creating an atmosphere of fear and retaliation, which were "sufficiently serious to warrant termination, even without prior discipline or documented poor performance." (Pa64-65)

In sum, the Arbitrator applied the applicable and proper factors in deciding the discipline to be imposed and her determination for discharge does not shock one's sense of fairness in light of Plaintiff's unbecoming conduct.

CONCLUSION

As set forth above, the Award finding that Plaintiff engaged in unbecoming conduct warranting termination of his employment was in accordance with the Arbitrator's authority under the TEHL and the cases interpreting and applying such law and was based upon substantial credible record evidence. The trial court's order denying Plaintiff's request to vacate the Award should be affirmed.

Respectfully submitted,
CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendant-Respondent

/s/ Mary Anne Groh
Mary Anne Groh

Dated: December 4, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003406-23T2

TIMOTHY CAPONE,	**CIVIL ACTION**
Plaintiff-Appellant,	**ON APPEAL FROM DENIAL OF ORDER TO SHOW CAUSE TO VACATE ARBITRATION AWARD**
vs.	**SUPERIOR COURT CHANCERY DIVISION SUSSEX COUNTY**
MONTAGUE TOWNSHIP BOARD OF EDUCATION,	**Honorable Frank J. DeAngelis, P.J.Ch.**
Defendant-Respondent.	**Sat below**

REPLY BRIEF OF PLAINTIFF-APPELLANT TIMOTHY CAPONE

GREEN SAVITS, LLC
Laura M. LoGiudice, Esq.
BAR ID #022721999
Glen D. Savits, Esq.
BAR ID #029921982
25B Vreeland Road, Suite 207
Florham Park, New Jersey 07932
Telephone: (973) 695-7777
Facsimile: (973) 695-7788
Attorneys for Plaintiff-Appellant Timothy Capone

Dated: January 3, 2025

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PRELIMINARY STATEMENT

The arbitrator's award discharging Plaintiff must be vacated because it was procured in violation of due process, by undue means, exceeded the arbitrator's authority and was not based upon substantial credible evidence.

Even if the arbitrator's findings could be upheld, the punishment of discharge is shocking and is disproportionate to the findings made by the arbitrator given the totality of the circumstances and must be vacated.

REPLY STATEMENT OF FACTS

Defendant recounts the responsibilities of Plaintiff as CSA. However, Defendant ignores the multiple performance evaluations which unmistakably demonstrate that Plaintiff not only met but exceeded those responsibilities. **Pa159-195**.

Defendant claims that the brand-new Board, two members of which had campaigned to terminate Plaintiff and reverse the prior Board's policies, suddenly "became aware of improprieties in Plaintiff's conduct in the performance of this duties" which compelled them to immediately place him on administrative leave without the knowledge or consent of two members of the Board. **Db at p. 4** (citing ¶10 of the Tenure Charges which states the same without identifying what the Board allegedly became aware of). However, **neither Defendant nor the arbitrator**

identify what the alleged "improprieties" were. Therefore, it is undisputed that Defendant had no legitimate reason to place Plaintiff on administrative leave.

In reciting the findings of the arbitrator, the Defendant assists in highlighting the arbitrator's mistakes and how those mistakes severely prejudiced Plaintiff. Plaintiff will address those issues *infra* at Point II of the Legal Argument.

LEGAL ARGUMENT

POINT I
THE ARBITRATOR EXCEEDED HER AUTHORITY AND SEVERELY PREJUDICED PLAINTIFF WHEN SHE VIOLATED THE MANDATES OF *N.J.S.A.* 18A:6-17.1(B)(3) AND *N.J.A.C.* 6A:3-5.1(b)(1) (Pa19-20, Pa49-50; and Pa67).

Defendant asks this Court to ignore the mandates of New Jersey's statutes and administrative codes which explicitly preclude the presentation of new charges during the tenure proceedings which were not stated with specificity in the tenure charges themselves. *See N.J.S.A.* 18A:6-17.1(b)(3); and *N.J.A.C.* 6A:3-5.1(b)(1). **Db at Point III**. To allow Defendant's position to be sustained would negate the meaning and purpose of the statute and administrative code.

