

FOR PUBLIC RELEASE

NEW YORK STATE EDUCATION DEPARTMENT
UNIVERSITY OF THE STATE OF NEW YORK

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In the Matter of the Disciplinary Proceeding between

NEW YORK CITY DEPARTMENT OF EDUCATION,
Complainant

SED FILE # 20,938

-and-

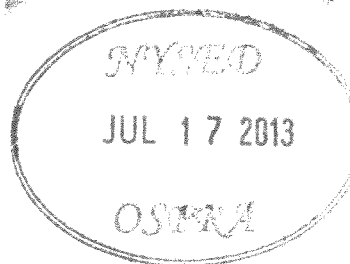
**OPINION
AND AWARD**

JOHN SILVERS, JR.

Respondent

Pursuant to Education Law Section 3020-a

-----X
Before **LISA BROGAN, ESQ., Hearing Officer**



APPEARANCES:

For the Complainant:

**COURTENAYE JACKSON-CHASE, ESQ., GENERAL COUNSEL TO THE
CHANCELLOR, by FRANCES HOPSON, ESQ.**

For the Respondent:

**RICHARD E. CASAGRANDE, GENERAL COUNSEL, NYSUT
by ANTONIO CAVALLARO, ESQ.**

Pursuant to the provisions of New York State Education Law §3020-a, the undersigned was appointed to hear and decide whether there is just cause for the proposed disciplinary action against the Respondent, John Silvers, Jr. A pre-hearing conference was held in this matter on December 10, 2012 and January 23, 2013. Hearings were conducted at the offices of the New York City Department of Education (the "Department") at 49-51 Chambers Street in New York City on January 29, February 6, 7, 20, 25, 26, March 7, 11, 13, 19, 20, April 4 and April 9, 2013. The record was closed upon receipt of the final transcript.

Both parties were represented by counsel in this proceeding and had a full and fair opportunity to adduce evidence, cross-examine witnesses and to make argument in support of their respective positions. The evidence adduced, the legal authorities cited and all the positions

and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

THE CHARGES AND SPECIFICATIONS

The Respondent has been charged as follows:

SPECIFICATIONS

JOHN SILVERS (hereinafter referred to as “Respondent”), under File #798711, is a tenured teacher assigned¹ to Manhattan Center for Science and Mathematics (04M435), within Geographic District 4. During the 2010-2011 and 2011-2012 school years, Respondent engaged in discrimination, unsatisfactory performance, misconduct, conduct unbecoming his position, neglect of duty, insubordination, and conduct prejudicial to the good order, efficiency or discipline of the service as follows:

IN PARTICULAR:

SPECIFICATION 1:

On or about June 11, 2010, during a meeting with Assistant Principal Daniel Albetta (“AP Albetta”) and teacher Dennis Hernandez, Respondent:

1. Closed the door and/or blocked the door to AP Albetta’s office.
2. Pointed his finger at Dennis Hernandez and/or AP Albetta.
3. Stated in sum and substance:
 - a. [REDACTED]
 - b. I’m going to say this in front of your boy.
 - c. I want you to say it in front of your boy.
 - d. I’m not going anywhere until you tell me what your issue with me is. Man up. Be a man. I want you to say it in front of him.
4. Refused to comply with AP Albetta’s directive to leave the office.

SPECIFICATION 2:

[REDACTED]

SPECIFICATION 3:

On or about October 13, 2010, during a meeting with Principal David Jimenez (“Principal Jimenez”) and AP Albetta, Respondent pointed his finger at AP Albetta and stated in sum and substance, you’re not a real man.

¹ The original Specifications (both D1A and D1B) stated that the Respondent was *formerly* assigned to the Manhattan Center for Science and Mathematics. The evidence shows, and the parties acknowledge, that the Respondent, at the time of the charges and throughout this hearing, was still assigned and teaching at that school, and I have therefore amended the Specifications to conform to the evidence.

SPECIFICATION 4:

On or about January 13, 2011, Respondent:

1. [REDACTED]
2. [REDACTED]
3. Referred to AP Albetta as a faggot and/or fag.
4. [REDACTED]
5. Stated to AP Albetta, in sum and substance:
 - a. [REDACTED]
 - b. Yeah, you're a fucking faggot.
 - c. [REDACTED]
6. [REDACTED]
7. [REDACTED]

SPECIFICATION 5:

[REDACTED]

SPECIFICATION 6:

[REDACTED]

SPECIFICATION 7:

[REDACTED]

SPECIFICATION 8:

On or about January 6, 2012, Respondent left his Circular 6 assignment post prior to the conclusion of the period without authorization.

SPECIFICATION 9:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]

SPECIFICATION 10:

On or about January 11, 2012, during a disciplinary conference called to discuss the allegations contained in Specification 7 & 8, Respondent:

1. Pointed his finger at Assistant Principal Denise Winchester (“AP Winchester”) and stated, in sum and substance:
 - a. You’re being watched.
 - b. [REDACTED]
 - c. [REDACTED]
 - d. I’ve proved that AP Winchester is a proven liar because Latoya just said that she was with me.
2. [REDACTED]
3. Called AP Winchester a liar.

SPECIFICATION 11:

[REDACTED]

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]

SPECIFICATION 12:

On or about May 16, 2012, during a staff meeting called to discuss proper protocol during student demonstrations, Respondent:

1. Interrupted the meeting and demanded that Principal Jimenez explain himself to the staff regarding an earlier comment that the Principal allegedly made to Respondent.
2. Continued to disrupt the meeting despite numerous requests from Principal Jimenez to stop interrupting the meeting.
3. [REDACTED]

SPECIFICATION 13

[REDACTED]



SPECIFICATION 14:

On or about December 7, 2011, Respondent's performance was unsatisfactory as detailed in a classroom observation report prepared by Assistant Principal Brian Bradley ("AP Bradley"), in that Respondent:

1. Failed to produce a lesson plan related to the topics being presented at the time of the class period.
2. Failed to engage the majority of the students during the lesson.
3. Failed to hold students accountable for class assignments during the period.
4. Failed to direct and/or encourage students to take notes during the lesson.
5. Failed to adhere to the Global 1 curriculum.
6. Failed to implement a reasonable method of formative student assessment during the lesson.
7. Failed to circulate the classroom during the class period.
8. Failed to present students with an opening activity and/or a "Do Now" assignment at the beginning of the class period.
9. Allowed a student to leave the classroom without a hall pass.
10. Failed to assign students a preplanned homework assignment related to the lesson taught at the conclusion of the class period.

SPECIFICATION 15:

On or about February 10, 2012, Respondent's performance was unsatisfactory as detailed in a classroom observation report prepared by AP Bradley, in that Respondent:

1. Failed to present a lesson consistent with the freshman second term H2 social studies curriculum.
2. Failed to implement pedagogical methods to engage student with special needs.

3. Failed to produce a lesson plan consistent with school policy for the class period being taught.
4. Failed to engage the majority of students during the lesson.
5. Failed to direct and/or encourage students to take notes during the lesson.
6. Failed to provide students with a structured class assignment during the period.
7. Failed to implement a reasonable method of formative student assessment during the lesson.
8. Failed to hold students accountable for class participation during the lesson.
9. Failed to circulate the classroom during the period.

SPECIFICATION 16:

On or about April 18, 2012, Respondent's performance was unsatisfactory as detailed in a classroom observation report prepared by AP Albetta, in that Respondent:

1. Failed to produce a lesson plan consistent with school policy for the class period being taught.
2. Consumed food and/or beverages during the class period.
3. Presented a lesson that failed to adhere to the H6 curriculum map.
4. Failed to implement a reasonable method of formative student assessment during the lesson.
5. Failed to direct and/or encourage students to take notes during the lesson.
6. Failed to circulate the classroom during the period.
7. Failed to engage a majority of students during the lesson.
8. Failed to hold students accountable for class participation during the lesson.
9. Failed to assign students a preplanned homework assignment related to the lesson taught at the conclusion of the class period.
10. Failed to provide students with a summary of the lesson at the conclusion of the class period.
11. Failed to incorporate writing into the lesson to assisted students improve [sic] their writing on a DBQ and/or thematic essay on the New York State Regents exam.
12. Failed to address a female student sitting with her eyes closed during the class period.
13. Failed to incorporate various instructional methods into the lesson.
14. Failed to present students with an opening activity and/or a "Do Now" assignment at the beginning of the class period.
15. Failed to address student lateness and/or implement lateness procedures for students.

SPECIFICATION 17:

[REDACTED]

[REDACTED]

18:
[REDACTED]

The foregoing constitutes:

- Just cause for disciplinary action under Education Law §3020-a;
- Conduct unbecoming Respondent's position, or conduct prejudicial to the good order, efficiency, and discipline of the service;
- Substantial cause rendering Respondent unfit to properly perform his obligations to the service;
- A violation of the rules, by-laws, and regulations of the Chancellor, Department, School or District;
- Incompetence;
- Neglect of duty;
- Insubordination; and
- Just cause for termination.

(D1A)².

