

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

In the matter of:

**The Tenure Hearing of Moriamo
Okundaye**

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: **Agency Docket No. 335-10/15**

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**State Operated School District
of The City of Newark, Essex County**

:

Decision

Appearances:

On behalf of the State Operated School District of The City of Newark:

Robert M. Tosti, Esquire
Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC
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On behalf of Moriamo Okundaye:

Joseph Fusella, Esquire
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P.O. Box 1432
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Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against Moriamo Okundaye, (Respondent) by the State Operated School District of The City of Newark, Essex County (the District) and a November 23, 2015 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *P.L. 2012, c. 26* as amended by *P.L. 2015, c. 109*.

The hearing in this matter was conducted on January 7, 2016 in Newark, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Moriamo Okundaye was present for the entire hearing and testified on her own behalf. At the close of the hearing on January 4, 2016, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on January 25, 2016 the matter was deemed submitted.

This Decision is made following careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and (a) if so, what is the appropriate penalty, if any, and (b) if not, what is the appropriate remedy?

The Tenure Charge

The tenure charges in this matter were certified by the State District Superintendent of the State Operated School District of The City of Newark Christopher Cerf October 27, 2015. The Notice of Tenure Charges provides in its entirety:

NOTICE OF TENURE CHARGES

I, Larry Ramkissoon, being of full age and duly sworn according to law, depose and say:

1. I am employed by the State Operated School District of The City of Newark (the "District") as Principal of Newark Vocational High School – Westside Campus. As principal, I oversee the students, staff and curriculum at Newark Vocational High School, including but not limited to the supervision of staff performance and other employee-related matters.
2. I hereby file charges based upon unbecoming conduct pursuant to N.J.S.A. 18A:6-10 and N.J.A.C. 6A:3-5.1 against the Respondent, a tenured teacher employed by the District. The charges stated herein are based upon my personal knowledge, information and belief derived from personnel and other files and records maintained by the District, and information imparted to me by and from staff members.

CHARGE ONE – UNBECOMING CONDUCT

3. Moriamo Okundaye, (hereinafter "Okundaye"), a tenured teacher employed by the District, engaged in conduct unbecoming a teacher by using inappropriate and abusive language toward a student and a student's parent on January 15, 2015. Okundaye engaged in conduct unbecoming a teacher as follows:
 - a. Okundaye, a special education math teacher used profanity toward a student about a student's parent during the course of the school day. (See incident report dated January 16, 2015 attached hereto as Exhibit A).
 - b. The inappropriate and abusive language uttered by Okundaye is documented in a video taken by a student on his cell phone. (See video attached as Exhibit B).
 - c. Okundaye refused to cooperate with the investigation of this matter and has made no effort to explain her behavior.
 - d. Okundaye's unbecoming and inappropriate conduct threatened the health, safety and welfare of students at the Newark Vocational High School Westside Campus and caused disruption to the educational program and overall operation of the building and supervision of students.
 - e. Okundaye's unbecoming and inappropriate conduct created a condition under which the proper operation of the school was adversely affected and therefor, consistent with law and District policy, Petitioner hereby files these charges against Okundaye.

District Evidence

Testimony of Larry Ramkissoon

Larry Ramkissoon is Principal of the Newark Vocational High School (West Side Campus) and held that position during the 2014 – 2015 school year. He testified that Respondent was a math teacher at the school and that the class involved in this matter was a special needs math class. He recalled that on January 15, 2015 while at a meeting with school administrators he was informed by school Vice Principal Ogele that the mother of student DB had shown him a video of Respondent using inappropriate language in the classroom. According to Ramkissoon he thereafter asked DB to show him the video – which the student did – and received permission from DB’s mother to take possession of the phone so that a copy of the video and a transcript of the words spoken in the video could be made. Ramkissoon explained that after viewing the video he “was appalled” and communicated to his supervisor and requested direction on how to proceed.

