

**STATE OF NEW JERSEY  
COMMISSIONER DEPARTMENT OF EDUCATION**

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| <b>IN THE MATTER OF THE TENURE OF</b>                              | ) |                       |
|  | ) |                       |
| Marvin Davis   | ) |                       |
|  | ) |                       |
| and  | ) | Docket Number 22-1/14 |
|  | ) |                       |
| The School District of Asbury Park,<br>Monmouth County, New Jersey | ) |                       |
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**OPINION AND AWARD**

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| <b>Before:</b>          |                             | Alan A. Symonette, Esq.<br>Impartial Arbitrator  |
| <b>Appearances:</b>     | Marvin Davis                | David J. DeFillippo, Esq.  |
|                         | Asbury Park School District | John G. Geppert Jr., Esq.<br>John A. Boppert, Esq. <i>On brief</i><br>Scott W. Carbone, Esq. <i>On brief</i> |
| <b>Date of Hearing:</b> |                             | April 2 and 3, 2014<br>Asbury Park, New Jersey   |

**Statement of the Decision:** The charges submitted by the School Board of the Asbury Park School District have been substantiated. Moreover, the decision to summarily terminate the Respondent is supported by the evidence presented. The Respondent Marvin Davis, a tenured custodian employed by the Asbury Park Board of Education indeed engaged in conduct unbecoming of a staff member. Such conduct was flagrant and unjustifiable. Accordingly, the Respondent shall be dismissed from his employment as a custodian with the Asbury Park Board of Education.

## INTRODUCTION

This matter was brought before to arbitration before the undersigned arbitrator pursuant to P.L 2012, Chapter 26 of Title 18a *N.J.S.A.* The matter concerns charges filed on November 15, 2013 against the Respondent Mr. Marvin Davis by the Asbury Park, NJ School District. The charges seek to remove Mr. Davis, a custodian at the Thurgood Marshall Elementary School in Asbury Park, New Jersey from his position. The sole charge in this matter states that "Respondent Marvin Davis, a tenured custodian, engaged in conduct unbecoming by having inappropriate physical contact with students."

On January 14, 2014, the Asbury Park Board of Education met and certified the statements of charges by a majority vote of its full membership. The specifications supporting the charges are set forth as follows:

**SPECIFICATION 1:** Mr. Davis is a tenured custodian hired in 2001 as a substitute custodian and later appointed as a full time custodian on April 20, 2004. He is currently assigned to the Thurgood Marshall Elementary School. :

**SPECIFICATION 2:** On June 4, 2013, the parent of J.R. reported that she witnessed Mr. Davis touch her daughter's hair.

**SPECIFICATION 3:** Security Officer Davis interviewed J.R. who confirmed that Mr. Davis touched and pulled her hair making her head bend backward and she felt uncomfortable. J.R. stated that this touching happened on several occasions. J.R. also reported that Mr. Davis hit her arm, snuck up on the girls and punched her in the back.

**SPECIFICATION 4:** Student T.M. was interviewed by Security Officer Davis and reported that Mr. Marvin Davis pulled her hair so hard her head bent backwards and he pulled on her arm and hit her in the back. T.M. said "he makes me feel weird."

**SPECIFICATION 5:** Student C.H. reported to Security Officer Davis that Mr. Marvin Davis patted her on the back and touched her hair. C.H. stated she "felt weird [sic] out" by his actions.

**SPECIFICATION 6:** During an interview conducted on June 13, 2013, Mr. Davis admitted to touching the girls' hair. During this interview, Mr. Davis stated:

- Q: Why would you touch a student's hair?  
A: It was natural.  
Q: What do you mean it was natural?  
A: You know.  
Q: No, I don't know, what do you mean?  
A: It was nice.  
Q: Did you pull hair hard or was it an accident?  
A: It was natural. I was not trying to hurt her.  
Q: Why did you pull the hair of the student in the cafeteria at the Thurgood Marshall School?  
A: She had nice hair.  
Q: Have you ever touched any female student hair while at the Bradley School?  
A: No.  
Q: Why did you pull this student's hair?  
A: I was just playing around.  
Q: A number of the girls reported that you touched them on the back is that right?  
A: I was just playing with them, that's all.  
Q: Have you ever been to the classroom of any of the girls?  
A: Yes, I went by in the morning time.