At the pre-hearing conference, the Department moved to consolidate the above charges with a second set of charges brought against the Respondent, which motion was granted. In the second set of Specifications, the Respondent is charged as follows:

² Department Exhibit 1. Department exhibits are referred to throughout as D1, D2, etc. Respondent's exhibits are referred to throughout as R1, R2, etc.

SPECIFICATIONS

John Silvers (hereinafter referred to as “Respondent”), under File #798711, is a tenured teacher formerly assigned to Manhattan Center for Science and Mathematics (04M435) in Manhattan, within Geographic District 4. During the 2012-2013 school year, Respondent engaged in discrimination, misconduct, conduct unbecoming his position, neglect of duty, insubordination, and conduct prejudicial to the good order, efficiency or discipline of the service as follows:

IN PARTICULAR:

SPECIFICATION 1: [REDACTED]

SPECIFICATION 2: [REDACTED]

SPECIFICATION 3: On or about November 30, 2012, Respondent failed to remove a quote from Niccolo Machiavelli from his bullet board after being instructed to do so previously by Principal J. David Jimenez.

SPECIFICATION 4: [REDACTED]

The foregoing constitutes:

- Just cause for disciplinary action under Education Law §3020-a;
- Conduct unbecoming Respondent’s position, or conduct prejudicial to the good order, efficiency, and discipline of the service;
- Substantial cause rendering Respondent unfit to perform properly his obligations to the service;
- A violation of the rules, by-laws, and regulations of the Chancellor, Department, School or District;
- Neglect of duty;
- Insubordination; and
- Just cause for termination.

(D1B).

BACKGROUND

The Respondent is a tenured teacher who has been employed by the Department for eleven years, all of which have been spent at the Manhattan Center for Science and Mathematics (“the Manhattan Center”) as a teacher of Social Studies. From August 2007 until June 2010 he also served as a Dean, dealing with student safety and discipline matters. The undersigned was presented with no record of prior discipline of the Respondent.

Although the record is generally restricted to the time period of the charges in question, it nonetheless suggests an uneventful tenure, with both satisfactory classroom and annual observations, up until June of 2010, when the incidents which are the subject of these charges began. Jose David Jimenez became the Principal of the Manhattan Center in 2007 (T. 466). Daniel Albetta, formerly a physical education teacher and Dean, became an Assistant Principal of Security at the Manhattan Center in December of 2009, which included supervision of the Deans, and he assumed duties as the Assistant Principal of Social Studies in January 2010 (T. 165, 167). Albetta and the Respondent’s tenure as Deans overlapped during the 2008-09 school year and the fall semester of the 2009-2010 school year until Albetta was appointed Assistant Principal, at which point he became Respondent’s supervisor.

In April of 2010, in an uncharged incident, a student [REDACTED] was involved in an altercation that led to him being arrested (D36). Both Respondent and Albetta were present at the scene, and strongly disagreed about who should be handling the situation and how. Each felt the other had acted inappropriately, Respondent claiming that Albetta made the situation worse and caused [REDACTED] to be arrested unnecessarily (T. 1192-4), and Albetta stating that despite telling Respondent he would handle the situation, Respondent further inflamed the situation and was insubordinate and unprofessional in his actions (T. 187). The conduct alleged herein began two months later,

in June 2010, and includes charges of misconduct, primarily insubordination, as well as unsatisfactory performance in the classroom. The facts surrounding each are discussed below.

Various theories were proposed by different witnesses about the root of the troubles between Respondent and the administration. Respondent traced it back to his altercation with Albetta during the arrest of student [REDACTED]. Albetta and Jimenez appeared convinced that Respondent had an ongoing obsession about the question of Albetta's sexual orientation which fueled their disagreements. Other witnesses offered other theories, but whatever the impetus, there is no question that there was a problem, on a personal level, between Respondent and his administrators, and it played out over the course of two years with increasing intensity.

In June of 2011, Respondent received an unsatisfactory rating for the year on his Annual Professional Performance Review, his first ever (T. 620). The reason cited was a charge substantiated by the Office of Equal Opportunity which is the subject of Specification 4 (D25). In June of 2012, Respondent again received an unsatisfactory rating for the year, this time supported by the various charges of insubordination and incompetency which comprise the balance of these charges (D26). Charges were first filed on September 14, 2012, with a second set of charges alleging additional conduct between October and December 2012 preferred on January 9, 2013. The two sets of charges were consolidated on motion of the Department, and this hearing ensued.

POSITIONS OF THE PARTIES³

CONTENTIONS OF THE DEPARTMENT

The Department asserts that it has proven, by a preponderance of the evidence, that the conduct charged in these Specifications not only occurred, but that having occurred, has rendered Respondent incapable of properly performing his duties to the service. It posits that the

³ The parties' positions regarding each individual Specification are set forth in the Discussion section below.

administrators at the Manhattan Center attempted to work with the Respondent from the 2009-10 school year through to the 2012-13 school year, and were met with open hostility. The Respondent, according to the Department, became so consumed with the idea that the administrators of the Manhattan Center were conspiring against him, that he was unable or unwilling to heed their advice about his pedagogy, or to properly do his job.

The Department urges me to consider the relative credibility of all the witnesses who testified at this hearing. It finds that although the Respondent has an answer for everything, his explanations and denials are not credible, and that a conspiracy of the type Respondent imagines between and among the administrators and others at the Manhattan Center is simply not believable. It insists that all of Respondent's witness were highly opinionated about their dislike for the administration, and were ultimately unsuccessful in their attempt to rally around their colleague at this hearing.

The Department sees the Respondent as someone justifying his every action, and who wants to be judged only in the way he chooses to be judged. It believes he is governed only by his ego and as such, he is beyond remediation. He refuses, says the Department, to listen to scrutiny or advice, and therefore there is no likelihood that he will improve. Rather, the Department opines that any administrator will face nothing but open hostility, belligerence and threats from him in the future, and I am therefore urged to terminate his employment.

CONTENTIONS OF THE RESPONDENT

The Respondent argues that he is a victim of the administration's desire to get rid of anyone they perceive stands in their way, specifically, people who support the union. Further, he contends that he has been the target of a persistent campaign of harassment and retaliation, grounded in personal animosity between himself and AP Albetta, which led members of the

administration to be overly critical of his performance and conduct inside and outside the classroom.

The Respondent urges me to weigh the credibility of six witnesses, including the Respondent, whose testimony paints a very different picture than that proffered by the Department. Far from the innocent victims who complain of being intimidated by an out-of-control Respondent in every interaction they had with him, Respondent insists that it was the administrators themselves who were out of control and unprofessional. He points to the testimony of five witnesses who, in various settings, witnessed the Respondent maintaining a calm and professional demeanor while being railed against by members of the administration. It encourages me to conclude that these witnesses did not all make a decision to come to this hearing and lie under oath.

The Respondent asserts that many of the charges herein, even if proven, do not rise to the level of misconduct under §3020a of the Education Law, and reminds me of the case law which holds that it takes more than picayune and inconsequential acts to remove someone from a tenured position. Rather, the conduct must be both substantial and substantiated, a threshold which the Respondent argues has not been met for many of these specifications.

As to those specifications which speak to Respondent's competency as a teacher, I am urged to remember that the standard for determining whether an educator should be deprived of his position is whether he can provide a valid educational experience for his students, and that a finding of incompetency requires more than just unsatisfactory observations to meet this standard. It is necessary to find that there is no likelihood that he will improve, and the Respondent argues that the evidence shows that he is, in fact, capable of improving. Moreover, he argues that the administration failed to live up to its obligations to him, relying on informal

observations and insufficient remedial efforts, all in violation of both the contract between the Department of Education and the UFT, and the Education Law.

The Respondent expresses particular concern about those charges where he has been accused of acting inappropriately when, in fact, he claims he was only defending himself against a persistent onslaught of criticism from the administration. He has a right, he insists, to express dissent and defend himself against unfair allegations. He points to a prior case decided under §3020a by Hearing Officer Douglas Abel, which Respondent argues stands for the proposition that, in a meeting between adults, even if it is about negative feedback in observations, even churlish behavior is not misconduct (*Matter of A.F.*, SED # 17,060, July 18, 2011).

Overall, the Respondent argues that he has been targeted and treated unfairly by the administration at the Manhattan Center, that their observations of his classroom performance were tainted by their goal of getting him out, and that their testimony at this hearing was likewise fabricated in furtherance of that goal. He suggests that a ruling for the Department in this case is a ruling in favor administrative fiat, and against the union. He urges me to dismiss the charges.