Because he was concerned about the video being viewed by the public, Ramkissoon further testified, he received assurance from DB that the student would not post the video on social media and received assurance from the student’s mother that she would make sure the video was deleted. The principal testified that DB stated he had taken the video, and further testified that he did not know DB’s qualifications relating to video recording, did not know if the video had recorded all of the incident, did not know if the video had been altered and did not know when the video had been taken.¹ He did not make any effort to identify the students speaking on the video, Ramkissoon testified.

¹ According to Ramkissoon, DB was suspended for violating the school’s rule against having cell phones in the building.

Nor did he attempt to interview students about the incident individually. However, he further testified, he did speak with the class as a group and at least one student (Murphy) approached him after the meeting and expressed the view that Ramkissoon was making too big a deal out of the matter and that such talk has always been done in the classroom.

After seeing the video on January 15, 2015 Ramkissoon reported the matter to the Institutional Abuse Investigation Unit at the Department of Children and Families (DCF)² and requested that Respondent meet with him about the matter. At the resulting meeting that same day Respondent was accompanied by her union representative. According to Ramkissoon, the union representative stated that she had advised Respondent not to say anything and Ramkissoon then said what the allegations were, that they would be investigated and that Respondent was to report to the Media Center rather than her classroom.

According to Ramkissoon the entire investigation into the matter consisted of his review of the video, the decline of Respondent to offer any information on the matter and the principal's meeting with Respondent's math class. Ramkissoon provided a report of the incident to District Administration on January 16, 2015. That report provides in relevant part:

Description of Incident:

At the end of the day, yesterday – 1/15/15, I was advised by Vice-Principal Henry Ogele, that Ms. [VB], parent of a 10th grade male student, [DB], reported that her son had shared with her a video of his teacher making inappropriate comments to students. At the time, Ms. [VB] gave her son permission to share a copy of the video that he had made on his phone with

² DCF declined to proceed on the basis of insufficient evidence. According to Ramkissoon the school was informed by DCF that it should contact the police and determine what, if anything, could be done by that authority. Ramkissoon testified that the school's Public Safety Officer thereafter reviewed the video and opined that there was not enough evidence to pursue a criminal charge.

Vice-Principal Ogele. In the video the teacher is sitting at her desk and the following conversation is overheard:

Student: *Don't call my mother again...*

Teacher: *Excuse me I just called dumb ass bitch*

Student: *you really ugly as shit*

Teacher: *basically your mother is a dumb ass bitch*

Student: *she no dumb ass bitch, you is a fat ass bitch*

Teacher: *tell that dumb ass bitch to come in here*

Student: *I'm gonna smack the shit out of you, you gonna be mad as hell*

Teacher: *you gonna smack the shit out of me...(the teacher got up out of her desk and approached the students...the video clip ended)*

Administrative Action:

I informed the Asst. Superintendent of the incident

I contacted Labor Relations and spoke with Janelle Francios

I advised the teacher in the presence of the NTU representative of the allegations and of the following actions that would be taken:

- The teacher was asked to remain in the media center while an investigation was conducted
- The teacher was asked to avoid all interaction with students until she has been officially notified
- A copy of this incident and the video will be shared with Labor Relations

Ramkissoon submitted the tenure charges. He explained that he has been a teacher for 29 years and that as a parent he was appalled that a teacher would use such language in an urban district and found it totally inappropriate for the classroom. Teachers should be role models, Ramkissoon testified.

Respondent Evidence

Testimony of Respondent

Respondent has taught Math in the Newark School District since 2001, initially as a long-term substitute and eventually as a full-time teacher since 2007. Prior to the incident at issue herein, Respondent received no discipline. She is certified in Math and Statistics and holds a temporary Special Needs certification.

Respondent testified that one of the students during the 2014-2015 school year (referred to herein as "TW") was a special needs student and in her words; "a troublesome child." She explained that TW's I-E-P stated that the student needed to be in a small class with one-on-one help. In contrast, she explained, her class began the year with over thirty students, a number eventually reduced to about 12 students and TW had no one-on-one help. She explained that TW was always late to class, would cause a disruption when eventually entering class, would grab and rip up her notes and would just get up in the middle of class and shut off Respondent's computer. Respondent recalled one incident when TW threw paper balls at Respondent while she had her backed turned as she was writing on a white-board, and two incidents when TW swiped at and hit Respondent with a yard-stick ruler. According to Respondent, she made three disciplinary referrals to the school's administration about TW's conduct, including two oral referrals and one written referral. She explained that the oral referrals occurred before the District instituted an October 2014 electronic discipline referral system.