**SPECIFICATION 7:** Mr. Davis did not obtain the consent of any of the students before touching them.

**SPECIFICATION 8:** Board policy 4215 requires all support staff commit themselves to providing the best possible services for pupils.

**SPECIFICATION 9:** Board policy 4281 requires the Board of Education hold all school staff to the highest level of professional responsibility in their conduct with pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated. This policy also mandates that school staff shall not engage in inappropriate conduct toward or with pupils.

**SPECIFICATION 10:** This Board believes Mr. Davis' behavior with the students constitutes conduct unbecoming a staff so as to require the termination of his employment with the Asbury Park School District. The charges were duly served upon the Respondent.

On or about February 12, 2014 Respondent's attorneys entered their appearance and submitted an answer to the charges. In general, the answer stated that "Respondent denies that he engaged in conduct unbecoming and denies that he had inappropriate physical contact with any students so as to warrant the proffering of tenure charges." After the receipt of the Respondent's answer, the Commissioner of the Department of Education of the State of New Jersey reviewed the charges and determined that they were sufficient, if true, to warrant dismissal or reduction in salary. Accordingly, the matter was referred to the undersigned arbitrator pursuant N.J.S.A. 18A:6-16 as amended by P.L.2012, Ch.26.

After a brief discovery period, a hearing was convened and held on April 2 and 3, 2014 in the offices of the Thurgood Marshall Elementary School located in Asbury, New Jersey. Throughout the hearing both the School District and the Respondent were represented by Counsel who presented evidence through the sworn oral testimony of witnesses as well as through documents. Each side had the opportunity to confront the evidence presented by the opposing party. The hearing was officially closed upon the receipt of the post hearing briefs.

### **BACKGROUND**

The Respondent Marvin Davis was at all times material herein employed as a custodian in the Thurgood Marshall Elementary School located in Asbury Park, New Jersey. As such, he was an employee of the Asbury Park School Board. He was employed by the Board in 2004. His general responsibilities included the cleaning of the building and grounds including classrooms, common areas including the cafeteria and auditorium. His typical shift of work was from 2:00 p.m. to 11:00 p.m.

The initial incident that gave rise to the charges occurred during the week beginning Monday, May 22, 2013. During that week, the third and fourth grade classes were presented a theatrical production of Cinderella. Most of the production was put on during the day. However, there was an evening production during which parents were invited. One of the fourth graders JR participated in the play. JR's mother SR attended the evening performance. SR was familiar with the Respondent as a custodian at her daughter's school. As they were leaving the building, that the Respondent approached them and congratulated JR on her performance and in doing so stroked or fondled her hair. SR testified that she did not think much of the touching but became concerned when she saw her daughter's face indicating that the touch made her uncomfortable.

Afterwards, she asked her daughter what was wrong. JR stated that the Respondent would touch her hair and that she stated that it was very weird. According to SR it was clear that her daughter was very uncomfortable. During the discussion that evening JR told her mother that she was uncomfortable with him and indicated that he had also touched some of her classmates on other occasions and allegedly stared at her while she was in class and he was working.

On or about June 4, 2013, SR approached one of the School's security guards Mr. Syron Davis. In speaking to Mr. Davis SR stated that she had witnessed the Respondent touch her daughter's hair and that she smiled until she saw her daughter make a facial expression. Mr. Davis informed SR that he was going to report the incident to the building administrators the Principal Mr. Mark Gerbino and the Assistant Principal Mr. William Wells.