DISCUSSION

On the entire record before me, including my assessment of witnesses' credibility and the probative value of the evidence introduced at trial, I find: On the first set of charges, Respondent is culpable of the conduct set forth in Specifications 1.1, 1.2, 1.3(b), 1.3(c), 1.3(d), 1.4, 3, 4.3, 4.5(b), 8, 10.1(a), 10.1(d), 10.3, 12.1, 12.2, 14, 15 and 16, and not culpable of the conduct set forth in Specifications 1.3(a), 2, 4.1, 4.2, 4.5(c), 4.6, 4.7, 5, 6, 7, 9.1, 9.2, 9.3, 10.1(b), 10.1(c), 10.2, 11.1, 11.2, 11.3, 12.3, 13, 17 and 18. As to the second set of charges, I find the Respondent culpable of the conduct charged in Specification 3, and not culpable of the

conduct charged in Specifications 1, 2 and 4. Specifications 4.4, 4.5(a) are dismissed as being duplicative. Each Specification is discussed in detail below.

Before proceeding to the individual charges, some preliminary comments are in order. Much of this case involves the Department's presentation of one version of events which is directly contradicted by the Respondent's version of those same events. The Department claims that the Respondent acted in a threatening and intimidating fashion towards his superiors, while the Respondent claims that it was the administrators that were bullying and threatening him. One stayed calm while the other raged. One moved forward while the other moved back. One was reasonable and the other was out of control. On the competency charges, the Department claims that the observation reports are fair and objective renderings of Respondent's pedagogical difficulties, while the Respondent finds them to be tainted by bias.

By its very nature, then, this case should hinge on the relative credibility of the witnesses. I have studied the record in great detail for evidence that one side or the other may have been fabricating or exaggerating the truth in an effort to persuade me to accept their account. What I found was adequate reason to question the credibility of witnesses on both sides of this bitter equation. A few examples will suffice to make this point.

Principal Jimenez testified over a period of three days on the Department's direct case, and then was called as a witness for the Respondent as well as for rebuttal by the Department, and his testimony is key to many of the charges herein. He suffered a major blow to his credibility, however, when he spoke about the incident which is the subject of Specification 1 in the second set of charges. The charge involves an incident which allegedly occurred when Respondent and Albetta were driving in close proximity on the FDR Drive. Jimenez claimed that Albetta thought Respondent was stalking him, and in support of that notion, insisted that Respondent drove up on Albetta, an explanation which was contrary even to what Albetta

himself said happened (both on a audio recording of the meeting in question, and at trial). Jimenez' unwillingness to bend from that position was astounding. Either he refused to believe that the Respondent could possibly be telling the truth, or, even more troubling, he believed that his account was more damaging and therefore the story which must be told. He went so far as to say that if, in fact, Albetta had driven up on Respondent – which is what both Albetta and Respondent said happened -- then he would think Albetta was stalking Respondent (T. 759).

I also found it odd that throughout his testimony, Jimenez frequently sought opportunities, even when he had not been asked, to bring up the issue of Mr. Albetta's sexuality and his belief that the Respondent was somehow obsessed with this issue and that it was at the core of his inability to get along with Albetta. His insistence on this point – one which, as will be discussed below, I reject – gave the appearance that he was, once again, trying too hard to paint a picture which he thought was damaging to Respondent. It is also difficult to accept Albetta's consistent assertions that he always remained calm and professional in his dealings with Respondent in light of the credible testimony of numerous witnesses for the Respondent, whose observations about Albetta's general behavior towards those under his supervision casts serious doubt on the picture Albetta attempted to portray of himself during these proceedings. It is also noteworthy that, in an apparent effort to bolster the profile of Albetta, Jimenez actually stated that he “never heard Mr. Albetta [say] a bad thing about [Respondent] ever” (T. 740). This record is replete, however, with reports from Albetta to Jimenez accusing Respondent of misconduct, and it strains credulity to think that Albetta spoke in a consistently positive manner about someone with whom he sustained so much conflict.

The Respondent's lengthy testimony also raised some credibility concerns. He would have me believe that in every single encounter with one of these administrators, he was calm and collected, and always managed to “take a step back,” illustrating that he was the one being

threatened and intimidated, not the other way around. Respondent is a large man and, frankly, the idea that he could feel physically threatened by Principal Jimenez, a man of much smaller stature, is difficult to believe. His attempts to portray himself as always taking everything in stride led him to describe situations where, to this objective observer, his reactions were disproportionately calm to what was going on around him. I therefore conclude that his depictions of his unshakably calm demeanor, no matter what, may in fact be overstated. Similarly, when asked about using the word “shit” during a post-observation conference with Albetta, the Respondent attempted to pass it off as “collegial bantering” (T. 1483). This occurred on April 20, 2012, by which time there was no longer anything collegial about the relationship between Respondent and Albetta, and I find that explanation to be disingenuous. There was also some inconsistent testimony, such as when he said it never entered his mind to ask AP Bradley why he hadn’t mentioned a problem with the scope and sequence for a particular class during their pre-observation conference, and then moments later, said he asked him why he didn’t mention it before the class and Bradley had no response (T. 1394, 1398). Respondent’s insistence that he didn’t even read an OEO report which substantiated certain charges against him, and immediately shredded it when it was delivered to him (T. 1287), was called into question by a concurrent email to the OEO asking for a detailed written explanation of why the charges were substantiated (R18), raising further questions about his overall credibility.

These are just by way of example. There are other such instances on both sides of this case. The result is that I cannot and have not approached this decision from the overarching perspective that, in this exercise of pointing fingers at one another, one side or the other is consistently lying and the other consistently telling the truth. Each charge will stand on its own as to whether the Department has met its burden of proving, by a preponderance of the evidence

that the conduct charged occurred, and the overall atmosphere in which these events occurred will be considered on penalty.

FIRST SET OF CHARGES

SPECIFICATION 1:

On June 11, 2010, Respondent found himself in AP Albetta's office after a meeting with a student and parent during which Albetta, Respondent and another teacher, Dennis Hernandez, had been present. Although the details both leading up that meeting and the meeting itself are not at issue in the charges, suffice it to say that there was a disagreement between Respondent and Albetta as to whether Respondent belonged at the meeting, and Albetta clearly did not welcome his participation (T. 12, 112, 1201). After the parent and student left, there was an exchange between Albetta and Respondent, which was testified to by Hernandez, Albetta and Respondent at trial.

Hernandez and Albetta both testified that Respondent stood in the doorway to the office with his arms crossed (T. 15, 112), and said, in sum and substance, "What is your problem with me," "I'm not leaving until you tell me what your issue is with me," and "I want you to say it in front of your boy" (T. 15-16, 112). Hernandez also said Respondent used the phrase "man up" (T. 16). Albetta said he told Respondent that he didn't have a problem with him, and asked him "officially" to leave the room (T. 112). Hernandez recalled that Albetta asked Respondent to leave twice, and both recalled Respondent saying he was not going anywhere until Albetta told him what the problem was between them (T. 28, 112). Albetta said that Respondent aggressively pointed at him (T. 112), while Hernandez said Respondent pointed at him (T. 16) and that his overall impression of him was that he was being aggressive (T. 25).

Respondent admitted much of the conduct charged in the specification. He acknowledged standing in the doorway (T. 1203-4), and being 6'1" and 220 pounds, he

acknowledged that it may have looked as if he was blocking the doorway, but said he really wasn't (T. 1209). He admits saying "do you have a problem with me" and "I will ask you in front of your boy" (T. 1203-4), but denies that Albetta ever asked him to leave (T. 1206). He also explained that by calling Hernandez Albetta's "boy," he meant his friend, and that there was no sexual connotation in the use of that word (T. 1205, 1207). He acknowledged that he talks with his hands, but denied ever pointing (T. 1205).

The Respondent also provided some context for his comments to Albetta. It was Respondent's view that, ever since the incident with student [REDACTED] two months earlier, his relationship with Albetta had been strained (T. 1197). He explained that earlier that week he had heard Albetta tell another teacher, Evan DeCruz, to stay away from Respondent (T. 1202), and he wanted to air the issues between them and end it, not escalate it (T. 1207). He acknowledged on cross that he didn't tell Albetta about overhearing the conversation with DeCruz (T. 1610). He also said that he stood by the door, at a distance from Albetta, because he didn't want him to be able to say he was threatening, noting that ever since he watched Albetta's reaction during the [REDACTED] incident he decided it would always be best to keep his distance (T. 1208).

The testimony from all parties is clear that Respondent was standing in such a way as to block the doorway of AP Albetta's office (Specification 1.1). Both Hernandez and Albetta said that he pointed at one or the other of them, and although Respondent denied pointing, he did acknowledge talking with his hands, and so I find it likely that he pointed while speaking the words to which he admitted (Specification 1.2). Respondent admitted, in sum and substance, the statements which are charged in Specifications 1.3(b), 1.3(c) and 1.3(d), so these comments, with the exception of the phrase "I'm not going anywhere" in 1.3(d), are undisputed.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Finally, I am persuaded by the testimony of both Albetta and Hernandez that Albetta asked Respondent to leave and he refused. Albetta clearly did not want to engage in this conversation. It makes sense that he would want and ask Respondent to leave. Respondent recalled Albetta saying to him more than once, "I don't have a problem with you." The repetition suggests that Respondent was being insistent and that his statement as recounted by Albetta and Hernandez, that he wasn't leaving until Albetta answered him, was a response to being asked to leave. I therefore find that Respondent engaged in the conduct described in Specifications 1.1, 1.2, 1.3(b), 1.3 (c), 1.3(d) and 1.4. The question remains, however, as to whether these statements and conduct rise to the level of chargeable misconduct. In this instance, I conclude that they do.

