

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION	::	DOE DOCKET NO. 276-9/12
OF THE TENURE CHARGE	::	
between	::	
STATE OPERATED SCHOOL DISTRICT,	::	
CITY OF NEWARK,	::	
Petitioner,	::	OPINION
-and-	::	AND
OWEN NEWSON,	::	AWARD
Respondent	::	

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATES OF HEARING: November 27, 2012; December 5, 2012;
December 13, 2012; December 21, 2012

DATE OF AWARD: January 10, 2013

APPEARANCES:

For the Petitioner:

Rita Barone, Esq., PURCELL, MULCAHY, O'NEIL & HAWKINS, LLC
 Shonda Davis, Principal Barringer H.S. (11/27/12)
 Christina Wallace, Vice Principal Barringer H.S. "
 Antonio Lopes, Social Studies Dept. Chair Barringer H.S. (12/5/12)
 Dana Chibbaro, Director of Social Studies & Multicultural Ed. "

For the Respondent:

Kathleen Naprstek Cerisano, Esq. ZAZZALI, FAGELLA, NOWAK,
 KLEINBAUM & FRIEDMAN, P.C.
 Owen Newson, Respondent

Terry Jefferson, Former English Dept. Chair Barringer H.S. (12/13/12)
Delores Phelps, English Inclusion Teacher Barringer H.S. “
Michael Caputo, Staff Representative Newark Teachers Union (12/21/12)
Jose Gomez Rivera, Former Social Studies Teacher, Barringer H.S. “

I. BACKGROUND OF THE CASE

Owen Newson is a tenured and long-time social studies teacher of 23 years with the State Operated School District City of Newark (“the Newark School District”) At all times relevant for the purposes of the instant case, Mr. Newson taught at Barringer High School during the 2010 – 2011 and 2011-2012 school years. After numerous spot observations, formative observations and evaluations commencing in September 2011, in March 2012, Mr. Newson was notified that the Newark School District planned to bring tenure charges against him on the basis of inefficiency.

As required under the tenure statute, a 90 day improvement plan was implemented. However, on July 20, 2012, Barringer Principal Shonda Davis filed a NOTICE OF INEFFICIENCY CHARGES (“Notice”) against Mr. Newson, pursuant to N.J.S.A. 18A:6-10 and N.J.A.C. 6A:3-5.1. In pertinent part, this asserted that during the period from September 2011 to the present, Respondent had demonstrated an inability to completely and responsibly execute his duties as a teacher. The Notice concomitantly concluded that Mr. Newson had failed to improve in certain areas set forth, despite the

provision of a 90 day improvement period. These were specifically found to include: a. demonstrating knowledge of content and pedagogy; b. demonstrating knowledge of students by attempting to engage them through learning about their backgrounds and learning styles; c. failing to implement curricular goals and objectives; d. failing to design coherent instruction; e. failing to assess student learning as to each individual student's needs rather than the whole; f. failing to create an environment of respect and rapport; g. failing to manage student behaviors; h. failing to manage classroom procedures; i. failing to establish a culture of learning; j. failing to use questions and discussion techniques with flexibility and responsiveness; k. failing to engage students in learning; l. failing to provide feedback to students; m. failing to attain student achievement that meets or exceeds performance benchmarks; n. failure to consistently prepare lesson plans with clear, specific, measurable instructional objectives and standards.

Of the above categories, marginal improvement was noted by the principal with regard to paragraphs c. (curricular goals and objectives); f. (creating an environment of respect and rapport); g. (managing student behaviors); h. (managing classroom procedures); j. (use of question and discussion techniques); l. (providing feedback to students); n. (consistent preparation of lesson plans). On September 7, 2012, the Newark School District adopted a resolution which Inter alia certified tenure charges to the

On September 28, 2012, Respondent Newson by Counsel Cerisano filed an ANSWER TO CHARGE ONE – INEFFICIENCY. This initially and specifically denied the allegations contained in paragraphs a. through n. of the charge, and further affirmed that: Mr. Newson was not and is not an inefficient employee, as evidenced by the 22 years of “Proficient” and “Satisfactory” evaluations which he received prior to the 2011-2012 school year; Mr. Newson was not afforded the requisite 90 days from the notice of inefficiency to improve his performance; the District was required to promulgate a Performance Improvement Plan jointly with Mr. Newson, but instead promulgated its plan unilaterally; the District failed to provide Mr. Newson with reasonable assistance in satisfying the requirements of his Performance Improvement Plan; the evaluations of Mr. Newson which indicate unsatisfactory ratings were incorrect, inaccurate and invalid; the District failed to abide by its own procedures and timeline with respect to bringing inefficiency charges against Mr. Newson and therefore the charges are invalid and should be dismissed. Nine SEPARATE DEFENSES were also articulated by Respondent’s ANSWER.

On October 2, 2012, Director Duncan notified the subject parties that following receipt of Respondent’s ANSWER on October 1, 2012, the

captioned tenure charges had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary. She went on to advise that they had accordingly been referred to me for hearing and determination. On October 4, 2012, I sent a correspondence to the parties advising of the foregoing, and

proposing potential dates for a conference call, and hearing dates. The conference call took place on October 16, 2012, and on October 18, 2012, a scheduling order was issued outlining the time period within which: interrogatories within the statutory limit of 25 with no subparts should be propounded and answered; witness lists and statements should be supplied; evidence should be provided by Respondent. Initial hearings were then scheduled for November 15, 2012 and November 27, 2012.

In the aftermath of Hurricane Sandy, the law offices of counsel were closed for the period of a week. This limited access to client files necessary for compliance with discovery requests; restricted Email communication at the outset; and by virtue of the closure of the New Jersey State Board of Mediation in Newark, New Jersey, required the cancellation of the November 15, 2012 hearing. After close communication with Ms. Barone and Ms. Cerisano, the discovery schedule was modified to now reflect a November 15th due date, with an extension request made to Ms. Duncan. I made this application in a letter dated November 9, 2012, which cited the foregoing

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exceptional circumstances and asked that the initial statutory period of 45 days be extended until the hearing date of November 27, 2012. Ms. Duncan graciously granted this request in her November 13, 2012 letter, which confirmed that the 45 days for issuing the AWARD would now commence

on the first hearing date. This correspondence was entered into the record

on November 27th, along with my evidentiary ruling on the threshold issue.

All statutorily required time lines for the provision of witness lists,

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On November 15, 2012, Kathleen Naprstek Cerisano, Esq., counsel for Respondent Newson forwarded a letter to Rita Barone, Esq, counsel for Petitioner Newark School District. and I concerning the scope of the arbitration. This stated that it had come to her attention, that in other inefficiency proceedings currently pending before arbitrators assigned by the Commissioner of Education, the Newark School District had taken the incorrect position that because the procedures and timelines of the new tenure law were applicable to tenure charges certified after August 6, 2012, then all other provisions must also apply. More particularly, that in the case of inefficiency, the arbitrator shall only consider 4 very limited issues set forth in N.J.S.A. 18A:6-17.2 (a). Ms. Cerisano argued, however, that it is apparent that the restrictions set forth in N.J.S.A. 18A:6-17.2 only apply if the charges of inefficiency have been brought pursuant to N.J.S.A. 18A:6-17.3 (Section 25 of the Act). In turn, N.J.S.A. 18A6-17.3 provides that tenure charges for inefficiency must be based upon "evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. 2012 c 26. Finally, Ms. Cerisano reasoned that N.J.S.A. 18A:6-123 provides that the State Board of Education shall promulgate regulations to set standards for the approval of evaluation rubrics submitted by school districts in accordance with those standards however these regulations have not yet been written let alone enacted. In her November 21, 2012 correspondence, Ms. Barone disagreed with the Respondent's interpretation of the statute, countering that this contradicted my own ruling during our initial conference call; maintaining that the case is governed by the TEACHER EFFECTIVENESS AND ACCOUNTABILITY FOR THE CHILDREN OF NEW JERSEY ACT, which took effect at the beginning of the 2012-2013 school year; in fact, the N.J. DOE accepted this tenure charge filed on or about September 13, 2012 under the Act and found the charges to be sufficient by referring the same to arbitration pursuant to N.J.S.A. 18A:6-16. See also N.J.S.A. 18A:6-17.3 ("The Commissioner ... shall refer the case to an arbitrator ... unless he determines that the evaluation process has not been followed."). On November 26, 2012, Ms. Cerisano filed a reply to Ms. Barone's letter, which substantially argued that the pending tenure charges clearly were not filed "pursuant to Section 25" of the Act.