Whether or not the arbitrator ultimately made findings as to the voluminous new allegations presented for the first time during the hearing is of no moment. The Plaintiff was bombarded with testimony from Defendant's witnesses making unfounded claims about conduct not included within the Tenure Charges. Without a shred of documentary evidence Defendant's witnesses spewed testimony about any

gripe, speculation, gossip or random thought they had which placed Plaintiff in a negative light. When **more than fifty percent** of the testimony **related to uncharged conduct**, Defendant cannot legitimately claim that it had no prejudice to Plaintiff or no influence on the arbitrator's decision. In fact, **the arbitrator herself acknowledged that she did rely upon the uncharged allegations**, stating: "As I noted in the hearing, to the extent that any such testimony relates to credibility, or other facts at issue, **I have considered it** . . . ." **Pa50** (emphasis added).

It is also of no moment that some of the uncharged conduct presented during the hearing was allegedly recounted in **a report prepared by Defendant's current counsel**. **Pa213** (summaries of alleged interviews were prepared solely by counsel without review or corroboration of the individual's interviewed). The Defendant took more than a year to issue Tenure Charges after placing Plaintiff on administrative leave for no reason – there is no justifiable reason why even one, let alone voluminous, allegations of conduct were not included in the Tenure Charges but instead presented for the first time during the hearing. Perhaps that is because the "investigator" who was also Defendant's attorney recommended that they were not chargeable claims. **Pa138-140.**

The cases cited by Defendant are either inapposite or support Plaintiff's arguments. In *Allen v East Orange Bd. Of Educ.*, the court held that production of documents one month prior to the start of the hearing was sufficient to allow a fair

opportunity to prepare – thus it has nothing to do with the introduction of new charges during a hearing. 2022 WL 332910 (App. Div. Feb. 4, 2022) at *2, and 4-5 (**Da184**). In *Petrella v. Hackensack Bd of Educ.*, the court specifically noted that the Board had **not** added any new charges during the hearing, but rather merely introduced additional evidence to support the charged conduct. 2021 WL 840756 at *3) (App. Div. March 5, 2021) (**Da596**).

Here, Defendant was permitted to present not just one or two, but voluminous new allegations for the first time during the hearing that were **not** included within the Tenure Charges. In allowing the presentation of these allegations and refusing to dismiss them at the close of Defendant's case, the arbitrator ignored the law and denied Plaintiff due process, compelling that the arbitrator's award be vacated. *See In the Matter of Watchung Borough Board of Education Tenure Charges Against Christopher Riley*, Docket No. 112-520 (August 7, 2020) (Arbitrator Robert H. Barron, Esq.) (granting motion to dismiss tenure charges not supported by sworn statements of witness and lacking sufficient detail to meet due process requirements) **(Pa763)**.

POINT II

THE ARBITRATOR RELIED UPON NON-EXISTENT TESTIMONY TO SUPPORT HER FINDINGS COMPELLING THAT HER DECISION BE VACATED (Pa19-20; Pa57-Pa64).

Defendant, like the arbitrator, misstates and/or mischaracterizes the record evidence, providing only further proof that the findings of the arbitrator were not based upon substantial credible evidence.

i. Tenure Charges at ¶29 (iii) (non-communication with staff)

Defendant misstates and mischaracterizes the testimony of Ms. Howard and Ms. Battikha – neither of which support the finding of the arbitrator. The arbitrator's finding was that Plaintiff would "stop speaking to [Ms. Howard and Ms. Battikha] when they had certain types of disagreements . . . [and] they detailed the issues involved, and their fears of reprisals." **Pa58**.

While Ms. Howard testified that her perception was that some teachers did not feel liked by Plaintiff, she testified to no specific interactions that those teachers had with Plaintiff or what caused those teacher's alleged perception of how Plaintiff viewed them. **Db at p. 33**. Plaintiff has absolutely no ability to respond to such vague allegations about the perceptions of Ms. Howard about the perceptions of other teachers. Further, Ms. Howard in no way shape or form suggested in her testimony that her transfer from teaching kindergarten to teaching middle school was anything other than a response to a legitimate need related to the educational responsibilities of the school. **2T**[1] **at T285:11-15; and T306:8-18**.

[1] 2T refers to the 1/25/023 Hearing Transcript, 4T refers to the 2/22/2023 Hearing Transcript, 6T refers to the 6/13/2023 Hearing Transcript, and 9T refers to the 8/14/2023 Hearing Transcript.