Whatever Respondent's issues may have been with Albetta, and whatever rights he may have to air his concerns with his supervisor, he does not have the right to do so in such a fashion in front of another teacher. In *Matter of A. [REDACTED]*, Hearing Officer Abel was addressing a private conversation between a teacher and a supervisor where there was heated disagreement about the performance evaluation in question and the motive behind it. I agree that such a conversation between adults, giving a teacher the ability to voice dissent, should not necessarily be viewed as misconduct⁴. Here, however, the antagonism directed at Albetta was far more personal, and if such behavior is to be tolerated at all, it certainly is not acceptable in public, where Albetta was subject to humiliation in front of his colleague. I find his conduct under these circumstances to be unprofessional. I also find his refusal of Albetta's directive to leave his office to be

⁴ [REDACTED]

insubordinate⁵. Respondent is culpable of the conduct charged in Specification 1, with the exception of Specification 1.3(a).

SPECIFICATION 2

[REDACTED]

⁵ While I find the Respondent guilty of insubordination and misconduct, I do not find that any of his conduct or statements set forth in Specification 1 to be discriminatory in any way, nor that his choice of language (e.g. “man up” and “your boy”) was meant to implicate Mr. Albetta’s sexual preferences.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SPECIFICATION 3

On October 13, 2010, Principal Jimenez convened a meeting with Respondent and Albetta to discuss Respondent's purported behavior at the October 12 post-observation conference. Eric Cohen attended the meeting as Respondent's union representative. Respondent is charged with using the phrase "you're not a real man" and pointing his finger at AP Albetta during that meeting.

Albetta testified that during this meeting, Respondent was belligerent, aggressive, and used the phrases "you're not a real man" and "man up" (T. 138). While keeping in mind that Albetta had already testified to his difficulty in distinguishing one encounter from the next, this meeting was also attended by two other people, Jimenez and Cohen. Jimenez testified that Respondent "pointed his finger . . . at Mr. Albetta and said, "Yes. You're not a man" (T. 475). Cohen did not recount the words at issue when testifying about the meeting (T. 916).⁶

Respondent testified about the conversation which took place during the meeting:

A: [Jimenez] said that I called Mr. Albetta names, that I threatened him, that I stood up to him. I said, "I did no such thing." And it was just constant badgering about, you know, I questioned his manhood and why do I always use that term, that I called him -- say--oh, that I he wasn't a real teacher. You know, that I questioned

⁶ Cohen actually recounted two separate meetings where the post-observation was discussed. One took place on October 12, 2012 and was convened, according to Cohen, to discuss the issue of Respondent having recorded the post-observation conference. Once the recording in question had been erased, he said that Albetta left the meeting. He then recalled a subsequent meeting convened to discuss the fact that Respondent had received an unsatisfactory rating for that observation, a meeting which he said Albetta did not attend. While he recalled conversation at both meetings about Respondent's relationship with Albetta, he did not recall words to the effect of those charged in discussing either meeting.

his ability, and I do remember stating to Mr. Jimenez, "The only ability I question is that Mr. Albetta is a gym teacher and not a history teacher." That's probably-- that I said that was the only thing I questioned.

Q. With regard to the meeting in Mr. Jimenez's office, anything else occur?

A. I'm drawing a blank right now.

Respondent never denied making the statement charged during this meeting. He denied the comments Jimenez was claiming he made at the post-observation conference, but as to the balance of this meeting, he drew a blank. As such, the preponderance of the evidence in this case goes to the Department. I find it more likely than not that Respondent used a phrase of this nature, such as he admitted using directly to Albetta on at least one other occasion (see Specification 1), during a meeting at which his difficulty in getting Albetta to confront their issues was on the table.

The comment here is similar in nature and tone to those at issue in Specification 1. Here, as there, other people were present in the room when the comments were made. This is a somewhat different case, in that the other adults at the meeting were there for the express purpose of discussing Respondent's conduct towards Albetta. Nonetheless, those other individuals were Albetta's supervisor and another teacher. For the same reasons set forth at Specification 1, I find that the right of Respondent to air his differences with Albetta does not extend to making remarks such as this in front of Jimenez and Cohen. Respondent is culpable of the conduct charged in Specification 3.

SPECIFICATION 4

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ The OEO did not substantiate allegations of discrimination based on any of the statement attributed to Respondent in Specifications 1, 2 and 3 hereof.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

(T. 921-2). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ This trial was not the first time Cohen took issue with the OEO report. He discussed his concerns about its accuracy at the meeting which was convened to deliver the report to Respondent on June 21, 2011.

¹² I find the record unclear as to who it was that Cohen is asserting said "What does that have to do with anything?" Although the transcript says "I said," meaning Cohen, there is no other indication that Cohen was verbally involved in the conversation at this point. In fact, he indicated that he was uncomfortable and looking for a way out of the room (T. 921).

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[REDACTED]

13

[REDACTED]

14

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[Redacted text block consisting of approximately 28 horizontal black bars of varying lengths, covering the majority of the page's content.]



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[REDACTED]

3. As discussed above, Respondent is guilty of having referred to AP Albetta as a faggot.

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

[REDACTED]

SPECIFICATIONS 5 and 6

[REDACTED]

[Redacted text block]

16 [Redacted footnote text]

[REDACTED]

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[REDACTED]

17 [REDACTED]

[REDACTED]

SPECIFICATIONS 7 and 8

These specifications also relate to Respondent's Circular 6 assignment. In early December, the post had once again been changed and Respondent's duty was in connection with the boys' bathroom on the first floor. In an email dated December 8, 2011 changing the assignment to the first floor, AP Winchester noted the following: "Please unlock the bathroom at the beginning of your assignment and lock it before you leave. If you do not have a key, please inform me. The sign in book will now be kept in the outer Dean's [sic] which must remain locked at all times. Please report to the boys' first floor restroom beginning tomorrow during your regularly assigned C-6 period" (D34).

These specifications charge that on [REDACTED] and January 6, 2012, Respondent left his Circular 6 assignment prior to the conclusion of the period without authorization. In support of the charges, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On January 6, she testified that she again observed him sitting and conversing in the same teacher's classroom, and said "it was easily at least ten minutes that he was, like not, you know, it was easily an early departure from the post. I didn't stand there and stare. I actually didn't even want to know I didn't stand there and wait around to see how long. But I do know that I re-observed the post at the end of the period. And he was not there." She estimated that fifteen minutes elapsed between the time she saw him in the first floor classroom, and when she observed that he was not at the post (T. 69).

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] On January 6, Respondent testified that he left his Circular 6 post a few minutes early to give a student a homework assignment that he had missed (T. 1357). He did not say precisely how long he was gone.

A meeting to discuss Respondent's actions on January [REDACTED] and 6¹⁸ deteriorated such that, according to Winchester, it was difficult to discuss what had actually happened (T. 70-1), but she did say that she, along with Ms. Martin and Mr. Jimenez, did view surveillance tapes which, according to Winchester, showed "exactly what happened" (T. 73). The impetus to view the tapes came from Ms. Martin's initial belief, which she ultimately agreed was mistaken, that she had been with Respondent on the day in question at his post. After viewing the tape, she realized she had not been there. Winchester said that they were viewing the tape both to determine whether Martin was present, and also to account for Respondent's whereabouts, and ultimately testified that they viewed the empty post on the third floor, Martin nowhere near the post, and then moved on to the first floor camera which she said showed Respondent entering the teacher's classroom and not coming out until the end of the period (T. 74). Jimenez testified that the video showed that on both days, he entered the teacher's classroom and stayed there for ten minutes, and that Martin saw this on the video (T. 487). Martin, however, testified that she saw only a few seconds of video, thirty seconds at most, that showed Respondent walking away from the post, that she saw no indication of where he may have been before or after the video snippet, and

¹⁸ Respondent's conduct at that meeting is the subject of separate charges, and is discussed in greater detail at Specifications 9 and 10 below.

that she saw no date or time on the screen (T. 1130-1). The videos were not available because, according to Jimenez, they were erased in the ordinary course approximately three months after the event in question.

[REDACTED]

[REDACTED]

[REDACTED]

January 6 is a different story. Winchester says she again saw Respondent absent from his post and in Ms. Warner's room. The evidence from the Department's standpoint is similarly deficient as it is for January [REDACTED]. But Respondent admits leaving his post on this day, which is what he is charged with. He explained that he left to help a student with a homework assignment. There is nothing in this record to suggest that Respondent, or anyone else, was free to use any portion of the time allotted for his Circular 6 assignment to do other tasks which would take him away from his post.

[REDACTED]

[REDACTED] and culpable of the conduct charged in Specification 8.