Subsequently Mr. Davis called down JR and spoke to her. According to the investigatory report, she stated that she was uncomfortable with the Respondent touching her hair and that she did not know him and he touched her hair several times and he touched several other students' hair. After hearing this information, Mr. Davis contacted the other students identified by JR. They were TM who also admitted that the Respondent had touched his hair and AC. AC denied this and stated that he had never touched her hair or made her feel uncomfortable. Finally, he also spoke with CH. CH initially denied that the Respondent touched her. After speaking with each individual student, Mr. Davis sent them to the main office to speak with Mr. Gerbino and Mr. Wells.

That same day, the students spoke to Mr. Gerbino. Mr. Wells was also present and took notes. Mr. Gerbino initially stated that he spoke to each student individually and then collectively. He spoke to JR first. JR stated that the Respondent touched her and pulled her hair by making her head bend backwards. She stated that the Respondent also hit her on her arm and that sometimes he sneaks up on her and her friends and that it made her feel weird and that one time he punched her in her back. She stated that this made her feel uncomfortable. She then stated that the Respondent had done the same thing to her friends in the fourth grade.

As a result, TM, CH, and AR were interviewed. TM stated that the Respondent would be in the cafeteria collecting trash and that he had walked around the lunch table talking to the girls and stared at them. She also stated that the Respondent had pulled her hair so hard that her head bent backwards and that he had pulled on her arm. TM also stated that the Respondent had touched her back with his hand. He had also come into

the classroom to take trash out and stated that the Respondent knew her first and last name. TM stated that the Respondent made her feel weird.

CH stated that when she would get out of the car that the Respondent had said hello to her and in class had patted her on the back. CH also stated that in the lunchroom the Respondent had patted her on her back and had touched her hair. As a result, Principal Gerbino directed Officer Davis to complete his written report. They also contacted the Resource Officer as well as the NJ Department of Youth and Family Services (DYFS) as well as the Central office.

That same day, the District's Director of Security Mr. L. Lewis Jordan was in the school building on an unrelated matter. He was called into a meeting with Mr. Gerbino and Mr. Wells. At that time he was informed of allegations that the building custodian had inappropriately touched and pulled on the hair of some female students. Later that afternoon, Mr. Wells prepared a report of his and Mr. Gerbino's meeting and submitted it to Mr. Jordan. In addition, Mr. Gerbino had reported that two office employees Ms. Gretz and Ms. Bellamy had complained that the Respondent had made them uncomfortable as well.

Mr. Jordan subsequently spoke to TM who stated that during lunch time the Respondent was at the table looking at her and talking to all the girls. She also stated that on one occasion he had touched her back and pulled her arm. Mr. Jordan then spoke to CH who reported that the Respondent had patted her on the back and touched her hair.

On June 13, Mr. Jordan instructed Mr. Gerbino to have the Respondent report to his office when he reported for his shift. The Respondent arrived later that afternoon and was informed by Mr. Jordan that he was the target of an investigation with respect to an

alleged incident that took place on June 4 at the school. Mr. Jordan stated that he identified all of the alleged students involved and requested that he provide him with whatever he knew about the incident and to be truthful. He then conducted an interview during which he had asked the Respondent a number of questions and typed out the responses. The interview was witnessed by Ms. Shante James.

As indicated in the above specifications, the Respondent admitted to touching the girls' hair. He stated that he did not know the names of the students involved. He stated that he was just playing around and that he would not hurt them rather "he loved them". When asked why he would touch a student's hair he responded "it was natural". When asked further, the Respondent stated that "it was nice". When asked why he had pulled the hair of the students in the cafeteria the Respondent stated that "she had nice hair" and that he was "just playing around" when he pulled their hair. He stated that if there was anything he was saying to the girls, he would ask them about how their classes were going and whether they had a nice day. When asked if any of the girls pulled away from him the Respondent answered "some are just jealous Mr. Jordan". When asked if he ever told any of the girls that he loved them the Respondent again answered that he was just playing around.