It is true that Ms. Battikha testified in general that she did not believe Plaintiff cared for her and he allegedly did not greet her when she saw him in the hallways on non-specified dates. However, she did not equate that to anything retaliatory. **Db at p. 33**. She testified to no specific instance of disagreement with Plaintiff which caused him to change the way he communicated with her. Again, Plaintiff has absolutely no ability to respond to such vague allegations of non-specified times or events.

ii. *Tenure Charges at ¶¶29 (iv) and 30 (verbally and emotionally demeaning staff)*

Defendant ***incorrectly*** claims Plaintiff admitted to referring to Mr. Andriac as "Nancy" and "little girl" and provided an explanation for same. **Db at 9**. This is not true. Plaintiff denied referring to Mr. Andriac as "Nancy" or similar names. **9Tat T69:2-16**. The arbitrator failed to mention Plaintiff's testimony on this issue and failed to discuss Plaintiff's denials in any way. **Pa21-Pa66**. As detailed in Plaintiff's moving brief, the arbitrator also relied upon "text messages" which do not exist. **Pb at pp. 25-27**.

As Plaintiff **denied** referring to Mr. Andriac by any such terms, he certainly offered no explanation as stated by Defendant. **Db at 9 and 33-34**. Rather, in Plaintiff's Closing Argument the undersigned referenced Mr. Runne's testimony about use of the term "Nancy" **only to rebut the uncharged allegations of**

discrimination Defendant was permitted to present for the first time during the hearing. **Pa288**.

iii. *Tenure Charges at ¶¶86 and 87 (soccer permission slip); and ¶85 (FFA officer)*

First, with regard to the soccer permission slip, it is interesting that Defendant references the child as a male, since the testimony was so vague, the sex of the alleged child was not disclosed. **Db at p 34**. Plaintiff was not questioned about the soccer permission slip. However, even if he had been, how could he possibly respond to an allegation about an unidentified student and an unidentified parent, and unsupported wishy-washy testimony that the unidentified student might have missed part of a soccer season in some unidentified year. The true question that abounds is how the arbitrator could determine that such non-specific allegations constituted "substantial credible evidence." It is exactly this type of non-specific allegation that the tenure laws prohibit, and the arbitrator's finding as to this issue was a clear mistake of fact and law.

As to the leadership position, there is credible evidence to contradict Ms. Van Gorden's testimony – Plaintiff's testimony. The arbitrator appeared to be unaware of Plaintiff's testimony as she failed to make any mention of it in her Opinion, either in recounting the positions of the parties, in her findings, or even to simply state she did not find his testimony credible. **Pa21-Pa66**. **9T at T301:13-T303:12**.

iv. *Tenure Charges at ¶¶121, 123-126 (calling into the Board)*

Defendant fails to address the testimonies of Ms. Van Gorden, Ms. Lehmkuhl and Ms. Howard that were misstated by the arbitrator to justify this finding. **Db a pp. 10 and 35**. The Defendant also ignores the testimony of the former board president that there was **nothing inappropriate about Plaintiff asking non-tenured teachers to speak to the Board about programs in the school**. **6T at T178:19-23**.

As part of these findings, the arbitrator also made a determination that Mr. Andriac's name was removed from the district website after he allegedly refused to call into a Board meeting. **Pa62**. Mr. Andriac testified that in November 2020 his name was removed from the district website in retaliation for not calling into the board. **4T at T27:21-T28:22; and T162:10-17**. The person responsible for the website was not called to testify during the hearing. However, after the hearing, the trial court proceedings and the filing of Plaintiff's brief in this appeal, Plaintiff became aware of board meeting minutes which were not produced by the Board during the Tenure proceedings and which undermine this finding by the arbitrator.

During the November 23, 2020 Board meeting, a motion was made by Board member Brislin to "list the Administrative staff back on the School website." **Pa760**. Board member Christmann (who testified during this hearing) asked "why it disappeared." In response, Plaintiff stated that "the phone numbers were getting updated and needed to be pulled down." **Pa761**. Thus, it would appear that all

administrative staff names, not just Mr. Andriac's, were removed during updates being made to the website, and not because of any retaliatory motive on the part of Plaintiff. This Court can take judicial notice of this information pursuant to *N.J.R.E.* 201(b) and *N.J.R.E.* 202(b) ("The reviewing court may take judicial notice of any matter specified in Rule 201, whether or not judicially noticed by the trial court.").