SPECIFICATION 9

[Redacted text block containing approximately 20 lines of obscured content]

19

[Redacted text block]

[REDACTED]

[REDACTED] Respondent is not culpable of the conduct charged in Specification 9.3.

SPECIFICATION 10

This Specification deals with comments made and conduct allegedly engaged in by the Respondent during the meeting with Jimenez, Winchester and Martin on January 11, 2012. The Department relies on the testimony of Winchester and Jimenez, as well as Jimenez' letter memorializing the disciplinary meeting about these matters (D17). In that letter, he recounts that during the meeting, Respondent called Winchester a liar, said that there were cameras in the building and that Winchester was being watched, that Respondent was taking notes, and that Winchester should watch it. He described Respondent as yelling and flailing his arms, and engaging in demonstrative and accusatory behavior such that it had a physical affect on Winchester, and that both he and Martin had asked Respondent to step outside to calm down, which he did. When he and Martin returned, he called Winchester a proven liar, because Martin had just said that she had been with Respondent at his post at the time in question, which turned out to be in error. He found Respondent's behavior toward Winchester to be abusive, inappropriate, menacing and unbecoming a professional, and admonished him. His testimony

about the meeting at trial was relatively consistent with the version of events set forth in the letter (T. 485-7), although he did not mention any physical gestures, such as the flailing of arms or anything else of that nature.

Winchester's recollection of the meeting largely comports with that of Jimenez. She testified that Respondent said "we're watching you", called her a liar, and later said it was now proven she was a liar (T. 70-73). She also described Respondent and Martin leaving for a time so that Respondent could calm down (T. 72). While she said Respondent was screaming and angry, and that the situation was highly uncomfortable for her (T. 70), she did not describe him flailing his arms or making any other physical gestures.

Martin testified about the meeting as well. She acknowledged that Respondent said that Winchester and Jimenez were not telling the truth (T. 1125), and admitted that Respondent was annoyed and upset, but insisted he remained professional (T. 1126). She stated that Winchester was annoyed that her authority was being questioned, but that she did not appear to be intimidated or threatened (T. 1127). She said nothing about stepping out with the Respondent for any period of time, and made no mention of comments regarding Winchester being watched.

Respondent also testified about the meeting. He recounted that he took notes at the meeting and, when questioned about it by Winchester, said "it's my right to take notes" (T. 1359). Then, as Winchester spoke about seeing Respondent on the camera, he testified that he finally had enough of the allegations, and said "[y]ou know, those cameras, they watch us like they watch you. And they see you walking out to Target every day" (T. 1360). He described Winchester as "ranting," "raving," and "going off on a tangent" (T. 1360). He recalled Jimenez asking them to leave the room "because he said we were getting uptight. I think he asked us to leave the room because Ms. Winchester was on the verge of losing it again. So he asked us to leave the room" (T. 1361). He admitted going on the defensive in response to the allegations

being made against him (T. 1362). He admitted that he said he thought Winchester was lying (T. 1363).

Respondent has admitted to making the statements charged in Specification 10.1(a), and to making a statement similar to that charged in Specification 10.1(b). He also admitted calling Winchester a liar, as alleged in Specification 10.3. His demeanor and conduct, as charged in Specification 10.2, is disputed, but there is insufficient evidence to prove that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As to Specification 10.1(d), here, the assertion in the letter was corroborated at trial by both Jimenez and Winchester. Nothing that Martin or Respondent directly contradicts this, as they both acknowledged that Respondent called Winchester a liar, and Specification 10.2 simply puts that assertion in another context. I find it likely that it was repeated in this context after Respondent had reason to believe that Martin was with him at the time in question.

I find Respondent engaged in the conduct charged in Specifications 10.1(a), (b) and (d), and 10.3. Whether these statements rise to the level of chargeable misconduct depends, I believe, on the manner in which they were uttered. Once again, the administrators portray Respondent as out of control, while Respondent portrays the administrator as ranting and raving. If, in fact, Respondent was screaming and out of control, then he is guilty of conduct unbecoming his profession. If the administrator was out of control, then the harshness of the comments might be

mitigated by the surrounding circumstances. Having carefully considered all the testimony about this incident, I find that the Department’s version is the more credible of the two. Respondent was, by his own account, angry and upset about allegations which he deemed false being made against him. He admits to finally having had enough, and becoming defensive. Most telling is the fact that Jimenez had to ask Respondent to step out. While Respondent passes this off as an opportunity to let Winchester calm down, he admits that Jimenez said that he should step out because he was getting “uptight.” The preponderance of the evidence suggests that he was.

Having so concluded, I find Respondent culpable of misconduct as a result of the statements made which are charged in Specifications 10.1(a), 10.1(d), and 10.3. [REDACTED]
[REDACTED]
[REDACTED], and therefore find him not culpable of the conduct charged in Specification 10.1(b). For the reasons set forth above, I also find Respondent not culpable of the conduct charged in Specifications 10.1(c) and 10.2.

SPECIFICATION 11

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[REDACTED]

[REDACTED] – [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SPECIFICATION 12

On May 16, 2012, a student demonstration, also referred to as a “walkout,” took place at the Manhattan Center. At the end of the school day, Principal Jimenez convened a meeting of the faculty to discuss issues relating to the walkout.

According to Jimenez, Respondent interrupted the meeting and repeatedly insisted that Jimenez explain to everyone a comment which he said the Principal had made to him earlier outside in the hallway. Jimenez acknowledged an encounter in the hallway in which Respondent was upset, which Jimenez attributed to an observation he had conducted the previous day, and during which he found Respondent intimidating (T. 512-13). Respondent claimed that during that encounter in the hallway, Jimenez blamed him for the walkout, but Jimenez did not acknowledge making such a comment. Jimenez went on to testify that during the meeting, Respondent was “standing right beside him” which he found annoying, and said “tell them what you said, that you blame me” while walking towards him and pointing his finger (T. 514). He said that Respondent “went on and on” and then when he finished, Jimenez was rattled and ended the meeting. [REDACTED]

[REDACTED] Jimenez met with Respondent to discuss his behavior at the faculty meeting, and memorialized that meeting in a letter dated June 14, 2012 (D21). In the letter, Jimenez explained that he had told Respondent at the time that the meeting was not a proper place to discuss such matters and asked him to stop, but Respondent persisted.

No other Department witnesses testified about this meeting, but Respondent and many of his witnesses did. Their various recollections differed in certain respects, although all agreed that Respondent stood by the windows some distance from Jimenez, and no one described him moving or approaching Jimenez while he spoke, or being loud or aggressive in his manner. The testimony disagreed in other respects, including what it was Respondent said, but it is Respondent's own admissions which are most important here. He said that he raised his hand and, when Jimenez called on him, he "projected [his] voice and asked him to explain to everyone what he said to me on the stairwell" (T. 1510). Corroborating Jimenez' version of the event, he acknowledged that Jimenez told him he was disrupting the meeting (T. 1510). As to the conclusion of the meeting, Respondent did not admit making a parting comment to Jimenez, but rather, testified that Jimenez said under his breath that he was going to have Respondent investigated, and Respondent answered "I'm right here, go ahead and do it" (T. 1511). Latoya Martin, testifying for Respondent, recalled that Jimenez was "trying to outtalk" the Respondent (T. 1144), and Robert McHugh noted that Respondent's voice escalated when he was being shouted down by Jimenez, who McHugh said did not want Respondent to share the conversation with people in the room (T. 1066). When asked how he got that impression, McHugh said:

[Jimenez] kept talking while [Respondent] tried to reference the conversation they had had coming up the stair to the second floor to the music room. He would keep talking, and he just said, 'You can't talk. You don't talk. I'm talking. This is my meeting.'

(T. 1067)

The evidence adduced supports the conclusion that Respondent was insistently trying to have Jimenez address the conversation they had in the stairwell in front of the entire faculty. Respondent tried to defend the charge that he "interrupted" the meeting, as noted in Specification 12.1, by insisting that he raised his hand and was called on. Even if that was so at the beginning,

his behavior thereafter was a continuous interruption, and the initial raising of a hand does not serve to mitigate the fact that he caused a disruption to the meeting. He does not deny the substance of Specification 12.1, which is that he was demanding that Jimenez explain his earlier comment to the staff. Specification 12.2 speaks to the repeated nature of the disruption, and Jimenez' calls for Respondent to cease his behavior, which is corroborated by both McHugh and the Respondent himself.

As with the conduct discussed at Specification 1, here, Respondent brought his fight with the administration into public view. Whatever his views, whatever his concerns, and whatever his rights may be to air his differences with his supervisors, he does not have the right to publicly force a conversation in front of the entire faculty of the school. To do so, and to refuse his principal's directive to stop disrupting the meeting, is both unprofessional and insubordinate. I therefore find Respondent guilty of the conduct charged in Specifications 12.1 and 12.2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SPECIFICATIONS 13 – 18 – INCOMPETENCY CHARGES

There are six unsatisfactory classroom observations which form the basis for that part of the charges which claims that Respondent is incompetent and can no longer perform as a teacher for the Department. While the Department made various arguments about “fundamental weaknesses” captured by observations, and emphasized Respondent’s refusal to provide a lesson plan, the argument that Respondent had become so consumed by the notion that the administration was conspiring against him that he became unwilling or unable to heed advice about his pedagogy and to do his job may be more to the point.