In any event, Respondent testified, she received no long-term relief from her referrals. (She did on one occasion have the school's safety officer remove TW for the remainder of a class period but the student returned the next scheduled class session.) According to Respondent, she eventually had a conversation with the Vice Principal about TW and the Vice Principal responded to her complaints by saying the only thing Respondent could do was file a police report and have the student locked up. Respondent testified that she rejected the Vice Principal's advice as she is a mother of three and TW is a special needs student who needs a one-on-one environment and should not have to

suffer so. According to Respondent, she received no other advice from school administration.

After rejecting the have-him-locked-up advice from the administration, Respondent decided to try to take some action of her own. She explained that she had attended District workshops on “Restorative Practices” in 2012 and 2013 and used the materials she received in the workshops, and the demonstrations made during the workshops, to help her develop a plan.³

That plan, Respondent testified, involved a roll-playing exercise where TW could observe others behaving as he behaved and the impact of such conduct on them. On October 27, 2014 Respondent spoke to her class and explained her plan to the class when TW was not present. According to Respondent, student CC had agreed to help Respondent engage in a roll-play interaction designed to mimic TW’s conduct and the other students agreed to play along with the act. Student DB was present and was the student who watched out for TW and announced he was approaching. When TW entered the classroom, KC and Respondent began their exchange, an exchange that Respondent estimated lasted about three minutes. Student (DB) video recorded a portion of the exchange on his cell phone.

According to Respondent, after the roll-play she spoke with TW and asked him how they could help him and discussed why the students acted that way he did. Thereafter, Respondent testified, TW changed his behavior and he was no longer an issue

³ Respondent admitted that she did not know if the written Restorative Practices materials provided to teachers says a teacher may use abusive language in applying restorative practices, but stated that participants in a demonstration given during the workshop used abusive language.

in the classroom. Respondent admitted that she had not informed any administrator of her plan beforehand and that her restorative plan was not included in her lesson plans.

Respondent further testified the words she used in the roll-play were not said out of anger or hatred; that she was trying to make TW think the incident was real. She further testified that in the normal course students were not permitted to use "street language" in her classroom and that when students did so she would correct them.

As for her interaction with DB, Respondent explained, unlike TW, DB was not a special needs student. She testified that she met with DB's mother about report cards in December 2013 and that during that meeting Respondent explained that she had an issue with DB walking out of the classroom during class. According to Respondent, DB's mother responded by asking the teacher to call her the next time such happened. On January 12, 2015, DB walked out of class but had a permission slip. On January 14, 2015 the student walked out without permission and as suggested, Respondent testified, she telephoned DB's mother and made an appointment for January 15. Meanwhile, Respondent testified, DB came back to her classroom and learned of Respondent contacting his mother. According to Respondent, DB was angry and began texting his mother and told Respondent she was going to lose her job.

According to Respondent, the next day, January 15, 2015, DB's mother came directly to Respondent's classroom while class was going on. Respondent explained to the parent that she did not have another teacher to cover the class at that time and asked the parent to wait in the Vice Principal's office. When she thereafter went to the office to meet with CB's mother, Respondent testified, the parent was no longer there and the Vice

Principal informed Respondent that he had sent the parent home and that the parent would be coming back the next day.

Respondent further testified that when she arrived in her classroom the next morning, the morning of January 16, 2015, there was another teacher in her classroom and Respondent was instructed to go to the Media Center. Respondent reported to the Media Center as instructed and was eventually called to a meeting in the principal's office. Present, Respondent recalled, were five or six administrators and a representative of the teachers' union. According to Respondent the Principal then asked her; "what happened in your classroom yesterday?" Respondent testified that she responded by looking bewildered because nothing had happened in her classroom the day before. Respondent admitted she did not say anything based upon advice she received from her union rep.