As I indicated in a prior Email to counsel, this matter was initially addressed prior to the commencement of the November 27, 2012 hearing. During an Executive Session convened I credited the position of the Petitioner that the opinion of the DOE was of no (continued)

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evidence, etc. were adhered to by the parties.

In addition to November 27, 2012, additional tenure hearings were conducted at the New Jersey State Board of Mediation, Gateway II Building, in Newark, New Jersey, on December 5, 2012, December 13, 2012, and December 21, 2012. A verbatim transcription of the proceedings was recorded by GAF LEGAL SERVICES, INC. At hearing, counsel were provided with a full

opportunity to engage in oral argument; to introduce relevant documentary evidence; and to examine and cross-examine sworn witnesses under oath. Mr. Newson was present in the hearing room at all times, and in the event an Executive Session was convened, the reason for and outcome of the same was explained at its conclusion. The advocates opted for post-hearing letter briefs with supporting case citation in lieu of closing arguments. These submissions were forwarded to me in WORD format via Email by the close of business January 3, 2013, with the cases sent via Regular Mail. This AWARD is issued within the revised 45 day time period

(Footnote 1, continued)

moment. That said, I advised that I had independently confirmed with Ms. Duncan that the evaluation rubric to be adopted by all boards and approved by the Commissioner had a January 2013 submission date. Further, pursuant to [26] 25.d of the ACT, “[t]he only evaluations which may be used for the purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner.” Accordingly, I found that since the ACT was approved on August 6, 2012, the evaluations that took place before that date and underpin the inefficiency charges would not qualify. The old standard of review of a *preponderance of the credible evidence* would therefore apply, and counsel were invited to submit prior OAL and Commissioner decisions germane to this issue. In so ruling, I expressly acknowledged that my prior finding on this issue was incorrect based upon the plain language of the statute.

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prescribed by the ACT.

II. FRAMING OF THE ISSUE

Whether the Newark School District has established the inefficiency charge against Mr. Newson by a preponderance of the credible evidence, and if not, what shall be the remedy?

III. RELEVANT STATUTORY LANGUAGE

P.L. 2012, Ch. 26 (TEACHNJ) ACT

* * *

8. N.J.S.A. 18a:6-16 Is amended to read as follows;

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section [23] 22 of P.L. 2012 Ch. 26 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

[17] 16 (New Section) a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other

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teaching staff members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

* * *

[18] 17. (New Section) a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section [17] 16. of P.L. 2012, Ch. 26. The Board of Education shall adopt a rubric approved by the commissioner.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C:52:14B-1 et seq.) to set standards for the approval of evaluation rubrics for teachers, principals, and vice-principals. The standards at a minimum shall include: ****

* * *

[23] 22. (New Section)

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. , c. (C (pending before the Legislature as this bill):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any

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additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall

render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the

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start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

[24] 23. (New Section) a. In the event that the matter before the arbitrator pursuant to section [23] 22 of this act is employee inefficiency pursuant to section [26] 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

- (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
- (2) there is a mistake of fact in the evaluation;
- (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;
- (4) the district's actions were arbitrary and capricious.

(b) In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

(d) The board of education shall have the ultimate

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burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

[25] 24. (New Section) The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedures Act," P.L.1968, c.410 (C.52:14B-1 et seq.), in accordance with an expeditious time frame, to set standards for the approval of evaluation rubrics for all teaching staff members, other than those included under the provisions of subsection b. of section [18] 17. of P.L. , c. (C.) (pending before the Legislature as this bill). The standards at a minimum shall include: four defined annual rating categories: ineffective, partially effective, effective and highly effective.

[26] 25. (New Section) a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of the law to the contrary, in the case of a teacher, principal, assistant principal, and vice principal:

(1) The superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next summative evaluation. If the employee is not rated effective or highly

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effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

* * *

(d) The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. , c. (C.) (pending before the Legislature as this bill).

[27] 26. (New Section) The commissioner shall have the authority to extend the timelines in the tenure charge process upon a showing of exceptional circumstances.

IV. CONTENTIONS OF THE PARTIES

The Position of the Petitioner Newark School District

Pursuant to N.J.S.A. 18A:6-10, a tenured teaching staff member cannot be “dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, or other just cause.” The statutory status of a tenured employee may not be lightly removed. Tenure protects teachers from arbitrary dismissal for “unfounded, flimsy or political reasons.” Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of “a competent and efficient school system” by affording teachers a measure of

security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949). The determination of whether to remove a teacher from a

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tenured position requires consideration of the nature of the act, the totality of the circumstances, and the impact on the teacher's career. In re: Fulcomer, 93 N.J. Super, 404, 421 (App. Div. 1967).

As the petitioner, the District bears the burden of proof and consequently to prevail in the instant case, the truth of the charges must be established by a preponderance of the "credible evidence." Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); see also In re: Tenure Hearing of Grossman, 127 N.J. Super 13, 23 (App. Div. 1974) *cert. denied* 65 N.J. 292 (1974); In re: Philips, 117 N.J. 567, 575 (1990). The term "preponderance" has been defined as the "greater weight of the credible evidence in the case," as testified to, at trial by the witnesses. State v. Lewis, 67 N.J. 47 (1975).

"A charge of inefficiency constitutes an allegation that while a teacher has the capacity to perform ably, he nonetheless failed to do so." Gilmer v. State-Operated School District of the City of Newark, OAL DKT. NO. EDU 13895-08 and OAL DKT. NO. EDU 13560-09, 2011 N.J. AGEN LEXIS 300 at * 60 (OAL May 6, 2011). In establishing a charge of inefficiency, "the district is required to inform the employee with specificity where his performance is inefficient, and further inform him that, unless the inefficiencies are corrected within a minimal ninety-day period, it intends to

certify those charges of inefficiency with the Commissioner.” Id.

The Legislature has imposed a number of obligations on a local board of education that seeks to remove a tenured employee on grounds of inefficiency in this State, which are set forth in the regulation N.J.A.C. 6A:3-5.1(c) and the statute N.J.S.A. 18A:6-11. The parameters of the regulation and statute were reviewed by the Appellate Division in Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super. 65 (App.

Div. 1985), and it was held that:

[t]he Commissioner of Education has consistently construed the statutory mandate in the light of this guideline, concluding that ‘if a board chooses to file tenure charges of inefficiency against any teacher, the administration bears the heavy responsibility to render positive assistance to the teacher in an effort to overcome his inefficiencies.’

....

. . . [u]nder N.J.S.A., 18A:6-11, a local board of education is duty bound to assist a tenured teaching staff member, against whom it has filed charges of inefficiency, in improving his teaching performance before removing him from his teaching position. The rationale underlying this rule is that a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he is still capable of effective teaching. He can only avail himself of that opportunity if he understands clearly the basis for the criticism supporting the allegations of inefficiency and is offered constructive advice as to how he might restore his teaching skills.

Id. at 71 (citations omitted). Thus, in Rowley, the Court concluded that the district is required to “make reasonable efforts to provide assistance to the teaching staff member to overcome the specific inefficiencies.”

Further, in Gilmer, 2011 N.J. AGEN LEXIS at *62-63, the administrative law judge found the analysis in Green Brook School District v. Fodor, 1984 S.L.D. 269, 284, *affirmed*, State Board, 1984 S.L.D. 297, to be instructive with regard to a school district’s obligations during the ninety-

day period. In Green Brook, the Commissioner of Education held:

No particular pattern or scheme of assistance or approach by a school board is required during the 90 day period. Each case must, therefore, be judged on its own merits. A determination must be made concerning whether the 90 day period was reasonably implemented so that the teacher had a fair opportunity to improve.

Id. at 284.

With regard to Respondent’s assertion that any portion of the assistance given to him must come from a specific person employed by the District, such as his supervisor, an administrative law court has determined that such is not a valid argument. In Gilmer, 2011 N.J. AGEN LEXIS at 63, the tenured teaching staff member argued that the school district failed in its obligations to provide him with meaningful assistance because model lessons and other assistance needed to come from the principal of the school where

he worked. Id. However, the administrative law judge held that “nowhere does the law require that the school principal herself directly provide the support and assistance needed.” Id.