This also provides substantial evidence undermining the credibility of Mr. Andriac, whose testimony the arbitrator relied upon extensively. Plaintiff notes that Mr. Andriac's testimony, which the arbitrator credited, was completely contradictory to the testimony of Ms. Howard on the issue of calling into the Board. As previously stated, Ms. Howard testified that Plaintiff requested that she call into the Board **to support another staff member**. **Pb at p. 30**. However, Mr. Andriac testified that Ms. Howard was asked to call into Board meetings to say "how much people, the staff loves to work under Mr. Capone, how great of a relationship that he has with the people in the building and how fantastic it is working for Mr. Capone." **4T at T18:17-23**. It appears the arbitrator relied upon Mr. Andriac's hearsay while rejecting Ms. Howard's own testimony.

v. *Tenure Charges at ¶¶129-131 (enlisting candidates and calling voters)*

Defendant again misrepresents the record evidence, claiming incorrectly that Plaintiff did not deny asking Mr. Andriac to contact registered voters concerning the upcoming board election or canvass for candidates and that the arbitrator's findings

were based upon that lack of denial. **Db at p. 36**. However, Plaintiff did deny these allegations. **9T at T123:14-T125:21**. Yet the arbitrator made no mention of Plaintiff's testimony on this issue, either in her recitation of the parties' positions, in her findings or even to state that she did not find Plaintiff credible.

POINT III
WHETHER OR NOT THE ARBITRATOR NEEDED TO APPLY THE SEVEN JUST CAUSE TEST OR FULCOMER, THE DISCIPLINE OF TERMINATION IS SHOCKING BASED UPON THE TOTALITY OF THE CIRCUMSTANCES (Pa19-20; Pa64-66).

Defendant acknowledges that for decades both arbitrators and courts have applied the seven "just cause" factors to determine the appropriate discipline in tenure proceedings but claims simply because they are not mentioned in the American Arbitration Association's rules, they should be ignored by this Court. This is simply ridiculous, as the American Arbitration Association Rules do not address or establish the substantive law applicable to claims adjudicated by arbitrators.

Even if the "just cause" factors are not strictly required to be followed to the letter, the whole point of their existence is to provide a guideline as to when just cause has been shown. Defendant fails to otherwise address the application of those factors to the facts of this case, all of which lead to the conclusion that there is no just cause to terminate Plaintiff.

Instead of addressing the "just cause" factors, Defendant focuses on the *Fulcomer* factors, which it claims the arbitrator applied, even though not mentioning them in her decision. It is true that the arbitrator mentioned some factors to be considered in imposing discipline that Defendant included in its Closing Argument, however, she did not mention *Fulcomer* and the factors she recited are not the complete *Fulcomer* factors. **Db at p. 39 (citing Pa35);** and *In Re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967)**.** The arbitrator failed to mention or consider whether the conduct was "cruel or vicious" or done with an "intent to punish", all of the circumstances surrounding the conduct, including mitigating factors, Plaintiff's record and ability, or the impact of the discipline upon Plaintiff's career. Moreover, without explanation, the arbitrator failed to mention or apply the seven "just cause" factors recited by Plaintiff in his Closing Argument. **Pa270**.

When viewed in conjunction with the paucity of evidence presented by Defendant, which included not one single document to support the testimony of its witnesses about non-specific allegations from years ago, in addition to the blatant misstatements of the testimonial record, the arbitrator's failure to provide any substantive analysis of the *Fulcomer* factors resulted in a disciplinary decision that is nothing short of shocking.

The arbitrator gave no weight to Plaintiff's years of stellar performance reviews or the testimony of ***any of*** Defendant's witnesses including, *inter alia*,

former Board president Glen Plotsky and former board member Jennifer VanNess who had nothing but praise for the many positive changes Plaintiff made to the school and for the children. Likewise, the arbitrator gave no weight to the fact that the witnesses whose testimony she relied upon were former friends of Plaintiff, or that the witnesses had not made any complaints about Plaintiff until after he had been on leave for months and they were interviewed by the new Board's new attorney.