According to Respondent, she reported to the Superintendent's office for the remainder of the school year.

Testimony of Shaquan Murphy

Murphy is 20 years old and a graduate of the West Side school. He was in Respondent's math class during the events at issue during the 2014-2015 school year. Murphy testified that TW was disruptive in class and would arrive for the 2:00 pm math class at 2:20 or 2:30 pm, late arrivals resulting from what Murphy believed were efforts by TW to hide from the school's discipline team. Murphy testified that TW would strike Respondent with a ruler and would do it often until Respondent said she would call security. He recalled that on one occasion TW struck Respondent with the yard stick and

Respondent grabbed the stick and immediately typed up an incident report and called security. Murphy testified that Respondent tried her best with TW and he recalled that on one occasion when Respondent gave the student a pass to take a walk, something Respondent did to allow TW to calm down, while TW was out of the classroom Respondent told the class that the next day they were going to do a play on TW. Respondent explained that she and a female student CC were going to do a play to show TW what he does to Respondent. At the hearing, Murphy viewed the video and testified that the video was of the October 2014 play between Respondent and CC. The students were all laughing on the video because, Murphy testified, “we all knew what was going on.”

As for DB, Murphy testified, because he was always sneaking out of class without permission, Respondent had moved him to a desk right next to the teacher’s. According to Murphy, he knew DB was recording the play because Murphy saw that he was doing so. Also, Murphy continued, DB knew it was roll-playing because he was in on it.

Murphy confirmed that he spoke to Principal Ramkissoon when the principal came down and spoke to the class. Finally, according to Murphy, the play-acting effort worked as TW’s behavior improved after the event.

Testimony of Alayah Valentine

Alayah Valentine is also a recent graduate of the school and testified that she was in Respondent’s math class when she was in 12th grade during the 2014-2015 school year. She recalled that the math class eventually had about 12 students and that Respondent and TW had an “iffy” relationship. Valentine testified that TW was always coming in

late, disrupting the lesson, going around class picking on everyone and going to Respondent and cursing her. Valentine recalled that when she arrived in class one day there was no objective on the board and Respondent told the students that that day they were going to have a lesson for TW. Valentine recalled that Respondent explained that maybe if TW realizes how he speaks to her he would realize his impact on her. Valentine confirmed that the video in evidence was of the lesson for TW. She testified that hers is the voice saying; "Oh shit!" on the video.

Valentine testified that TW really changed after the lesson; it really helped him and that TW's relationship with Respondent improved.

The Video

The video of the incident offered into evidence and relied upon by the District as the primary evidence to support its conclusions in this matter is about 25 to 30 seconds long. The video reflects that the dialog transcribed by the District is substantially accurate. However, the transcript does not reflect the general laughter of students and the teacher throughout the dialog. The video is taken from a low angle from five to ten feet away from Respondent and is primarily focused on Respondent sitting at her desk. The video ends with the dialog reflected in the transcript and Respondent standing.

Position of the School District

The District argued that the video is admissible and reliable evidence and asserts that the evidence supports its tenure charges. The District has relied upon the video throughout the course of this tenure case and at no time has Respondent herself denied that the video depicted what occurred in her classroom. The video establishes that

Respondent participated in and permitted conduct that Principal Ramkissoo reasonably concluded could not be tolerated; that he could not permit such poor teacher modeling in a school building under his control. The video shows that Grievant engaged in misconduct and, the District asserted, serious consequences are called for.