To the extent that Respondent challenges his evaluations, one court in the context of a tenure hearing has held that the evaluator’s determination in an evaluation is afforded deference. In Harvey v. State-Operated School District of the City of Newark, OAL DKT. NO. EDU 10914-96N, 1998 N.J. AGEN LEXIS 453 (OAL, August 21, 1998), in response to a tenure charge brought against her, a principal criticized the way in which her supervisor conducted the evaluation of her and the conclusions he reached. Id. at *16. The administrative law judge rejected the principal’s arguments. Id. at *16-17.

Specifically, the ALJ noted that “evaluations of performance are a matter of professional judgment and are necessarily ‘highly subjective.’” Id. at *17 (quoting Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County, 1968 S.L.D. 7, 10, aff’d by State Board, 1968 S.L.D. 11, aff’d by Appellate Division, 1969 S.L.D. 202.) Accordingly, in order to challenge the “correctness” of evaluations, a teaching staff member must allege facts to show that the “evaluation” was made in bad faith, the result of personal animosity or bias, or in other ways

improper.” Id. (quoting Ruch, 168 S.L.D. at 11-12). A teacher’s mere disagreement with the evaluation is insufficient. Id.

After a tenure charge of inefficiency is found to have been proved, a determination must be made as to the appropriate penalty. “Factors to be taken into account in making a penalty determination include the nature and circumstance of the incidents or charges, the teacher’s prior record and present attitude and any harm or injurious effect that the conduct at issue will have on the proper administration of the schools.” Gilmer, 2011 N.J. AGEN LEXIS at *69 (citing In re MacDowell, 96 N.J.A.R.2d (EDU) 644; In re Fulcomer, 93 N.J. Super. 404-12 (App. Div. 1967).

This matter was heard over four days on November 27th, December 5th, December 13th and December 21st, 2012. NPS presented the testimony of Shonda Davis, Principal of Barringer High School, Christina Wallace, Vice Principal and prior Department Chair of Social Studies at Barringer High School, Antonio Lopes, present Department Chair of Social Studies at Barringer High School and Dana Chibbaro, District Director of Social Studies along with Documentary Exhibits marked P1-83. Documents and transcripts of the testimony have been provided to the arbitrator during the course of the hearing. Such documents and testimony will be referenced herein, but will not be attached.

NPS previously submitted the above outline of legal argument to the arbitrator based on the arbitrator’s ruling that the standard of “a preponderance of the evidence” would be used to determine this matter. Essentially, the arbitrator determined that he should apply the burden of proof as interpreted by New

Jersey case law under N.J.S.A. 18A:6-10;11 and N.J.A.C. 6A:3-5.1 prior to the passage of the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act in August of 2012. On behalf of NPS, the undersigned objected to the application of the prior law and submitted legal argument pursuant to a letter submission dated November 21, 2012. NPS hereby preserves this legal issue for appeal and continues to contend that the arbitrator's review should be limited to the new standard set forth in N.J.S.A. 18A:6-17. Specifically, the arbitrator's review should be limited to whether:

- 1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
- 2) there is a mistake of fact;
- 3) the charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
- 4) the district's actions were arbitrary and capricious.

NPS also contends that the appropriate standard of review does not allow

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the arbitrator to substitute his judgment for the quality of the teaching determined by the evaluators. "The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review." N.J.S.A. 18A:6-17.2(c).

In its original charge of inefficiency against Respondent, NPS asserted the following:

- a. The Respondent has failed to demonstrate knowledge of students;
- b. The Respondent has failed to implement curricular goals and objective(s);
- c. The Respondent has failed to assess student learning;
- d. The Respondent has failed to create an environment of respect and rapport;
- e. The Respondent has failed to manage student behavior;
- f. The Respondent has failed to manage classroom procedures;
- g. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness;
- h. The Respondent has failed to engage students in learning;
- i. The Respondent has failed to provide feedback to students;
- j. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks;
- k. Respondent has failed to comply with the School Directives;
- l. Respondent has failed to demonstrate knowledge of content and pedagogy;
- m. Respondent has failed to design coherent instruction;
- n. Respondent has failed to establish a culture of learning;
- o. Respondent has failed to prepare lesson plans with clear, specific, measurable instructional objectives and assessment standards;
- p. Respondent has failed to grow and develop professionally; and
- q. Respondent has failed to submit lesson plans on time.

The majority of the charges of inefficiency noted above are closely aligned

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with the evaluative tool used by NPS in assessing Respondent's teaching. Based on a preponderance of the documentary and testimonial evidence submitted, NPS has met its burden that Respondent is inefficient in all of these regards.

First, Respondent was rated unsatisfactory and/or basic in all areas assessed in Domain #1 of the evaluation tool in every Formative Observation during the 2011-12 school year. These Domain areas correspond to charges (a), (b), (c), (l) and (m) above. See P13; P29; P44; P63 and P67. In fact, even after

the 90 day improvement period and after being provided with months of support from a Master Teacher prior to the 90 day improvement period, Respondent had not improved even minimally in two of the Domain #1 areas, specifically knowledge of his students and assessing student learning. See P67.

Second, under Domain #2, Respondent was rated unsatisfactory and/or basic in all areas assessed in every Formative Observation. This corresponds with charges (d), (e), (f) and (n) above. See P13; P17; P29; P44; P56; P59 and P67. In fact, charge (n), which essentially assesses

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Petitioner submits that although Respondent appears to argue that the evaluative tool used was new as of the 2011-2012 school year, testimonial and documentary evidence contradicts that assertion and demonstrates that NPS has used the same evaluative tool to assess its teachers for numerous years. See 11/27 Transcript at p. 48.

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whether the teacher creates an environment so that students can be engaged in learning, was rated unsatisfactory in all observations and evaluations except for on one occasion where it was rated a basic by Mr. Lopes. Even then, Mr. Lopes noted in his May 4th observation that a number of Respondent's students were not engaged throughout the lesson. P56. Respondent's consistent failure to meaningfully engage his students was also noted by Mr. Lopes in a number of his spot observations no matter the class period observed. See e.g. P30 – Spot observation of B3 class (“Most students were passive listeners. 2 students (by the door) had their heads down”); P32 – Spot observation of A4 class (“2+ students (seated by window”) were engaged in a conversation...1 student (by the teacher's desk) had his head down...4 students participated in the class discussion, while 4 were listening to the discussion.”); P36 – Spot observation of

A1 class (“1 student had his head down and would not respond to the teacher’s directions...1 student seated by the teacher’s desk did not write down the answer to the various questions assigned by the teacher...1 student seated by the cabinet did not write down her answers and did not participate in the discussion..”); P38 Spot observation (only 4 students participate in the discussion out of 9); and see P45 Spot observation A1 class (only 50% of the students were on task).

Respondent’s constant failure to engage his students is also deemed

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unsatisfactory and/or basic when assessing areas contained within Domain #3 by all of the evaluators. The areas assessed under Doman #3 correlate with charges (g), (h), (i) and (j) above. As testified to by Ms. Wallace, Domain #3 is the most highly weighted area in the evaluative tool because it focuses on instruction. In this area, even after the 90 day period of support and after months of support from a Master Teacher that started prior to the 90 day period, Respondent made no improvement in the areas of engaging student learning and attaining student achievement; arguably the two most important areas of teaching. See P67.

Of particular significance in Domain #3 is Respondent’s failure to use other techniques of teaching other than teacher driven instruction which in turn did not keep his students engaged in learning. This is noted by all the evaluators during all formative observations. See P13 – page 5 (“Students were observed for majority of the class period listening to lecture and teacher centered

discussion as well as copying lengthy notes from the overhead projector into notebooks.”); P17 – page 5 (“Throughout the lesson, most students were disengaged and off task... This means that 50% of the students were off task as evidenced by their heads being down on the desk or they were sitting at the desks staring at the wall.”); P44 – page 4 (“Teacher talk dominated the lesson and most of the questions were simple recall. The students were only minimally engaged in the lesson through

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compliance and only during the part where they had to complete the chart which was the last fifteen minutes of class.”); P56- page 4 (“Half of the class time was used to provide notes using the overhead projector and as a result, several of the students were engaged in side conversations and two students were observed using their cell phones.”); P59 - page 4 (“Mr. Newson did too much talking, and much of the discussion was teacher led... Not all students participated in the lesson.”).