After the interview Mr. Jordan met with SR about her complaint with respect to her daughter JR. According to the report SR recounted what had occurred at the time of the Cinderella play. SR stated in the interview that her daughter JR had stated that the Respondent was "weird" and that he would always touch her hair and other girls' hair. Based upon the interviews, Mr. Jordan concluded that there was a factual basis to believe that the incident had occurred and that the Respondent had intentionally touched the hair

of JR and the other girls. These actions according to Mr. Jordan were “totally inappropriate”. Mr. Jordan completed his report by speaking with the Respondent’s supervisors who related to him according to the report that the Respondent had been involved in similarly related incidents at both the Bradley School as well as Asbury Park Middle School.

Based upon the evidence of prior incidents, Mr. Jordan concluded that “there are clear aggravating factors in this case and that the aggravating factors outweigh the mitigating factors in that a pattern of negative behavior exists that there is a need to deter this type of behavior”.

The investigative reports of Mr. Jordan, Mr. Gerbino as well as Mr. Syron Davis were submitted to the Superintendent of Schools Dr. Denise M. Love. As a result on June 18, 2013 the Respondent was advised that he was suspended with pay effective June 18, 2013 pending investigation.

Pursuant to the school’s report the matter was also investigated by the New Jersey Department of Children and Families. As part of the investigation representatives interviewed the parents and the students involved. By letter dated September 27, 2013 the Department of determined that the evidence did not establish sexual abuse or a substantial risk of sexual injury. Thus, it was determined that corrective action was not required by the Department.

On November 15, 2013 the Interim Superintendent Mr. Robert Mahon reviewed the report and decided to charge the Respondent with conduct unbecoming. The charges were submitted to the Board of Education of the City of Asbury Park and as a result of a meeting in executive session on January 14, 2014 the Board determined that there was

probable cause to credit the statement of charges and the Affidavit of Superintendent Mahon and that such charge are sufficient to warrant the Respondent's dismissal. In addition, the Board determined that the Respondent should remain suspended from employment without pay as provided by law pending the disposition of the matter.

At the hearing, L. Lewis Jordan, Interim Superintendent Mahon, Principal Gerbino and Assistant Principal Wells, JR, her mother SR, CH and TM testified. JR testified that on at least one occasion while the Respondent was in the cafeteria cleaning and mopping the floor he would come over to play in her hair and said that he liked he liked her hair. She stated that it did not feel good and made her uncomfortable. She also stated that the Respondent would touch the hair of CH and TM.

She testified she spoke to her principal and her mother about the incident and that her mother had seen the Respondent touch her hair as they were leaving the school building after the evening production. She also relayed speaking to the security officer as well as the principal-

JR's mother SR also stated that as reported she had observed the Respondent touch her daughter's hair as they were leaving the school. She noticed that her daughter made a strange face and therefore queried her on whether something was wrong. According to SR, JR told her that the Respondent would touch her hair and that it was weird. It was clear to her that her daughter was very uncomfortable and therefore she reported it. She testified that she did not want the Respondent working around her daughter. She admitted that during the investigation she stated she told the investigators that she did not want to see the Respondent lose his position however since then she has

changed her mind and felt that he should be removed. She did not realize at the time the extent of her daughter's discovery and it disturbed her that it also involved other students.

CH testified that the Respondent had "touched me in the wrong way." She stated that the Respondent would touch her and her friend on her side and her back. He would also tell jokes and say that they looked pretty. This made her feel uncomfortable. She also recalled that in her classroom the Respondent would come in and one time they were studying underneath the desk when he pulled out the desk and asked what they were doing under there. She stated that the Respondent apparently did not know her name and had never called her by her name.

TM testified that the Respondent would touch her on her hair and her arm which made her feel "weird". She stated that the Respondent knew her name. When asked why she had denied anything ever happening when questioned by Mr. Syron Davis she stated that she was uncomfortable talking to security but felt that she could open up when she was talking to the administration.