Moreover, the cases cited by Defendant, which it claims supports a termination decision based upon the facts of this case, are completely distinguishable. In the case of *In re Tenure Hearing of Robert R. Vitacco*, OAL Dkt. No. EDU 7871-94, aff'd 347 N.J. Super. 337 (App. Div. 2002) **(Da513)**, Mr. Vitacco faced tenure charges to remove him as superintendent of schools "for conduct unbecoming a public employee, including tax evasion, misappropriation of public funds, misuse of vacation days, destruction of public records and financial mismanagement." *In the Matter of Vitacco*, 347 N.J. Super. 337, 339-40 (App. Div. 2002). After the tenure charges were filed, Mr. Vitacco was indicted by a federal grand jury for various criminal offenses, "including criminal conspiracy, embezzlement, and attempt to evade or defeat taxes by underreporting his true income for five separate years." **(Da514)**. He eventually pleaded guilty to two of the charges. *Id.* Furthermore, the issue before the Court was not whether the

punishment was appropriate, but whether forfeiture needed to be imposed by operation of law. Any suggestion that the conduct of Plaintiff has any relation to the conduct of Mr. Vitacco is simply absurd.

In *In re Tenure Hearing of Paula Weckesser, School District of the Township of Woodbridge*, OAL Dkt. No. EDU 09195-12 (Initial Decision June 14, 2013) (Da458), the Defendant cherry-picked one allegation among many, that were found to support termination of a teacher. Specifically, the litany of conduct found to support the teacher's termination was summarized in the synopsis of the final decision of the Commissioner as follows:

> The ALJ found, *inter alia*, that: respondent failed on numerous occasions to properly maintain grade books as required by District policy, and repeatedly refused to follow her supervisors' instructions regarding timely entering of grades; respondent continued a pattern of tardiness despite notifications from her supervisor that such behavior was not acceptable; respondent failed to adhere to an administrative directive that prohibited cell phones in testing rooms during the HSPA; respondent's communications with students – including calling one "a loser like you" on Facebook, and making sarcastic comments in the classroom – were highly inappropriate for an educator; respondent's challenges to the integrity and honesty of her superiors is likewise inappropriate; and respondent is defensive and places the blame for her poor performance on anyone but herself, including her students. The ALJ concluded that respondent's long history of unacceptable behavior constitutes unbecoming conduct and insubordination, and the number and nature of the instances of her conduct are such that the proper penalty in this case is termination of tenure.

Da502, Commissioner of Education Amended Decision. Plaintiff here is not accused of any conduct even approaching that of Weckesser. Also, as opposed to Weckesser, Plaintiff had no complaints against him and was never warned or reprimanded that any of his actions were not acceptable.

In *Holeman v Freehold Regional High School District Bd. of Ed.*, 2018 WL 6205081 (App. Div. Nov. 29, 2018) (**Da198**), the plaintiff was terminated for a multitude of behavioral issues. Some of the specific findings related to the plaintiff's treatment of colleagues and students are as follows:

> Plaintiff's former colleague testified that she had concerns referring future students to plaintiff due to his inappropriate actions toward students.
>
> Several of plaintiff's former colleagues contacted the principal with their concerns regarding plaintiff.
>
> The guidance counselor testified that a student confided in her that plaintiff used a derogatory term to refer to the student's ex-girlfriend and that plaintiff encouraged the student to "go off to college" and have sex with "[forty] girls." He also allegedly recommended that the student read a "profanity-filled self-help book."
>
> Students confided in other administrative employees that they no longer felt comfortable working with plaintiff. Plaintiff sent emails to students calling them "baby," his "little girl," and allowing them to call him "luv."

Id. at *4.

Finally, in *In re Tenure Hearing of John Howard, Jr.* , OAL Dkt. No. EDU 1528-01 (Initial Decision Feb. 6, 2002) (**Da393**), the plaintiff was found to have

improperly utilized a school employee to perform electrical work at his home for a two week period during normal work hours, improperly and without Board notice changed the address on his annuity and endorsed checks made payable to the Board from the annuity and deposited them into his own account, moved his office to a separate building at a cost of $30,000 without Board notice or approval, and intimidated a witness to testify favorably to him. Defendant's attempt to portray Mr. Howard's actions as akin to the findings of the arbitrator concerning Plaintiff are at the very least disingenuous.

Here, there was no testimony about Plaintiff even approaching the conduct sustained in the cases relied upon by Defendant.

As detailed in Plaintiff's moving brief, if the arbitrator had substantively applied the *Fulcomer* factors, she could not have found sufficient grounds to terminate Plaintiff. Her failure to consider all of the *Fulcomer* factors requires that her award be vacated.

CONCLUSION

For the foregoing reasons, the arbitrator's award must be vacated and the Plaintiff reinstated.

GREEN SAVITS, LLC
Attorneys for Plaintiff, Timothy Capone

By: *s/Laura M. LoGiudice*
Laura M. LoGiudice, Esq.

Dated: January 3, 2025