[REDACTED]

[REDACTED]

[REDACTED] two performed by AP Bradley in December 2011 and February 2012 (Specifications 14 and 15), and then three in rapid succession performed by Albetta in April 2012 (Specification 16) [REDACTED]). For each observation there are a plethora of alleged failures of performance, all of which are recounted in detail in the Specifications. In each case Respondent disagreed with the conclusions reached by the observing administrator, and offered his view of the lesson, as well as his overriding belief that his observations were biased and unfair because the administration was on a mission to remove him from the school.

I do not believe that §3020a charges would ever have been brought against this Respondent on incompetency grounds alone, and as discussed at greater length below, do not believe the observations at issue together form grounds for termination on that basis. That does not mean, however, that the observations do not reveal some pedagogical issues which should be addressed. I will not address in detail each of the seventy-four sub-specifications, which in their numbers suggest a more serious and pervasive pedagogical problem than that which I believe actually exists. I give some credit to the assertion that the administrators, particularly Albetta and Jimenez, were bearing down on Respondent through observations as the personal animosity between he and Albetta deepened, and Jimenez became increasingly frustrated by their behavior and his inability to control the situation. That being said, there are some issues which arise repeatedly, and for which Respondent's explanations are insufficient to conclude that these issues do not, in fact, exist and do not need to be improved upon.

²¹ I note that the charging period is only three years, and that the initial charges in this case were filed on Sept. 14, 2012, meaning that evidence could have only been introduced going back as far as September 2009. Beyond that, however, Respondent testified that he had never had an unsatisfactory annual rating, which was not disputed by any Department witness.

SPECIFICATION 13 – [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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SPECIFICATIONS 14 AND 15 – OBSERVATIONS BY AP BRADLEY, DECEMBER 7, 2011 AND FEBRUARY 10, 2012

More than a year later, AP Bradley had the opportunity to observe Respondent on two separate occasions. Specification 14 is easily addressed. Respondent himself admitted that the

lesson which Bradley observed on December 7, 2011 was unsatisfactory, and he told Bradley so at their post-observation conference (T. 1344). Respondent is therefore culpable of the conduct charged in Specification 14.

Bradley had come to Respondent's room on December 7 at his request. Respondent had made a plea to Jimenez that someone other than Albetta observe him, and asked that either AP Bradley or AP Bonnick come in to do so during 2nd period on that day. Although Bradley ended up observing a different class, it was clear from both Respondent's initial request and his responses to Bradley during the post-observation conference that he was willing to accept criticism, and Bradley – although not his direct supervisor – decided to take steps to help Respondent improve his performance. They worked together for the next seven weeks,²² at which time a second observation was scheduled for February 10, 2012. Unlike the first, this was a formal observation, which included a pre-observation conference at which the specifics of this lesson were discussed.

The observation report indicates a number of deficiencies in Respondent's performance, and resulted in an unsatisfactory rating. The observation report noted only one positive aspect of the lesson, the use of certain technology, and noted seven aspects that needed improvement, including student engagement, assessment, no written lesson plan, failure to fully address the Aim, and a failure of differentiation for special needs students. At trial, Bradley indicated that there were issues with time management, routines and assessment, as well as the insufficiency of using a Power Point as a lesson plan. He also stated that the lesson was not on pace with the curriculum (D15). On cross-examination, he admitted that he did not discuss differentiation with Respondent at the pre-observation conference, and the record indicates that there was only one student in the class with an IEP, which required only that adjustments be made for test-taking

²² The Educator Improvement Plan which was developed and under which they proceeded will be discussed at greater length when discussing remediation below.

(T. 1399). He also said that the primary reason he could not afford Respondent a satisfactory rating was the time management failure that prevented him from finishing the lesson (T. 352), and further noted that the lesson was approaching satisfactory, but fell short (T. 459).

Once again, an administrator was overly anxious to criticize Respondent, even at a moment when commendation and encouragement were, in Bradley's own estimation, called for. At trial, Bradley admitted that from his first observation to the second, Respondent had "absolutely improved" and was "on the right track" (T. 446). He even referred to him as someone who had "tremendous potential" (T. 463). You would never know this from the observation report. I find the commentary about special education students to be disingenuous, as Bradley didn't know how many such students were even in the class, much less what differentiation techniques their IEPs may have called for, and I find it equally disturbing that he devoted 25% of his criticism to problems which could have been avoided had they been discussed at the pre-observation conference, i.e. differentiation (see T. 438), and the fact that the topic was out of step with the curriculum.

Nonetheless, I believe the remaining criticisms regarding pacing, assessment and engagement to be valid, Respondent's protestations notwithstanding. I also find that Bradley provided the most helpful criticism and reasoning for why Respondent's Power Point presentations were insufficient as a lesson plan, provided him with resources for improvement, and clearly instructed him to have a written lesson plan in the future. While it can be argued that Bradley could have, and perhaps should have, been more encouraging and optimistic about the improvements Respondent had made to that point, I believe it was his professional judgment that the lesson, while better, still did not merit a satisfactory rating. I can take issue with his strategy, but I will not disturb his judgment in that regard. Respondent is culpable of the conduct charged in Specification 15.

SPECIFICATION 16 – ALBETTA OBSERVATION OF APRIL 18, 2012

On April 18, 2012, after not having observed Respondent alone since October 2012, AP Albetta conducted a formal observation of Respondent's class. In the intervening eighteen months, the interactions between Respondent and Albetta had deteriorated and, after the incident in which Respondent called Albetta a "faggot," the OEO investigated and substantiated that allegation against Respondent. In the background, a variety of claims were lodged by Respondent against the administrators, and the administrators in turn caused investigations to be conducted of Respondent, most of which amounted to nothing in the end (see T. 815, 820), but clearly stirred the pot of discontent between them. Respondent said that, when speaking to an investigator about one of the investigations he initiated against Jimenez, he said "as sure as you're sitting here, I will be retaliated against for this" (T. 1432). Respondent believed, right or wrong, that the administration was aligned against him. Blogs criticizing the administrators appeared which they believed, although without any proof and over Respondent's denials, were created by the Respondent²³. It was in this atmosphere that the observation of April 18, 2012 took place.

This was ostensibly a formal observation, for which a pre-observation took place perhaps two weeks prior to the lesson in question, but the date of the lesson and the content were never discussed in advance. Instead, Respondent was handed a sheet, which was given to everyone at the beginning of the year, which listed the elements of a good lesson. He did not know when Albetta would appear, or what lesson he would be observing in advance (T. 1434, 1450).

Like the observation in October 2010, this observation resulted in a report from Albetta which found almost nothing positive about the lesson, with the exception of the fact that Respondent utilized a Power Point presentation throughout the lesson (D5). His criticisms went

²³ For examples of the investigations initiated on both sides, as well as assertions regarding the blogs, see T. 1268-9, 1270, 1285, 1305, 1568, 1596-7, 1817 and 1865-1878.

to the issues of not having a written lesson plan, eating and drinking during the lesson which he deemed to be highly unprofessional, being behind in the curriculum, lack of student assessment, students not taking notes, the manner in which he called on students, homework assignments, failure to summarize, failure to admonish a sleeping student, lack of differentiation, failure to provide a Do Now activity, failure to provide student-centered activities, student lateness. In addition to these, a new item appeared in which Respondent was criticized for failing to prepare a lesson that could help his students improve their writing on either a DBQ or thematic essay on the New York State Regents exam, and asked him to prepare an assignment which incorporated writing into the lesson (D5). Once again, it seemed Respondent could do nothing right.

At trial, Respondent answered Albetta virtually point for point, explaining first that Albetta was late arriving and therefore missed the Do Now, attendance routine and discussion of homework assignments. He said the Do Now and Aim had been on the Smart Board and he had since moved on from them, which is why Albetta did not see them. He noted that there was nothing on the blackboard because there was no chalk in the room. He once again answered the complaint about his lesson plan by explaining that it was stored digitally on his computer (T. 1438-1448). He said he was eating cough drops and drinking hot tea as he always does, and that he was behind in the scope and sequence of the curriculum because he chose to cover a section on Supreme Court cases earlier in the year than is called for in the scope and sequence (T. 1454-5). He continued that the assessment occurred with a quiz the following day, as this was a two-day lesson (T. 1460), that he asked open-ended questions, circulated the room, had his own method for addressing lateness which did not involve admonishing students publicly when they arrived, and finally, that he was preparing his students for writing on the Regents exam by a separate research paper which had been assigned (T. 1461-1469).