Appearing on the behalf of the Respondent was third grade teacher Sharon Stevenson whose classes were on the same floor with the fourth grade. She also was involved in the Cinderella production working as the Assistant Director. She helped organize the students and also did the costuming. She admitted that the Respondent serviced her classroom but stated that whenever she met him she considered him to be always professional.

In addition to Ms. Stevenson, fourth grade teacher Fabrice Cuadrado testified. He was the director of the Cinderella play. The Respondent also entered his classroom from time to time to collect trash. He stated that to the best of his recollection, nothing

occurred when the Respondent came into the classroom. He also stated that he saw him in the cafeteria while having lunch. As far as he was concerned he did not see the Respondent having any negative interactions with the students and that basically he performed his job.

Finally, the Respondent testified and stated that he had a high school degree and had two grandchildren, 2 and 11 years old. He considered himself to be a very loving grandfather as part of a loving family with a lot of nieces and nephews. The Respondent admitted that when he saw JR and SR in the lobby that he approached JR in the lobby to congratulate her and that he stroked her hair while her mother was next to her. It became apparent to him almost immediately that SR did not like what he did.

The Respondent admitted to the statements that he made in the interview but added that he enjoyed his job and enjoyed interacting with the students while working. Periodically he would talk to the children as ask them how they were doing. In the cafeteria there were other adults in the class including gym teachers.

He also stated that in the cafeteria the tables were close together and that they were full of students. Therefore in order to clear the table and move the trash along he periodically had to lean over the students to pick up their tray. He stated that he did not want the kids to remove their own plates because they would tend to spill their milk on him and areas that he had already cleaned. He admitted that he recalled touching the girls while working in the cafeteria. He stated that sometimes he would tap them and ask them if they were finished with their meals. He did touch the girls on the hair to compliment how nice their hair was. As far as he was concerned he did not see the students recoil from him when he did that. He was not aware that he was making the girls

uncomfortable. He stated that if he was aware that they were uncomfortable he would immediately apologize and not do it anymore. He did not intend to annoy or hurt the students.

When asked, the Respondent stated that he understood how his actions would be misconstrued and that if he was allowed to return to work he would not touch any of the students. The Respondent also admitted at the interview that he considered touching the girls' hair to be "natural" in the sense that he touched their hair out of impulse. He explained it by saying that he was just playing around. At the end of his direct testimony the Respondent stated that if he was returned to work he would never do it again and he also apologized.

#### **SUMMARY OF THE ARGUMENTS OF THE SCHOOL DISTRICT AND RESPONDENT**

The School District in its presentation asserted that the Respondent is a "danger to young girls and should not be permitted to continue working among children." Based upon the legal precedent and the evidence presented at the hearing and in its brief, the School District requests that the Respondent should be dismissed from his tenured position.

The School District submitted tenured charges alleging that Respondent engaged in conduct unbecoming a staff member, in violation of school policy as well as state law, by having inappropriate physical conduct with students. In this respect, the School District maintains that it has proven by a preponderance of credible evidence that the Respondent is guilty of conduct unbecoming which constituted just cause for dismissal.

According to the School District, the Respondent as a member of the staff of the school is expected to protect and safeguard students attending that school. That expectation has clearly been jeopardized by the Respondent's conduct.

Based upon the well established arbitration case law, principles and precedent, the weight of the evidence shows that the Respondent is unfit to remain as a tenured custodian. In this regard, the School District cited the central elements proving just cause in arbitration. After citing those seven elements, the School District noted that the inherent duties of any public employee include "compliance with all reasonable rules and regulations, and duties arising from a fiduciary relationship to the public and from such duties as arise by the nature of the office held. Citing Hartman v. Ridgewood, 258 N.J. Super 32 (Appellate Division, 1992).