In addition, the District’s Director of Social Studies, Dana Chibbaro, noted in her testimony the following observations, which testimony as noted above, is consistent with the observations and comments of the three other evaluators as to Respondent’s teaching. For example, as noted by Ms. Wallace and acknowledged by Respondent in his testimony, Respondent admitted to Ms. Chibbaro that “as far as he was concerned it was only his job to deliver the instruction, not his job to ensure that the students were engaged in it...” 12/5

Transcript at p. 190, and if he was “given the right kind of kids [he] would be an excellent teacher.” 12/5 Transcript at P. 210.

Moreover, as recounted by Ms. Wallace and Mr. Lopes’ during their observations both formative and spot, Respondent’s lesson was not engaging for the students which was evidenced by “four student that were obviously engaging in inappropriate language across the room. There were

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numerous students that were texting on their phone, there were two student engaging in taking pictures of each other with their phones...” See 12/5 Transcript at Ps. 192-193.

Finally, as also noted by all evaluators, Ms. Chibbaro indicated in her testimony that in Respondent’s lesson, “most of the activities were absolutely teacher-directed not student centered, which is obviously, not going to get the kind of student engagement that you want.... and there was no attempt to differentiate instruction... nor did it appear that Mr. Newson even knew what the learning profiles of the students were.” See 12/5 Transcript at Ps. 195-200. Further, Ms. Chibbaro noted that there was “no checks for understanding... and [Respondent] didn’t even take anecdotal notes on students... which is another way to assess students.” See 12/5 Transcript at P. 204. This last comment is very similar to what was noted by Ms. Jefferson in her observation of Mr. Newson wherein she too indicated she saw no use of formative assessment to determine what if anything the students learned. 12/13 Transcript at P. 360.

As such, Respondent's annual evaluation indicates the following as to Domain #3: "His primary method was lecture and reading from the text, which are the lowest forms of learning.... he has stated that since students need to listen to lectures in college, then this is the best way to teach... [As

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a result], the teacher did not engage all students in the learning process as evidenced by the lack of lesson structure..."). P67 – page 3. In fact, Respondent's own testimony supports his apparent belief that teacher driven instruction is appropriate and it was not his job to engage his students. For example, during his direct testimony, Respondent related a conversation with Ms. Wallace wherein he asked her whether "you could lead a horse to water, but you can't make them drink." He elaborated during his testimony that this analogy demonstrates the reality of urban education; that is, even though the teacher can present the material, the teacher has no control over whether the students actually learn. 12/5 Transcript – Ps. 259-60.

Although Respondent suggests in his direct testimony that this statement was philosophical, his testimony during cross-examination belies that fact. In this respect, Respondent attempted to demonstrate that his teaching technique during Ms. Wallace's first observation of him was not teacher driven. 12/5 Transcript – Ps.183-186. However, during that class when Respondent claimed to be using something other than teacher driven instruction, Ms. Wallace noted that the students were constantly unengaged. In fact, they were passing out flyers to a party, talking about the party, cursing, eating, using their cell phones,

texting and making unrelated comments. It is recounted that at one point one student made an unrelated comment about Amsterdam in Europe. (Respondent was teaching about the

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Dutch settling New York City - New Amsterdam). Inexplicably, on cross examination, Respondent suggested that this comment by the student demonstrates engagement. 12/13 Transcript at Ps. 179-180. This is a perfect example of Respondent's low expectations of his students, and thus why he believes it is appropriate to just lead the students to the learning rather than making sure through innovative and best teaching practices that his students actually learn.

Finally, the remainder of the charges (k), (o), (p) & (q) demonstrate Respondent's lack of respect for the processes his superiors have put in place to support him as a teacher. For example on numerous occasions, Respondent failed to submit his lesson plans on time or submitted them incomplete. See P4, P5, P6, P15, P16, P20, P22, P31, P41, and P52. Some of these failures even occurred during the 90 day period of support when the Respondent knew that NPS was evaluating whether to certify tenure charges against him for inefficiency. Further, warning letters contained within Respondent's personnel file indicate that he was insubordinate on a number of occasions including when he failed to revise his lesson plans as directed, failed to input grades in a timely fashion as directed and failed to follow a directive to not show an entire fictional movie as a lesson. See P20.

With regard to this last directive, on November 28th, Ms. Wallace indicated in her lesson plan review that Respondent should not show the entire fictional film, "The Patriot." See P16. Further, Ms. Wallace recounted that Respondent was told verbally to not show the film on November 29th. See P20 and 11/27 Transcript at Ps. 213-215. Despite these directives, Respondent showed the film over two lessons on November 30th and December 2nd. On November 30th, he showed the film for at least 60 to 80 minutes. He did so, not only ignoring the directive, but also demonstrating that he did not believe in the importance of engaging his students in learning.

Ms. Shonda Davis observed Respondent's class while he showed this film. She testified candidly that she intended to do a limited spot observation, but instead stayed the entire period, and did not write the observation up because she did not want Respondent to question her feedback, but wanted to have an honest conversation with him. Significantly, Ms. Davis testified, that after the class she questioned Respondent about whether the students were engaged in learning while watching the film for the entire block. Respondent answered that he thought the students were engaged because they were actually watching the T.V. However, as Ms. Davis noted there was nothing on the students' desks while they watched the film and there was nothing provided to the students to assess their learning. Respondent could not know if the

students were engaged because at no time was their learning assessed. 11/27
Transcript at Ps. 65-69.

This anecdote is a perfect example of the disconnect between the Respondent and his ability to teach proficiently. As noted, Respondent thought he was engaging the students in learning because they sat there quietly and watched the film. NPS, however, is seeking teachers who make sure the student is learning; or “drinking the water” if one were to use Respondent’s analogy. It is not enough to lead the students to the water you must make sure that they drink by using active teaching techniques to engage them and assessing them throughout the lesson. This is Respondent’s ultimate failure.

In response to the above, Respondent does not draw on his 20 years of experience and institute the best practices of teaching of which he is well aware. Rather, inexplicably, he blames the students and claims that since he was never critically evaluated before, the students should continue to suffer via his inefficient teaching. When explaining why she recommended continuing with tenure charges for inefficiency against Respondent, Ms. Davis summed it up perfectly. She testified,

You have skill and then you have will, right. In order to be effective -- will is way more than compliance. And I'll get into that a little bit. Compliance can be, you know what guys, I need you to have an objective on the board.

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What is the purpose of an objective and what, you know, what makes an objective effective, right. So when you speak to skill and will, you're speaking to getting at that effectiveness of that objective, right. Not just placing an objective up on the board. It speaks to, okay, skill and will,

you know, this teacher is struggling in this capacity and these supports are provided. It speaks to whether the teacher internalizes the supports and works tirelessly to improve. Improvement doesn't just happen without effort and effort isn't just sitting there -- and I'm not making any, you know, judgments. But -- well, I guess I am. And so it's all of those things combined.

It speaks to in reference to Mr. Newson, the conversation that he and I had in the presence of Ms. Phelps who was the inclusion teacher. At one point -- and it goes back to me asking him, well, how many got it. And he eventually said a couple. And I said, what does a couple look like? And he pointed out students in the class. And I said, well, Mr. Newson, that's four or five of 20. And he said, well, what if -- and I know this. This is ingrained in me. He said, I know -- what if the kids that got it were the only kids that could? That's a problem. That speaks to a mind shift of a change in thinking that has to occur. And that comes from within. All of the coaching in the world, it's those decisions, you know. So for me, placing him on tenure charges, it was because he did not make the necessary gains that were needed to move the students we service. I didn't see evidence of that shift in that type of thinking for our students.

Additionally, comments such as you know speaking to his lecture style. If research is saying -- not Ms. Davis. If research is saying best practices indicate that, you know, students shouldn't be talked at all day, yes, we're preparing them for college and career readiness. I remember one of his conversations being about, well, in college they lecture. Well, they're not in college yet and we have to get them to a place in which they're ready to be in college. So they're not there and research says the students who are grade levels behind, that they cannot sit and listen to hours and hours worth of lecture because

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they won't retain it. We're doing students an injustice if we don't change our practice, right. That's gross negligence at its best. And that means -- that doesn't mean change your practice once or twice. That means change your practice day in and day out. That's it. And anything less is unacceptable.