While it is clear that Respondent was not going to allow that a single thing Albetta noted in his report actually occurred, there is some evidence to the contrary. For example, he claimed that Albetta came in 4-5 minutes late, and therefore missed the Do Now, which he explained involved the question “what is a catchphrase?” (T. 1445). Albetta’s report has him arriving at 8:19am, which is the start of the period according to the bell schedule (D26). Even allowing that he may have fudged his arrival time in the report, he clearly recounts that at 8:26am, Respondent asked “what is a catchphrase?” This is the very question which Respondent claimed was the Do Now which Albetta missed. Here, it is Respondent that is a bit over-anxious to prove Albetta wrong. While I find some of his explanations plausible, I find others to be tiresome. The issue of lesson planning had been repeated to him multiple times at this point. He clearly believed, and still believes, that his Power Point presentation, with notes he says he places in the “notes” boxes below the slides,²⁴ is a sufficient lesson plan, and that he does not have to have a hard copy in writing in his room during the lesson. But his supervisors had told him repeatedly by this time that they disagreed, and it was his obligation to do as they asked. The “two-day” lesson excuse for not summarizing and assessing was used repeatedly²⁵, but if this was the case, it should have been clear from the outset in some way, rather than coming up after-the-fact.

The circumstances surrounding this observation are unfortunate, and it is difficult to understand why Albetta was even sent into Respondent’s room at this point. No one could have thought it would go well. I am sure that Respondent’s performance suffered, and I am equally sure that Albetta once again made exceptional efforts to find deficiencies in Respondent’s performance. But when one clears away the debris of their relationship, we are left with a classroom of students who I believe suffered on April 18 because of the tension between these two adults. They have to come first, no matter what. The criticisms from Albetta on this day

²⁴ This was testified to but could not be illustrated at trial.

²⁵ See D5, D15 and D19.

have sufficient credibility for me to find that they did not. For these reasons, Specification 16 is sustained.

SPECIFICATIONS 17 AND 18 – [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED] * *

Some final notes about the incompetency charges, including efforts at remediation are in order. I have made findings regarding each individual observation report based on, among other things, circumstances which prevailed at the time. I find AP Bradley's observations of

Respondent's pedagogical skills to be the most reliable in terms of areas which called for improvement, but because I deem the last three observation reports to be inherently unreliable, I cannot judge whether Respondent did, in fact, improve to any significant degree since the time of Bradley's critiques. A few things, however, are clear. Respondent was repeatedly told that he had to have a hard copy of a written lesson plan in his classroom during every lesson. He continued to proceed using a system which he deemed to be appropriate but which did not meet with this directive (see T. 1644). Likewise, regarding homework assignments, he was told repeatedly to assign daily homework, but insisted that he used a different system of assigning homework on a syllabus at the beginning of the year, which he claimed help prepare students for the rigors of college. Whether he was wrong or right about that, his supervisors told him to do something else, and he simply ignored their directives in favor of what he believed to be best (see T. 1643). This is not acceptable. He acted similarly in his method of dealing with lateness. He was asked to have students sign a late log, and his reasons for feeling his method was superior notwithstanding, he should have complied. Even his participation in curriculum planning meetings did not convince him that he should follow the scope and sequence agreed to between and among his colleagues, and he veered from that scope and sequence as he saw appropriate.

The question for my consideration on the issue of competency is whether I believe the Respondent can improve, and provide a valid educational experience for his students in the future. I believe he can. He has shown an interest in improving (see T. 1336) and the ability to do so when assistance is offered in an untainted atmosphere. I also note that Respondent offered testimony that his students achieve a 98% Regents passing rate (T. 1228), an assertion that stands in this record un rebutted. Student performance is now accepted as a legitimate factor in

determining teacher effectiveness, and performance at this level cannot be ignored, particularly when the teacher is at risk of termination.

It is also clear to me that the only meaningful effort at remediating any of Respondent's purported pedagogical difficulties was the seven weeks he spent working with AP Bradley between December 2011 and February 2012. The observation reports themselves offered little in the way of concrete suggestions for addressing the more difficult problems identified, and the occasional sending of a link to generic professional development videos does little to convince me that the administration was concerned with Respondent's individual needs for development.

Bradley, however, seemed to take a genuine interest in seeing Respondent improve and thrive. After his initial observation of Respondent on December 7, 2011, he developed an Educator Improvement Plan (D14) dated December 13, 2011 which set out a plan for improvement which was to culminate in a second observation of February 13, 2012²⁷, at which time the outcome of the plan was to be evaluated (D14). The testimony of Respondent and Bradley was consistent that the two worked together professionally and productively during this time period. Indeed, Bradley testified, as previously noted, that Respondent "absolutely" improved, was "on the right track," and was someone of tremendous potential who he wanted to help (T. 446, 463). He also noted "several positive interactions" with Respondent during their work together, and commented that Respondent was receptive to feedback (T. 350), responsive to pointers and concerns (T. 450-1) and, until the last post-observation conference, comported himself professionally throughout. This does not sound like someone who is incapable of accepting suggestions for and working towards improvement in his pedagogy.

Unfortunately, Bradley's time and efforts with Respondent were cut short. According to Bradley, during the post-observation conference at which he informed Respondent that he

²⁷ This observation actually took place on February 10, 2012 (D15).

deemed the February 10 lesson unsatisfactory, Respondent grew discontent and said “just give me the U,” “somebody downstairs told you to give me a U” and walked out (T. 355-357). Respondent’s testimony was consistent with this recitation of events. Bradley determined that the ability to work any further with Respondent had been compromised, and he reached out to the chapter leader to address issues he felt arose from Respondent’s conduct at that post-observation conference.²⁸

More important, perhaps, than the reason these remediation efforts ended, is Bradley’s acknowledgement that the seven weeks originally planned for could never have been sufficient for proper remediation (T. 416). The end of the Educator Improvement Plan called for an assessment, and presumably would have called for more work once the second observation had been assessed. This never happened. Having lost his trust in Bradley, I do not believe there was an administrator at the Manhattan Center who could have worked with Respondent in any collegial way to help him with whatever difficulties he might be having. If outside resources were available to circumvent the personal animosity, none were employed. I therefore find the administration’s efforts at remediation to be insufficient to support a penalty of termination for incompetence.

SECOND SET OF CHARGES

SPECIFICATION 1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁸ I note that the post-observation conference with Bradley was not the subject of any of the charges herein.

[REDACTED]

SPECIFICATION 2

[REDACTED]

[REDACTED]

[REDACTED]

SPECIFICATION 3

The last incident in this angry tableau occurred on November 30, 2012, when Respondent encountered Principal Jimenez after school outside the Love Café, located directly across the street from the school. Once again, there was a great deal of testimony on both sides as to the nature of that encounter, how it came about, who was present, and the relative postures of aggression and calm on the part of each participant. A video of the encounter (without audio) was even placed into evidence (D41). The charge, however, goes to none of that. It goes to the underlying matter which was being discussed, a bulletin board which Respondent had put up and which contained a quote from Niccolo Machiavelli which, according to Jimenez, both Albetta and Jimenez found inappropriate, offensive, and a “not-so-veiled threat” against one or both of them (T. 534-5, 539, 540). The quote was “[a] prince should be careful not to seriously injure those working closest with him. These people will attack and kill you” (T. 534). Respondent explained that the quote was chosen by the students as the result of a contest, and appeared along with many other quotes also chosen by the students (R15). There was also testimony that this quote appeared on the Regents exam later that year (T. 1084-5).

It is not necessary for me to determine whether or not the posting of the quote was appropriate, but I mention the background again in the context of the overall tone of the case. This charge, however, is about whether Respondent failed to follow a directive to remove the bulletin board. He is charged with failing to remove it on or about November 30, 2012, after being instructed by Jimenez to do so. In his letter memorializing a meeting about this incident, Jimenez stated that on November 30, he asked Respondent to remove the quote from the bulletin board (D24). He did not explicitly so state during his testimony. Respondent denies being told by Jimenez to remove the bulletin board on November 30 (T. 1581-2), but recalls telling him that if he didn't like it he should feel free to take it down (T. 1580). Respondent claims that he was not instructed to remove the bulletin board until the meeting which took place on December 7, and once he was so instructed he promptly did so. Although he requested that the directive be put in writing, he ultimately concluded that since he was recording the meeting, having the directive on tape was sufficient (T. 1583). No one disputes that he removed the quote from the bulletin board after the December 7 meeting.

The Respondent's insistence that no one asked him to remove the bulletin board prior to December 7 is directly contradicted by an email from Jimenez to Respondent dated December 4, 2012 at 1:43pm, which appeared as the third page of D24. In that email, Jimenez says "[I]ast Friday [November 30] I asked you to remove a bulletin board quote that may be considered inappropriate. You have failed to remove the bulletin board." This email not only corroborates Jimenez' recitation in his December 7 letter that he had that the quote be removed on November 30, it also strikes at Respondent's credibility in asserting that no one asked him to take it down prior to the meeting. Even if Jimenez did not so direct on November 30, he clearly had done so by December 4, and the quote remained in place at the time of the meeting on December 7. Although Respondent defended the work on the bulletin board, he did not assert that the

Principal did not have the right to ask for it to be removed, or that he did not have to follow such a directive. In fact, he was quick to point out that as soon as he had what he deemed to be an appropriate directive, he followed it.