As for Respondent's claim that she was engaged in an exercise of Restoration Justice, such should be discredited, the District argued. In this regard, the District explained, in her initial sworn response to the tenure charges Respondent did not identify TW as the reason for the exercise but rather, identified an entirely different student; CC. Second, the District continued, the conduct shown in the video is inconsistent with the Restorative Practices technique taught by the District. In this regard, the Restorative Practices related manual provided Respondent by the District specifically provides that adults should respect children by "holding them to a higher standard of behavior" and by "giving them the support they need to become more responsible." Yet the evidence establishes that Respondent did not hold her students to a higher standard but rather allowed her students to use street language. Respondent's alleged lesson did not conform to the Restorative Practice methods she was taught, was not contained in her lesson plans and was not reviewed by a supervisor prior to Respondent engaging in the risky, double-messaged endeavor shown in the video.

Nor should the testimony of former students be considered persuasive, the District argued, as the two students offered little, and Respondent may not claim that she was not given the opportunity to present her story when the matter was under investigation as she was given the opportunity and refused to offer her statement.

Importantly, the District asserted, much of the explanation Respondent offered at the hearing to support her defense was focused upon her relationship with student DB, her claim that the video was taken in October 2014 and her further claim that DB showed the video in retaliation for Respondent's contacting DB's mother much later in January 2015. Yet, inexplicably, in her original sworn response to the charges Respondent said nothing of DB and did not make a claim that the video was taken some months before.

Considering the serious and offensive nature of Grievant's conduct, the District exercised its managerial judgment and concluded that discharge was warranted. Having exercised reasonable managerial judgment, such judgment may not be second guessed by the arbitrator as there has been no showing that the decision by the District was arbitrary, capricious, discriminatory or otherwise violative of fundamental notions of fairness and/or due process. Under the circumstances, considering the nature of the misconduct of Respondent and the total lack of cooperation of Respondent during the investigation, the District has shown that a very severe penalty is warranted and the arbitrator should sustain the tenure charges.

Position of Respondent

Respondent maintained that the tenure charges should be dismissed. The video relied upon by the District should not be considered by the arbitrator. First, the Respondent argued, the video was taken by DB and in taking the video DB violated the rules of the school; the video is the product of nefarious conduct by DB. Second, the record establishes that the video was surely edited by DB or someone else as the testimonial evidence offered by Respondent and two former students – the only evidence of the actual lesson subject to cross examination offered at the hearing – establishes that

the lesson was approximately three minutes long, yet the video is only about 30 seconds in duration. Third, the Respondent continued, the motivation of DB in disclosing the video when he did so should be considered. In this regard, the record establishes that DB was angry at Respondent for calling the student's mother about the student's misbehavior in class and deftly deflected the negative consequences he was surely to receive onto Respondent. Thus, the "abridged" video has not appropriately been authenticated; the student who reportedly took the video was not presented to answer questions about how, where and when the video was taken or the context of the video or whether the video has been altered. Nor was the student presented for examination as to the student's motivation for taking the video. The video is not competent evidence and should not be considered by the Arbitrator.

The record also reflects that other than have an unidentified staff member transcribe the video; the District did virtually nothing to investigate this matter. Nor did the District present any competent evidence to support its tenure charges at the arbitration. Instead the District simply offered the video. In contrast, Respondent offered her own un-contradicted testimony about the timing of the video, the reason for the lesson partially captured by the video and the reasons for the timing of student DB disclosing the video. Importantly, two other witnesses who were present during the Restorative lesson corroborated Respondent's truthful testimony. Respondent's conduct did not amount to misconduct and does not support discipline.

Respondent has been a full-time teacher for the District since 2007 and has never been the subject of disciplinary action; she had been consistently rated Proficient and has received numerous positive comments in her annual evaluations and observations. Her

evaluations, disciplinary history and observations of her supervisors do not support a finding that Respondent inappropriately used the language that is attributable to her.

The District has failed to show that Respondent engaged in conduct unbecoming through admissible and competent evidence and the charges should be dismissed.

Discussion

Considering the full record in this matter including all testimony, evidence and argument of the parties, I find that the District has failed to establish the truth of its unbecoming conduct charge against Respondent, or that Respondent engaged in conduct that otherwise warrants her termination, suspension or reduction in salary.