In this case, the School District maintains that summary termination is appropriate in this matter simply because there are some infractions that are so serious that removal would be appropriate notwithstanding a largely unblemished prior record. It should be noted in this regard that the School District has argued that the Respondent had been warned in 2003 about improper conduct with pupils and had been disciplined in 2009 with respect to unrelated tenure charges for conduct involving dishonesty. Nevertheless, despite those infractions, the concept of progressive discipline is not a necessary prerequisite because of the seriousness of the infraction in this matter.

The record shows that the Respondent engaged in wholly inappropriate conduct involving the touching of several female elementary school pupils. In this regard, the School District cites the testimony of the pupils including JR as well as her mother. This

testimony according to the School District was largely consistent with prior statements and evidence and was not contradicted by the Respondent or other witnesses.

According to the School District the term "unbecoming conduct" has been broadly defined to encompass conduct which has a tendency to destroy public respect for government employees. The application of a policy prohibiting unbecoming conduct does not require a violation of any specific rule or regulation. Rather, it is based primarily on an implicit standard of good behavior.

In this case, the evidence established that the Respondent did not contest the events as relayed by JR, TM and CH during their testimony as well as during the investigation. The evidence established that the Respondent on numerous occasions touched and pulled the young girls' hair, causing their heads to bend backwards, hit or punch the female pupils in the back, snuck up on the girls, and stared at the girls in a manner that made them feel "uncomfortable" and "weird". It was also established that the Respondent had on one occasion pulled on one young girl's arm. Such misconduct cannot be tolerated and requires dismissal.

There is no dispute that the Commissioner has previously recognized that a school custodian's role is considered to be quite important. Indeed, the School District citing a number of tenure matters involving custodians quotes the Commissioner as stating "a school janitor occupies a position of trust and responsibility and morality. His functions far exceed opening and closing the school house and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties." According to the School District, a number of arbitrations involving custodians have

resulted in the termination of tenured employees based upon inappropriate conduct toward fellow employees as well as students.

The School District also asserts that the evidence supports the conclusion that the Respondent should not be given another chance to work as a custodian. According to the evidence presented the Respondent has appeared to not understand the nature and severity of his misconduct. In this regard, the School District noted that before and during the hearing, the Respondent was observed roaming school building while he was suspended and not permitted to walk around Board property.

The summary, the School District asserts that "the Respondent has failed to satisfy the standards of one whose profession is predicated on protecting the well being of the children entrusted to him. He has betrayed that trust and breached the high standard enunciated by the Commissioner of Education time and time again." Moreover, the School District asserts that "Respondent's lack of remorse for his actions is illustrated by his inability to stop himself from continuing to act in the exact manner that had resulted in a warning about contact with pupils in 2003. In any case, it's simply too late in the game for Respondent to plead for yet another chance." Such conduct goes to the very heart of the Respondent's character and unfitness to continue to be employed by the Asbury Park School District therefore, the Respondent should be dismissed.

The counsel on the behalf of the Respondent describes the Respondent as someone who "grew up in a large, loving family inclusive of 8 brothers and sisters in the Bronx, New York." The facts of the matter that lead to the Respondent's dismissal are admittedly undisputed. According to the Respondent's counsel the evidence revealed that he had touched the hair of three fourth grade students at Thurgood Marshall

Elementary School in June 2013 during the course of performing his duties at the school. However, the Respondent's counsel notes that the Respondent's actions did not constitute a criminal violation nor did the conduct exhibit any sexual undertones. The Respondent was an "honest, simple man of limited formal education who was simply unaware that his attempt to engage the students in a positive manner, while well intentioned, were not only unwelcomed but made the girls uncomfortable."

Moreover, the statement provided by the Respondent as well as his testimony during the arbitration hearing illustrated him to be a man filled with genuine remorse for having caused the girls to feel awkward or uncomfortable. His actions will not be repeated in the event he is permitted to return to work.

Respondent's counsel further argues that the evidence presented nevertheless did not indicate that there was a violation of Board policies 4215 or 4281. The Respondent is charged with violating the policies relating to inappropriate staff conduct and its Code of Ethics. According to the Respondent's counsel each incident involving the students occurred in well lit crowded areas of the school with many other students and faculty present. Moreover, counsel points out that the incident that resulted in the investigation occurred in the presence of JR's mother SR. Moreover this was done while the Respondent was complimenting JR.