The Department has established, by a preponderance of the evidence, that Jimenez ordered the quote to be removed, verbally on November 30, and in writing on December 4, and that Respondent failed to follow either of those directives. Respondent is culpable of the conduct charged in Specification 3.

SPECIFICATION 4

[REDACTED]

PENALTY

Respondent has been found culpable of the conduct charged, with respect to the first set of Specifications, in Specifications 1.1, 1.2, 1.3(b), 1.3(c), 1.3(d), 1.4, 3, 4.3, 4.5(b), 8, 10.1(a), 10.1(d), 10.3, 12.1, 12.2, 14, 15 and 16; and with respect to the second set of Specifications, Specification 3. In so finding, I deem Respondent's behavior to have been insubordinate on a number of occasions, such conduct being misconduct, conduct unbecoming his position, and conduct prejudicial to the good order, efficiency or discipline of the service. I do not find any of these sustained charges to call for findings of discrimination, neglect of duty or a violation of any Chancellor's regulation. Nor do I find that, taken together, including the charges going to incompetency, that they constitute substantial cause rendering Respondent unfit to perform properly his obligations to the service. The only question which remains then, is that of penalty.

My view of the circumstances and atmosphere surrounding this case should be apparent by now. It is almost inconceivable to me that grown men could have allowed a situation like this to deteriorate so severely that someone's job is now at risk. It seems incredible that no amount of leadership or intervention on the part of Mr. Jimenez could have thwarted the ultimate course here. And yet here they all sat, pointing fingers and making accusations across the table, so committed to their own animosity that almost everyone involved exaggerated and took liberties with the truth. It was a painful exercise to watch. For every person who claimed to be the rational, calm actor in a given setting, several witnesses were available to explain why that person was lying and not to be trusted. The depth of negative feeling expressed by numerous witnesses for the Respondent about the types of individuals they deem Jimenez and Albetta to be, and the manner in which they run the Manhattan Center, was enough to cause this Hearing Officer serious concern²⁹. Many of these witnesses expressed their concern that the administration was somehow aligned against the union, but there was no credible evidence adduced that any of the actions taken against the Respondent, a teacher who favored the union but held no positions therein, were motivated by union animus.

Rather, a deep personal antagonism between Respondent and Albetta spilled over into his relationship with other administrators, and may have even affected his performance in the classroom. I find responsibility for the perpetuation of these circumstances on both sides, and have already accounted for this by excusing some of Respondent's conduct and discounting some of the administration's criticism of him. I am still left, however, with two serious instances

²⁹ See, for example, the testimony of Eric Cohen (recounting public rants by Jimenez and crude language used by Albetta, T. 942-963); Wendy Muskat (opining that Albetta is not a fair and kind individual, and puts himself above others, T. 1018, 1011); Robert McHugh (opining that "the truth is a cheap commodity" in this administration, and finding Albetta to be truculent, combative, cold and accusatory, T. 1047, 1059); Latoya Martin (who observed, as chapter chair during many of Respondent's disciplinary meetings, that it seemed to be the goal of the administration to antagonize Respondent, T. 1123); and Evan DeCruz (who cited derogatory and ethnic slurs used by Albetta, and recounted Albetta's promises to get rid of Respondent and make other changes when he became an Assistant Principal, T. 1729-1749).

of insubordination – the “faggot” episode, and his conduct during the faculty meeting of May 16, 2012 – as well as some lesser matters for which a penalty must be assessed.

I have reviewed the cases provided to me by both the Department and the Respondent on the issue of penalty. The Department asks me to liken this case to those in which termination was found to be an appropriate penalty for grossly insubordinate and confrontational behavior. While I do not condone, in any way, the Respondent’s conduct which has resulted in guilty findings herein, I find that the overall tenor of his relationship with the administration to be a mitigating factor in this case. If Respondent was the sole cause of the acrid tone between the parties, then there should be no mitigation, but he was not. The administrators at Manhattan Center played an active role in perpetuating the animosity which is at the heart of this case. As early as June 2010, aware that Albetta had some sort of issue with him, Respondent asked Albetta to address the problems between them, to be honest and tell him what the problem was. His methods at that moment were inappropriate, but the fact that he was seeking to air their differences and find a resolution was not. Albetta played dumb, claiming not to know what he was talking about, but I reject that assertion based on the entire record before me. Rather than find an opportunity to speak “man to man” with Respondent, he ran to Jimenez over and over again to complain about every slight he felt visited upon him by Respondent. Jimenez continually promised to “take care of it,” but it seems he was incapable of doing so.

Respondent, nonetheless, bears his share of responsibility. Of the cases provided to me by the Respondent on the issue of penalty, I find the language used by Hearing Officer Howard Edelman in *Matter of V.S.* to be instructive. Edelman said:

Teachers do not function in isolation and to the extent they are confrontational and non-cooperative, collegial relationship and even student learning may be adversely affected. Also, there is no doubt that [respondent] must comply with lawful directives given her. While she has a right to disagree with them and articulate her disagreement, she does not have a right to flout them.

Matter of V.S. at 25.

In that case, Edelman imposed a fine of \$5000, which he deemed put the respondent therein on “unequivocal notice of her obligation to function collegially within the school setting, as well as her obligation to comply with her supervisor’s orders.” *Id.* at 25-6. But the conduct of respondent in that case was far less severe than that with which Respondent herein has been found guilty. The purpose of penalty in 3020-a cases is corrective, and should be only as severe as necessary to insure that the respondent understands the wrongfulness of his conduct and is inhibited from repeating it in the future. Respondent, throughout this case, was convinced of the rightful nature of his actions. The penalty must be much more than a slap on the wrist if I am to have any level of confidence that similar behavior will not be repeated in the future, *even when the Respondent thinks he is right*. He should also understand that his behavior could have resulted in termination had it not been for the aggravating and mitigating circumstances which have been discussed herein. For these reasons, I am imposing a substantial fine of \$15,000, to be deducted from Respondent’s pay over a period of two years.

In addition, to address legitimate issues of pedagogical performance, and to get Respondent back on track and focused on teaching, he is ordered to take two courses, one addressing lesson planning, and the other addressing the assessment of student performance during class. Respondent’s persistent focus of the form of his lesson plans left me unable to assess the overall substance of his lesson planning, and further development in this area will, I believe, improve many aspects of his performance in the classroom. Similarly, the question of student assessment was often side-stepped by the excuse that there was insufficient time to assess because this was a two-day lesson, and the next day’s assessment, if it occurred was never addressed. This is a crucial skill to insure that students understand the lesson delivered, and

Respondent can benefit from a refresher in this area. These courses will be at the Department's discretion, and at Respondent's expense.

CONCLUSION

The Department argued that Respondent, driven by his ego, is unable to listen to scrutiny or advice and, as such, he is beyond remediation. It concluded that any administrator in the future would face nothing hostility and belligerence from Respondent, and therefore I am urged to terminate his employment. I do not, however, reach a similar conclusion. There is nothing in this record to suggest that hostility, belligerence and an unwillingness to cooperate with administrators were ever part of this Respondent's character and behavior prior to the events in question here. AP Bradley, who offered perhaps the most objective view of Respondent of any of the witnesses at trial, himself stated that Respondent was professional, cooperative, willing to learn, and that he had tremendous potential. Their interaction only deteriorated when the ongoing personal dispute between Albetta and Respondent seeped into his relationships with all his supervisors. Respondent has been stringently penalized for his part in allowing that to occur. I believe, however, that he is capable of, and deserving of, a fresh start.

By reason of the foregoing, the undersigned issues the following

AWARD

1. On the first set of charges, Respondent is culpable of the conduct set forth in Specifications 1.1, 1.2, 1.3(b), 1.3(c), 1.3(d), 1.4, 3, 4.3, 4.5(b), 8, 10.1(a), 10.1(d), 10.3, 12.1, 12.2, 14, 15 and 16. On the second set of charges, Respondent is culpable of the conduct charged in Specification 3.
2. On the first set of charges, Respondent is not culpable of the conduct set forth in Specifications 1.3(a), 2, 4.1, 4.2, 4.5(c), 4.6, 4.7, 5, 6, 7, 9.1, 9.2, 9.3, 10.1(b), 10.1(c), 10.2, 11.1, 11.2, 11.3, 12.3, 13, 17 and 18. On the second set of charges Respondent is not culpable of the conduct charged in Specification 1, 2 and 4.
3. Specifications 4.4 and 4.5(a) are dismissed.
4. For the violations listed in paragraph 1 above, Respondent shall pay a fine of \$15,000, to be deducted from his pay over a period of two years.
5. Respondent shall take, at his own expense and at the Department's discretion, courses addressing the issues of lesson planning and assessment of student work.

Dated: July 15, 2013



LISA BROGAN, Hearing Officer

AFFIRMATION

I, Lisa Brogan, do hereby affirm upon my oath as Hearing Officer, that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Dated: July 15, 2013



LISA BROGAN