Admissibility and Relevance of the Video

The undersigned cannot determine whether the District had sufficient basis upon which to file its tenure charges without considering what the District relied upon in making those charges. Here, the District primarily relied upon its 25 to 30-second video of an exchange between Respondent and students in her class; the video was, plain and simply, the motivating reason for the tenure charges. As a result, the undersigned admitted the video into evidence because notwithstanding other potential objections to its source, authenticity and reliability, it is the primary evidence upon which the District based its decision to certify tenure charges against Respondent. However, having admitted the video into the record under such circumstances does not mean the video must be, as a matter of course, given any more weight than it otherwise should be given.

Findings

Having considered the record as a whole, I find that the District's evidence does not establish the truth of its tenure charges. In reaching such conclusion I rely upon the following considerations:

1. The video relied upon by the District is without any non-hearsay evidence of provenance and is only a partial recording of an event;
2. The District failed to establish when the video was taken;
3. Respondent offered un-rebutted testimony (evidence I credit) that the video was taken months before it was presented to school administration;
4. Respondent offered un-rebutted testimony (evidence I credit) that the behavior depicted in the video was play acting and designed with a legitimately purpose of correcting conduct of a disruptive student;⁴
5. Respondent offered un-rebutted testimony (evidence I credit) that the video was incomplete and showed only a portion of the restorative effort;

⁴ As pointed out by the District, in her initial sworn written response to the tenure charges, Respondent stated that student C.C. was the focus of the lesson. Although Respondent's testimony at the hearing was that the lesson was motivated by a desire to change the behavior of TW, all witnesses to the exchanged identified CC as the student primarily engaged in the exchange with Respondent. Under such circumstances, notwithstanding that Respondent's sworn response and testimony are not identical, I find that such inconsistency is not sufficient basis upon which to discredit the testimony of Respondent and other witnesses that the recorded exchange was part of a pre-planned lesson to modify student behavior.

6. Although Respondent may not have received prior, specific permission to implement a restorative practices lesson in the circumstances, the District gave implicit encouragement of such efforts by Respondent by providing her two years of training on the process and by failing to otherwise assist Respondent in managing disruptive students;
7. Respondent offered un-contradicted testimony (testimony I credit) that examples of lessons presented during her restorative practices course included scenarios where language of a nature similar to that shown in the video was used;
8. It is true that the words used by the teacher and students in the video are inappropriate for the classroom under normal circumstances. However, based upon the video itself, it is manifest that: (a) the conversation being recorded was not a bona fide altercation between teacher and student; (b) the words used were not being spoken in anger or with bad intent and (c) some sort of play-acting was going on. All witnesses who were present during the incident confirmed such conclusions. As a result of these conclusions and my finding that the roll-play was a good faith effort by Respondent to apply restorative practices with a legitimate goal of improving student classroom behavior, I find the use of the words by Respondent under the circumstances did not constitute unbecoming conduct;

9. The District's witness testified, and the Tenure Charges confirm, that "a" motivation in recommending termination of Respondent was Respondent's failure to offer a statement during the investigation. Although in this regard it is true that Respondent did not offer a response when Principal Ramkissoo asked her what had happened in her classroom the day before because of advice received from her Union representative and because she did not know to what the principal was referring, the District offered no evidence to support a conclusion that an employee's failure to give a statement during an investigation is contrary to any District rule or norm or otherwise constitutes unbecoming conduct.

Conclusions

The District has failed to establish the truth of its conduct unbecoming charge against Respondent or to otherwise support the termination, suspension or other disciplining of Respondent. Under such circumstances, the District's pursuing tenure charges against Respondent is contrary to fundamental notions of fairness.

Order

The subject tenure charges against Respondent Moriamo Okundaye are dismissed.

As remedy, the District is ORDERED to:

1. Promptly offer Respondent reinstatement to her former position.
2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her discharge from the date of her discharge to the date of her reinstatement by the District.
3. Expunge all record of her dismissal from the District's files.

Dated: February 9, 2016



Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision in Agency Docket case No. 335-10/15 relating to tenure charges against Moriamo Okundaye on Tuesday, February 9, 2016.



Timothy J Brown