The evidence further revealed that Respondent touched the hair of CH and TM while emptying their lunch trays in the cafeteria. Based upon this and applying the policy there is no evidence that the student's "health, safety and welfare" was compromised during their brief encounters. While the students may have felt awkward or uncomfortable unbeknownst to the Respondent the intent was clearly to engage the

students and there is no dispute that any criminal wrong doing of any kind occurred. Furthermore, Respondent's counsel asserts that there is no indication that he failed to perform his duties and responsibilities as a custodian in anything but a professional and competent manner. Indeed, the Respondent's witnesses Fabrice Cuadrado and Sharon Stevenson each testified as to having observed the Respondent perform his duties during school hours in nothing but a professional manner.

The Respondent's counsel also asserted that precedent established by the Commissioner of Education as well as other arbitrators reinforce the contention that the Respondent's actions do not warrant his dismissal. In this regard, the Respondent cited a number of decisions by the Commissioner and arbitrators involving conduct of individuals that were considered to be inappropriate or conduct unbecoming which resulted in lengthy suspensions rather than terminations.

The Respondent's counsel also maintains that the testimony of the students themselves was inconsistent and therefore should not be credited. In this regard, the Respondent's counsel cited the testimony of JR as well as TH. On cross examination they admitted that the statements which they gave during the investigation were inconsistent with their testimony provided during the hearing. Nevertheless, the Respondent admittedly touched the hair and tapped the shoulders of three fourth grade students at the Thurgood Marshall middle school. These actions were "well meaning intentions to develop a positive report with the student, his actions had the untended effect of making the girls feel awkward and uncomfortable."

Respondent counsel further argues that "now armed with this knowledge, it is respectfully submitted that Respondent will not engage in any activity even remotely

close to the conduct alleged here in the event that he is allowed to return to work. "These actions on the part of the Respondent did not have any sexual undertones nor did his conduct constitute any type of assault or other criminal conduct. "

In this regard, Respondent's counsel speculates that his actions were "attributed to his limited formal education as well as the large, loving family he grew up in inclusive of an extended family of numerous nephews and nieces." In this regard, counsel maintains that Respondent clearly testified that he would not repeat the conduct in the event he is permitted to resume employment with the District. Therefore, termination of the Respondent, a long standing employee is both unreasonable and unwarranted. Accordingly, the Respondent requests that his dismissal be modified to a disciplinary suspension and that the Respondent be reinstated to his former position.

#### ANALYSIS

I have reviewed all of the evidence presented including the moving papers and other evidentiary documents of the investigation that were presented at the hearing, my notes of the testimony as well as the post hearing briefs submitted by counsel. In general, the Respondent a tenured custodian employed by the Asbury Park Board of Education has charged with engaging in conduct unbecoming by having inappropriate physical contact with students. According to an investigation which began on or about June 4, 2013 the Respondent was observed touching the hair of JR which was witnessed by her mother. This was reported to security officer Davis who interviewed JR who indicated that not only did she feel uncomfortable but that the Respondent had also touched other students notably TM and CH. These students were also interviewed by security officer Davis. They stated that Respondent had snuck up on them and touched their hair. All of

the students clearly stated that they felt uncomfortable. Subsequently, these statements were also repeated to the Principal and Vice Principal of the school.

The evidence also established that the Respondent was interviewed on June 13, 2013 and admitted to touching the girls' hair. Within the specification underlying the charges, the Respondent admitted that he had touched their hair because he felt that it was "natural" and that he was not trying to hurt any of the students. In conclusion, the School Board determined that the Respondent's conduct violated its Policy 4215 which requires all support staff to commit themselves to providing the best possible service for pupils. Moreover it was determined that Respondent's conduct violated Policy 4281 which requires all school staff to abide by the "highest level of professional responsibility in their conduct with pupils." The policy further states that "inappropriate conduct unbecoming a school staff member will not be tolerated."