In terms of Respondent's skill, during cross-examination he readily admitted to being aware of Bloom's Taxonomy and the Best Practices of Teaching. See 12/13 Transcript at Ps. 123-134. However, the testimonial and documentary evidence also demonstrates that Respondent failed to implement these well established practices with his students. Instead, Respondent characterizes these practices as either too hard for him in that it takes too much time to implement or claims that the student's abilities do not justify use of these approaches. See P13 at p. 2;

For example, although Respondent testified that he understood the concept of differentiated instruction, he still would teach at one level. He attempts to justify this by claiming that the students' knowledge base was all the same, but acknowledged that learning abilities and knowledge base are distinct. 12/13 Transcript at Ps.131-145. Respondent's failure to differentiate instruction was also observed by Respondent's prior department chair at Barringer as well, Ms. Vega-Moore. But, again, instead of implementing her recommendation to review his assessment methods in

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order to better differentiate between his students' learning ability and improve overall student performance, See Respondent Exhibit. at Bates Stamp 0001-0002, Respondent again makes excuses. In this respect, Respondent testified that essentially he did not have to implement his supervisor's recommendations, apparently even if they would help the students, because he was rated proficient. This answer begs the question. 12/13 Transcript at P. 150.

Respondent's failure to implement his supervisors' recommendations whether he was rated proficient, unsatisfactory or basic was a common theme. When cross-examined on these failures he would continue to make excuses. For example, when Ms. Vega Moore made a recommendation to provide feedback on student work and exemplify such work, Respondent claimed that his students did not like to be singled out as high achievers and that providing feedback on A papers was essentially a waste of time because the A student, he presumed, would already know what he did correct. It appeared to be completely unheard of in Respondent's world that students could learn from other exemplary work of other students. See 12/13 Transcript at P. 156-161.

Further, despite being told early on by Ms. Wallace that he should conduct a learning style inventory in order to better engage his students

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and differentiate instruction based on their unique abilities, See P 11 and 16, Respondent claimed that he complied by providing a survey concerning what were his students likes and dislikes, but then had to admit that he did not even attempt to comply with this recommendation until April of 2012 once tenure charges were served because he had a philosophical issue with determining how students' learned. 12/13 Transcript at Ps.173-174. In fact, Respondent failed to implement many of the suggestions made by Ms. Wallace in her exhaustive lesson plan reviews resulting in numerous neglect of duty memorandums. See P5, 20, 22. To make matters worse, in a series of rebuttal emails all allegedly dated December 16th, Respondent claims that his union

indicates that such is extra work and he therefore does not have to comply. See Respondent Exhibit. at Bates Stamp # 0365. Again, Respondent fails to implement this recommendation despite acknowledging that knowing how a student learns is a Best Practice of Teaching. 12/13 Transcript at P. 174.

As aptly put by the District Director's of Social Studies, Dana Chibbaro, implementing Best Practices of Teaching in the classroom is not an easy task. In this regard, Ms. Chibbaro testified:

[I]f you think anybody can do this job, not anybody can do this job, and it's built on a lot of different things other than just content knowledge, knowledge of pedagogy, there's such a human interaction part of this that, you know, you just can't put anybody in a classroom and say,

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"Here, go for it and teach," that's not what this is about. It's about relationships and about doing, you know, a job that not anybody can do. This is a hard job, it's a very difficult job. And there's a lot of components to it.

12/5 Transcript at page 228.

This is not a case where the school district failed to provide any or sufficient support to the teacher when contemplating certifying tenure charges. Rather, the record in this matter demonstrates significant support both before and after tenure charges were provided to Respondent at the end of March. First, once Respondent's evaluation in October was deemed unsatisfactory an intervention plan was developed. That intervention included among other supports, support from a District Master Teacher Patricia Wing. It is undisputed that Respondent received this support on numerous occasions beginning in early January and throughout his PIP. See P74. Further, Respondent received

support in the area of Best Practices of Teaching and how same relates to the Danielson Framework from November through February; again before tenure charges were ever provided to him. See P79 and 11/27 Transcript at P57.

Further, from the beginning of the school year, the Respondent received lesson plan reviews on at least a bi-weekly basis and had spot observations with feedback either once a week or once every two weeks along with Formative Observations throughout the year. And as was

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testified by Ms. Davis, Barringer had in place a systematic feedback system for their teachers so that they could grow and teach students' at Barringer proficiently who so sorely needed such teaching. 11/27 Transcript at Ps 58-59.

Thereafter, Respondent's PIP was detailed and full of support. In fact, Respondent tacitly acknowledges this. The only criticism of the support was that none of his administrators came in and took over his classroom and "modeled" a lesson. As set forth in our legal memorandum, at least one court has determined that such modeling is not a requirement in a 90 day PIP. Nevertheless, the testimony of Ms. Wallace indicates that she did offer to do such, but ran into other commitments and instead arranged for Respondent to observe a "model" lesson of herself in a video. 11/27 Transcript at pages 287-288. Moreover, over the course of the PIP Respondent observed "model"

lessons of a number of teachers both at Barringer and elsewhere as documented in his emails. See P75.

But it was not enough for Respondent to simply go through the motions of complying with the PIP. Rather, the support he received whether through lesson plan review recommendations, spot observation feedback, recommendations from the Master Teacher,

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recommendations in the Formative Observations and reflections from the materials and model lessons viewed needed to be incorporated into his teaching. The failure of Respondent to reflect on the supports in which he engaged during the PIP period is exemplified in the reflective questions he answered (or did not answer). Again, his reflections tended to blame the students he had versus focusing on changing his manner of teaching and demonstrated little thought as evidenced by the simple one sentence responses. See Respondent's Exhibit Bates Stamp # 0261-0292.

In conclusion, and as noted in the legal memorandum submitted previously, Respondent's challenge to the inefficient teaching charges must demonstrate that the "evaluation 'was made in bad faith, the result of personal animosity or bias, or in other ways improper.'" Harvey v. State-Operated School District of the City of Newark, OAL DKT. NO. EDU 10914-96N, 1998 N.J. AGEN LEXIS 453 (OAL, August 21, 1998) (quoting Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County, 1968 S.L.D.

7, 10, aff'd by State Board, 1968 S.L.D. 11 -12, aff'd by Appellate Division, 1969 S.L.D. 202). A teacher's mere disagreement with the evaluation is insufficient. Id. Notably, Respondent makes no such claims in this case and the documentary and testimonial evidence demonstrate that during the 2011-12 school year despite an

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abundance of feedback and support, Respondent remained ineffective as a teacher throughout.

Likewise, with regard to the 90 day period, the courts have held that “[n]o particular pattern or scheme of assistance or approach by a school board is required during the 90 day period. Each case must, therefore, be judged on its own merits. A determination must be made concerning whether the 90 day period was reasonably implemented so that the teacher had a fair opportunity to improve.” Gilmer v. State-Operated School District of the City of Newark, OAL DKT. NO. EDU 13895-08 and OAL DKT. NO. EDU 13560-09, 2011 N.J. AGEN LEXIS 300 at * 60 (OAL May 6, 2011)(citing Green Brook School District v. Fodor, 1984 S.L.D. 269, 284, *affirmed*, State Board, 1984 S.L.D. 297). The documentary and testimonial evidence in this matter demonstrates that not only did Respondent get such reasonable support during the 90 day period, but he also received feedback, support from his supervisors at Barringer and from NPS from beginning of the school year.

Finally, Respondent's testimony confirms that he himself does not believe that implementing the Best Teaching Practices constantly reviewed with him over

the 2011-12 school year would have any affect on his students' learning. It is unfortunate but Respondent's will to teach students

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at NPS is no longer apparent. As such, NPS had no other choice but to certify the tenure charges against him for inefficiency and based on the abundance of the documentary and testimonial evidence demonstrating not only the inefficiencies in Respondent's teaching but also the failure to implement recommendations when provided with an abundance of support, NPS asserts that the arbitrator has no other choice but to assess a penalty of dismissal.

The Position of Respondent Owen Newson

This matter involves the issue of whether the Petitioner State Operated School District of the City of Newark ("District") has proven, by a preponderance of the credible evidence, that the teaching performance of respondent Owen Newson ("Newson") during the 2011-2012 school year was inefficient pursuant to N.J.S.A. 18A:6-11, and, if so, whether such a finding is sufficient to warrant his termination from his tenured teaching position.