There is no dispute in this case that the School District has the burden of showing by a preponderance of the evidence that the Respondent had engaged in the conduct for which he had been charged and that the conduct violated the school district's policy. Moreover, the School District has the burden of showing that this conduct once proven is so contrary to the interest of the District that the penalty of summary dismissal, without prior warning or suspension is appropriate. For the reasons set forth below, I find that the School District has met its burden and that despite the sincere arguments of the Respondent, termination is an appropriate penalty under these circumstances.

The mission and responsibility of the School District can be simply articulated as follows - the School District is responsible for providing the best education possible to its students in an environment that protects their physical and mental welfare and well being.

The environment must be such that it fosters learning. This cannot exist when students feel uncomfortable around teachers and staff. The responsibility to maintain this environment not only extends to pedagogical employees but extends to the entire staff including administration, security and custodians. Students should be able to naturally trust the adults which their parents have placed in their care during the school day. Even though the cited policies may be seen a quite broad, their interpretation is defined by this critical interest.

There is no dispute in this case that the Respondent inappropriately touched the hair of JR, TM and CH. Even though Respondent asserts that the investigatory statements presented by these pupils were inconsistent the basic allegations have been consistent throughout and admitted to by the Respondent.

There is no dispute that an inappropriate touching occurred. Indeed, the most significant evidence supporting these charges was uttered by the Respondent himself during his interview during the investigation as well as during the arbitration hearing. The Respondent clearly admitted to touching the students but indicated that he felt that it was natural and that he was not trying to hurt them. According to the Respondent, he was "just playing around."

There is no dispute in this regard that the Respondent's activities made these students uncomfortable and that while he states that he did not intend this to happen, each student clearly articulated that they felt uncomfortable and "weird" as a result of the Respondent's actions. This reaction indicates that the Respondent's action was inappropriate and clearly contrary to the interests of the school community as articulated

by the Board's policies. As a result, the evidence supports the imposition of severe discipline.

The final question concerns whether summary termination is the appropriate action under these circumstances. The Respondent has been employed for a little more than a decade and his record indicates that he has been previously disciplined on an unrelated issue. Moreover, the evidence indicates that the Respondent was counseled about an earlier inappropriate interaction with a pupil during his probationary period. In addition, the Respondent has expressed remorse during the arbitration hearing. Respondent's counsel asserts that while the touching was inappropriate it was never considered by the authorities to be sexual in nature or constituted any criminal misconduct. In this regard, Respondent notes that the matter was negotiated by the New Jersey Department of Children and Families which eventually closed its case. Therefore, Respondent basically indicates that while the conduct was inappropriate it did not constitute sufficient harm to the interest of the School District as well as to the pupils and therefore while a discipline is appropriate termination is quite harsh. In other words, the Respondent requests a second chance.

It is this arbitrator's view that the Respondent's conduct as stated above clearly violates a central tenant of the School District's fiduciary responsibility with respect to its students. It also clearly violated the trust of these student's parents. The evidence further indicated that while the Respondent indicated that he regretted that he had inappropriately touched the students, this arbitrator is not convinced that the Respondent will refrain from engaging in this activity in the future. It is clear that the Respondent feels that in showing a sense of affection and in engaging with these pupils the expression of that feeling

though touch is "natural". In light of the Respondent's statements during the investigation the Respondent's actions while appropriate with family becomes an issue of impulse control in the school environment. This is especially critical when that interaction involves students. Therefore, while this arbitrator believes that the Respondent performed his day to day responsibilities in an appropriate and professional manner it is best that the Respondent pursue his occupation in an environment that does not involve interaction with young students for which he is responsible. Accordingly, I must conclude that the School District has substantiated its charges against the Respondent and that he should be dismissed from his employment by the Asbury Park School District.