The allegations in the tenure charge of inefficiency are false, taken out of context, and do not properly reflect Mr. Newson's capability and performance as a teacher with twenty-three (23) years of experience and commendable service with the District. Moreover, they do not reflect the measures taken by Mr. Newson during the 2011-2012 school year to

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effectuate changes in his teaching performance in response to the instructional mandates of a new administration and the dramatic improvement in the ratings he received from the beginning to the end of that school year. The District has not and cannot, through testimonial and documentary evidence, overcome its burden of proof to demonstrate by the preponderance of credible evidence that Mr. Newson is an inefficient teacher who should be disciplined in any way, and certainly not by termination from his tenured teaching position following receipt of his first ever year-end “unsatisfactory” evaluation in June 2012.

The Commissioner of Education has consistently held that the essence of “inefficiency” is that an employee has failed to reasonably and effectively perform his or her job duties. An “inefficiency” charge requires that the school district notify the employee of the charge, provide the employee with a minimum 90 day period of time to overcome any inefficiencies, to modify the employee’s professional improvement plan to assure that the plan addresses the specific inefficiencies and to provide the employee with real and positive assistance to overcome any inefficiencies.

The testimonial and documentary evidence in this case demonstrates that the District served him with tenure charges on March 26, 2012, and just barely provided Mr. Newson with 90 days in which to overcome his

alleged inefficiencies. During those 90 days, the District gave him with an improvement plan prepared solely by the administration consisting primarily of directives to watch professional learning videos, read internet articles, and

observe other teachers. During those 90 days, Mr. Newson was formally observed, and the ratings he received on those observations were significantly higher than the prior ratings he had received that year. Nevertheless, and in spite of this marked improvement, the District maintains that his improvement during this short period of time was not sufficient, and it hereby seeks his removal from his tenured position after only one (1) “Unsatisfactory” Annual Evaluation. Such an outcome is clearly not supported by the law, and the District has not and cannot demonstrate from the evidence presented at the arbitration hearing before Arbitrator Michael J. Pecklers, Esq. that Mr. Newson is an inefficient teacher whose teaching performance warrants his termination.

Owen Newson (“Mr. Newson”) is a tenured teacher employed by the State-Operated School District of the City of Newark (“District”) for over two decades as a high school Teacher of Social Studies, primarily teaching US History. He holds a BA and an MA in American History and obtained his NJ teaching certificate through participation in the State’s alternate route program, in which he was hired by the District with a provisional certificate and received his standard certification following completion of education

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courses at St. Peter’s College, which he attended on Tuesday evenings and Saturdays during the 1989-1990 school year.

For the first twenty-one (21) years, he was assigned to Malcolm X Shabazz High School, where he consistently received “Satisfactory” and “Proficient” ratings on his annual observations and evaluations, and complimentary remarks

from his supervisors (Exhibit R-4, ON-0004 through ON-0028 and ON-0032 through ON-0093). In September 2010, he was reassigned to Barringer High School, where he taught US History I and US History II during the 2010-2011 school year and the 2011-2012 school year.

During the 2010-2011 school year, he again received "Proficient" ratings on his annual observation and evaluation, and he and his supervisor developed a Professional Development Plan for the 2011-2012 school year to continue his professional growth (Exhibit R-4, ON-0029 through ON-0031 and ON-0001 through ON-0003). During the entire twenty-two (22) year period from the commencement of his employment in the Newark School District in September 1989 through the end of the 2010-2011 school year, Mr. Newson had never been told by any of his administrators that his overall teaching performance was anything but "satisfactory" or "proficient" and he had never been subjected to any form of discipline by his employer.

This all changed dramatically during the 2011-2012 school year.

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Testimony from Shonda Davis, who had assumed the position of principal at Barringer High School in October 2011, indicated that she assembled a new administrative team for the 2011-2012 school year to change the focus of instruction and to emphasize that all teachers were utilizing "best pedagogical practices" in their classroom instruction. This administrative team included Christina Wallace, who served as the Social Studies Department Chairperson at Barringer High School for the first few months, and assumed the position of Vice-

Principal of Instruction in December 2011. Both Ms. Davis and Ms. Wallace testified that during the Fall of 2011, the administrators at Barringer underwent extensive training in the Danielson framework, which essentially breaks teacher observation and evaluation into the four (4) domains of planning and preparation, classroom environment, instruction, and professional responsibilities. Those domains were further broken down into smaller performance components.

Additional testimony indicated that teachers received from 12 to 25 hours of training in the Danielson framework from November 2011 through February 2012; testimony by Mr. Newson and a fellow Social Studies Teacher, Jose Gomez-Rivera revealed that this training primarily consisted of viewing internet videos. More importantly, however, Mr. Newson and Mr. Gomez-Rivera testified that, although observation and evaluation forms used by the District for the past several years included these Danielson domains

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and components, the focus on how they were interpreted changed significantly during the 2011-2012 school year.

As a result, there was a marked change in the way Mr. Newson's teaching performance was observed and evaluated during the 2011-2012 school year, and particularly the way it was observed and evaluated by Ms. Wallace. While in past school years, his supervisors may have recommended that he could increase the amount of "print rich" materials in his room and display more graded student work, incorporate more student-driven activities, and differentiate his instruction based upon his students' "learning styles", he had never been told

prior to the Fall of 2011 that these were mandatory requirements for every lesson taught in order for him to be rated as a proficient teacher.

Extensive testimony was presented by Ms. Wallace and Mr. Newson with regard to those observations and evaluations, and it is based upon those observations and evaluations that the District filed the tenure charges of inefficiency against Mr. Newson. Recognizing that the arbitrator heard all of this testimony during the hearings and certainly does not wish to read a recitation of that testimony at this time, the discussion of the facts which follows will not focus on the discrepancy between Mr. Newson's actual satisfactory teaching performance and the observations/evaluations which he

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received, but upon the improvement demonstrated by Mr. Newson during the minimum 90 day improvement period mandated by N.J.S.A. 18A:6-11, through a comparison of the District's own evaluation ratings.

OBSERVATIONS/EVALUATIONS BEFORE THE FILING OF THE TENURE CHARGES

October 20, 2011 Formal Observation conducted by Christina Wallace

Both Mr. Newson and Ms. Wallace testified that a pre-observation conference was held on October 18, 2011, during which time Mr. Newson presented her with a planning conference form which he had completed about the lesson which he was planning to conduct during the formal observation scheduled for his Block 4 class on October 20, 2011 (Exhibit R-4, ON-0303). Mr. Newson noted on that form and discussed with Ms. Wallace particular discipline

problems that he had with that class. He also had a very candid conversation with her about some of the difficulties he had experienced while teaching in an urban setting, particularly with getting many of the students to be more actively involved in the learning process; these concerns were subsequently confirmed by Terry Jefferson, the English department chairperson at Barringer High School that year, in her testimony in which she referenced “non-compliant” students.

It is apparent that Ms. Wallace took serious offense to those

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statements made by Mr. Newson during this conversation as she noted them on the observation form and subsequently referenced them on the February 14, 2012 Mid-Year Performance Review, and it further appears that this significantly impacted her ability to truly be objective and supportive in her continued interactions with Mr. Newson.

On the formal observation, Ms. Wallace criticized the topic of Mr. Newson’s lesson, although she had not raised any objections during the pre-observation conference. She focused significantly upon several students who used “curse” words during their interactions with fellow students and Mr. Newson, although testimony from fellow teachers such as Mr. Gomez-Rivera and Delores Phelps and from Ms. Jefferson indicated that this was common practice at Barringer. She gave him an overall unsatisfactory rating for that observation of 30%.

Mr. Newson subsequently submitted a written rebuttal in which he clearly and adequately disputed the criticisms in that observation (Exhibit R-4, ON-0369 through ON-0370, ON-293 through 0301). Although he disagreed with this observation, he also began the process to meet with a Master Teacher.

December 6, 2011 Formal Observation conducted by Christina Wallace

Ms. Wallace conducted an unscheduled follow-up observation during

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the same Block 4 class that she had observed on October 20, 2011. Again she spent a significant period of time commenting on inappropriate comments and behavior by a small number of students. She gave him an overall unsatisfactory rating for that observation of 13%. Mr. Newson sub-sequently submitted a written rebuttal in which he clearly and sufficiently disputed the criticisms in that observation (Exhibit R-4, ON-0372 through ON-0373).

February 14, 2012 Mid-Year Performance Review prepared by Christina Wallace

This performance review is not based upon a new observation, but a summarization of the criticisms on the two formal observations conducted by Ms. Wallace. It also contains an unsubstantiated allegation, which she attributes to an anonymous student, that Mr. Newson is “racist towards the students” and another unsubstantiated allegation that he fraudulently noted on a parent contact log that he had called two parents who later claimed that this had not occurred. She gave him an overall Unsatisfactory rating on that Mid-Year Review. Mr. Newson subsequently submitted a written rebuttal in which he clearly and

satisfactorily disputed the criticisms in that observation and requested a transfer to another school (Exhibit R-4, ON-0386).

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OBSERVATIONS/EVALUATIONS FOLLOWING THE FILING OF THE TENURE CHARGES

On Monday, March 26, 2012, Mr. Newson was called to Ms. Davis' office where he met with Ms. Davis and Antonio Lopes. At that time he was served with the written tenure charges alleging inefficiency and he was provided with a copy of the 90 day Teacher Improvement Plan which had been prepared by Ms. Davis, Ms. Wallace and Mr. Lopes (Exhibit P69). At no time prior to the preparation of this Teacher Improvement Plan was any input sought from Mr. Newson. The 90 day Teacher Improvement Plan largely consisted of viewing videos on the computer which were part of an internet program purchased by the District (PD360.com), reading internet articles and discussing them with the master teacher, and observing some other teachers conduct lessons in their classrooms.

March 27, 2012 Formal Observation conducted by Dana Chibbaro

Testimony by both Mr. Newson and Ms. Chibbaro indicated that they were scheduled to have a pre-observation conference on Monday, March 26, 2012. Earlier that day Mr. Newson had been served with the written tenure charges and the 90 day Improvement Plan. Mr. Newson was clearly shaken and upset by the prospect of losing his tenured position and possibly his entire

teaching career, and he was certainly in no position to conduct that conference. Although he initially informed Ms. Chibbaro that he did not

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expect to be in school the following day for the formal observation, as he was attempting to schedule a meeting with an attorney for the Newark Teachers' Union (NTU), that meeting was not able to take place, and he did show up for work. Ms. Chibbaro testified that after she telephoned Barringer and was informed that Mr. Newson was present, she showed up for the observation as previously scheduled.

This formal observation occurred in the very same Block 4 class in which Ms. Wallace had conducted her formal observations in October and December of 2011; the very same Block 4 class which Mr. Newson noted was his most challenging class because of the significant number of students with behavioral problems. This formal observation also occurred the very next day after Mr. Newson was served with the tenure charges and while he was still understandably quite upset and unsettled. This formal observation also occurred on the very first day of the 90 day improvement period. It is apparent that including this Unsatisfactory formal observation is inherently unfair and that this formal observation should not be considered in assessing improvement in Mr. Newson's teaching performance during the 90 day improvement period. Mr. Newson submitted a written rebuttal, dated March 30, 2012, in which he clearly and satisfactorily disputed the criticisms in that observation (Exhibit P44).

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May 4, 2012 Formal Observation conducted by Antonio Lopes

Antonio Lopes became the Social Studies Department Chairperson at Barringer High School in December 2011, but did not assume any responsibility for observing and evaluating Mr. Newson until February 2012. Like Christina Wallace, he had come to Barringer after having worked for several years at Arts High School, one of the magnet schools in the District. Most of the spot observations which he performed and the lesson plan reviews which he conducted were quite favorable. He conducted an unannounced formal observation approximately four (4) weeks into the 90 day improvement period and gave Mr. Newson overall rating of 72% which, although basic, was only several points shy of a proficient rating. This overall rating and the more specific ratings for the various components of domains 2 and 3 which he evaluated was a significant improvement over the unsatisfactory ratings of 30% and 13% which Ms. Wallace had given to Mr. Newson earlier in the school year.

Mr. Lopes noted the classroom interactions were generally appropriate and that several students were actively engaged in responding to higher order questions which demonstrated that they were activating knowledge learned from prior lessons. He also noted that the teacher made an effort to establish standards of conduct for students, monitor student behavior and

respond to student misbehavior, although some of these efforts were thwarted by students' playing with their cell phones. Testimony from Mr. Lopes as well as

several others (Ms. Phelps, Mr. Gomez-Rivera) revealed that the issue of students and their cell phone usage in class was clearly not specific to Mr. Newson's class but was common throughout the school.

It is also apparent from Mr. Lopes' testimony that Mr. Newson sought constructive assistance with regard to the discipline problems he had with his Block 4 class. In early April 2012, Mr. Lopes and Mr. Brown, the Vice-Principal of Discipline, came in to that class to provide the requested support, but that testimony reveals that they did nothing more than briefly instruct the students to pay attention to and abide by the instructions of Mr. Newson – an action which Mr. Lopes acknowledged is an insufficient support for effectuating a change in student behavior.

May 17, 2012 Formal Observation conducted by Terry Jefferson

Terry Jefferson became the English Department Chairperson at Barringer High School in September 2011, following several years as an English teacher at Central High School. Although the 2011-2012 school year was her first year in a supervisory position in the Newark School District, she had previously worked in a supervisory position in the Irvington School District and had taught courses in supervision and evaluation of

instruction as an adjunct professor at Kean University's Graduate School of Education.

Ms. Jefferson conducted an unannounced formal observation at the request of Principal Davis as part of his 90 day improvement period. A review of the observation reveals that in Domain 2 (Classroom Environment), she rated him proficient in three (3) areas, basic in one (1) area, and unsatisfactory in one (1) area. In Domain 3 (Instruction), she gave him a proficient rating for communicating clearly and accurately, a basic rating in three (3) areas, and an unsatisfactory rating in one (1) area. She gave Mr. Newson an overall rating of 63%. Again, this overall basic rating and the more specific ratings for the various components of domains 2 and 3 which she evaluated was a significant improvement over the unsatisfactory ratings of 30% and 13% which Ms. Wallace had given to Mr. Newson before he was given the 90 day Improvement Plan.

More important than the improved ratings in Ms. Jefferson's observation, however, is the testimony that she gave at hearing about the circumstances surrounding that observation, the implementation of "best pedagogical practices" at Barringer High School, and the level of training which needs to be given to teachers – particularly teachers who had obtained their teaching certifications more than ten (10) years ago in those

"best pedagogical practices" so that they can truly understand and implement those practices. She testified that, prior to the observation, she was approached by Ms. Wallace who indicated that she wanted to give her some background information on Mr. Newson. Ms. Wallace thereafter stated her feelings that Mr. Newson was a racist and that she (Ms. Wallace) did not feel that he belonged in

a classroom. Ms. Jefferson testified that based upon her interactions with Mr. Newson, she did not believe that this was a valid statement. She further noted that it was not uncommon for a teacher working in a highly stressful urban educational environment such as Barringer High School with students whom she described as “non-compliant” to make comments about dealing with those students which are taken in the wrong way.

She testified that most teachers who obtained their teaching certification more than ten (10) years ago do not have the training in student-centered learning that younger or more recently certified teachers have. Those usually older teachers tend to use a more teacher-centered approach to instruction and need a much more “hands on” form of professional development than the form of professional development that was provided to Mr. Newson in his 90 day Improvement Plan (i.e. viewing PD360 videos and responding to reflection questions, reading internet articles, etc.) in order to develop the necessary skills to successfully

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implement the newer strategies. She realistically noted the existence of time constraints and other duties which severely impact upon a supervisor’s ability to provide adequate professional development support to teachers. Finally, she noted that she definitely witnessed evidence of Mr. Newson’s ability, if given more time and more thorough training, to develop the necessary skills to successfully implement the newer strategies.

May 24, 2012 Formal Observation conducted by Christina Wallace

Christina Wallace conducted an unannounced formal observation which also revealed significant improvement from the formal observations she conducted only several months before. In Domain 1 (Planning and Preparation), she rated him primarily basic with only one (1) unsatisfactory for the area of assessment of student learning, while in Domain 2 (Classroom Environment), she rated him basic in all areas. In Domain 3 (Instruction), she gave him a proficient rating for communicating clearly and accurately, and basic ratings for engaging students in learning and providing feedback to students. In Domain 4 (Professional Responsibilities) she gave him several proficient ratings, while rating him basic in the other areas. Mr. Newson subsequently submitted a written rebuttal in which he clearly and satisfactorily disputed the criticisms in that observation (Exhibit R-4, ON-0389 through ON-0390).

June 14, 2012 Annual Teacher Performance Evaluation

Like the mid-year review, this annual evaluation is not based upon a new observation, but a summarization of all of the criticisms/comments on the formal observations conducted throughout the year, including those from the period of time before Mr. Newson was served with the tenure inefficiency charges and given the minimum 90 day period to improve. Although his administrators testified that this was common practice, as it is supposed to reflect the teacher's performance over an entire year, the "weight" of the very negative observations from the beginning of the school year unfairly and inappropriately pulled his overall basic rating from the 90 day improvement period down to an

unsatisfactory rating, and doesn't accurately reflect the significant improvement he demonstrated during the very short 90 day improvement period. Mr. Newson subsequently submitted a written rebuttal in which he clearly and adequately disputed the criticisms in that annual evaluation (Exhibit R-4, ON-0394 through ON-0395).

Particularly and curiously, Mr. Newson received this first ever unsatisfactory Annual Evaluation in June 2012, when he was allegedly receiving assistance from the District under a ninety-day improvement plan as a result of being served with tenure inefficiency charges in late March 2012. His administrators at Barringer High School acknowledged in their

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testimony that Mr. Newson had demonstrated significant improvement in the criticized areas of instruction during the short 90 day improvement period, but maintained that anything short of a Proficient or Distinguished rating constituted unacceptable improvement and warranted the filing of tenure charges of inefficiency, even though this was the only time in his twenty-three (23) year career in the District that he had received an annual evaluation which was less than proficient.

This is also interesting in light of a policy and procedure for the filing of tenure inefficiency charges which had been maintained in the District for at least the past several years, and which was evidenced in various guidebooks outlining teacher observation and evaluation procedures which were in effect at least into

January 2012 when the District distributed a new guidebook (Exhibits R-3 and R-10).

Those prior guidebooks contained a section setting forth a policy of placing teachers who received unsatisfactory annual evaluations into various “tiers” as a precursor to the filing of tenure inefficiency charges. That policy essentially provided that if a teacher received an unsatisfactory annual evaluation, the teacher would be placed in one of three (3) tiers, based upon where the teacher’s performance fell in the domains set forth on pages 102-109 of the guidebook (Exhibit R-10). Then, beginning that following

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September, the teacher would be placed in the Teacher Assistance Program (TAP) and tenure inefficiency charges could be filed against the teacher, if his or her performance did not improve, no earlier than the following March (if the teacher was in Tier 1) or even later (if the teacher was in Tier 2 or 3).

In Mr. Newson’s case, the District filed tenure inefficiency charges against him after he received an unsatisfactory rating on a mid-year review and several months before he ever received an unsatisfactory rating on an annual evaluation. It is apparent based upon the evidence in this case, as well as the numerous decisions in tenure inefficiency cases, that the District acted precipitously and prematurely in filing these tenure charges against Mr. Newson, and, therefore, these tenure charges must be dismissed.

Certified tenured public school teachers in the State of New Jersey cannot be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause, and then only in a specific manner as prescribed by law. N.J.S.A. 18A:28-5, N.J.S.A. 18A:6-10, et seq. The tenure laws were designed to aid in the establishment of a competent and efficient school system by affording teachers a measure of security in their positions by reason of years of service, by preventing boards of education from abusing their superior bargaining powers in contract negotiations, and by protecting teachers from dismissal for unfounded,

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flimsy or political reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215 (App. Div. 1949). The statutory status of a tenured employee may not and should not be lightly removed. In Re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (Jan. 12, 2009), adopted by the Commissioner of Education (May 28, 2009).

Mr. Newson acquired tenure pursuant to N.J.S.A. 18A:28-5, and is therefore protected by the Tenure Act. The burden is on the Board to prove the tenure charges by a preponderance of the credible evidence. In Re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1956, 1962). This burden requires the District to offer evidence which would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Stated differently, the preponderance can be characterized as the

greater weight of evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975); Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Thus, the burden on the District is not to be taken frivolously, and what is needed to meet this burden must be analyzed on a case by case basis. In the Matter of Ziznewski, School District of Twp. Of Edison, Middlesex County, OAL Dkt. No. EDU 4727-08, (May 5, 2010).

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In this case, the District clearly has failed to meet its burden of proving by a preponderance of the evidence that Mr. Newson's performance at work was inefficient, such that dismissal from his position is warranted. Contrary to the Board's posturing, over the course of more than two decades, Mr. Newson responsibly and effectively performed his teaching duties. As reflected in the testimony and evidence presented at the hearing, until the 2011-12 school year, he received annual evaluations that were acceptable, and his dedication to the teen youth at the Newark high schools in which he has served is to be applauded. Absent from the record is any, much less a preponderance of evidence, that Mr. Newson's teaching warrants the harsh and unwarranted penalty of dismissal.

Consistent with the Tenure Act, N.J.S.A. 18A:28-5, and pursuant to N.J.S.A. 18A:6-10, a tenured teacher may only be dismissed or reduced in compensation for "inefficiency, incapacity, unbecoming conduct, or other just cause."

The plain meaning of "inefficiency" is "the quality or condition of being inefficient; lack of efficiency," and "inefficient" means "not efficient; unable to effect or achieve the desired result with reasonable economy." The Random House College Dictionary 680 (Revised Edition 1982). Therefore, the essence of inefficiency as a charge against an employee is that he or she has failed to **reasonably** effectively perform duties required of his or her title.

In the Matter of Antonio Lewis, Superintendent, Asbury Park School District,

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OAL Dkt. No. EDU 921-04 (April 4, 2004), *adopted* Commissioner of Education (June 7, 2004).

Where, as here, a board of education files a charge of inefficiency against a tenured employee, specific procedures must be adhered to, including the provision of detailed notice of the specific inefficiencies and at least a ninety (90) day period of time to correct those inefficiencies. N.J.S.A. 18A:6-11; N.J.A.C. 6A:3-5.1(c).³ In addition, the board of education must "direct that there be a modification of the individual professional improvement plan mandated by N.J.A.C. 6A:32-4.3 or 4.4, to assure that such plan addresses the specific charges of inefficiency and comports with the time lines established for correction." N.J.A.C. 6A:3-5.1(c)(4).

In Rowley v. Bd. of Ed. of Manalapan-Englishtown Regional School Dist., 205 N.J. Super. 65 (App. Div. 1985), the Appellate Division addressed the issue of the proper interpretation and application of N.J.S.A. 18A:6-11 with regard to charges of inefficiency, and more specifically the minimal 90 day period for the correction of any inefficiencies. Rowley, a twenty-three

year veteran of the District, had an otherwise unblemished history until

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Respondent urges that pursuant to my ruling in this case on the issue of the applicability of the Tenure Act prior to the recent amendments on August 6, 2012 and the adoption of the TEACHNJ Act, P.L. 2012, c. 26, its brief relies on the evaluation rubric set forth in the Tenure Act prior to its amendment. The procedural and limitations periods were followed, however.

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1981 when he received an unsatisfactory evaluation and had his increment withheld. During the first 6 months of the 1981-82 school year, 8 observations/evaluations were conducted by 5 different administrators, and patterns of some specific deficiencies apparently emerged. Charges of inefficiency were filed against Rowley on March 11, 1982, and he was notified that he had 90 days in which to improve. During the following 90 days, Rowley was evaluated 5 times and subsequently notified that he had failed to overcome his inefficiencies. Tenure charges were filed and following a hearing before the Office of Administrative Law, the ALJ recommended dismissal of the charges because of the board's failure to comply with N.J.S.A. 18A:6-11, particularly what he believed was the District's obligation to provide real assistance to the tenured teacher during the 90 day improvement period. That initial decision was affirmed by the Commissioner of Education, but subsequently reversed by the State Board of Education. In Re Tenure Hearing of David Rowley, Manalapan-Englishtown Regional School District, 1983 S.L.D. 360 (May 23, 1983), reversed, State Board of Education, 1984 S.L.D. 2006 (May 2, 1984).

On appeal, the Appellate Division concurred with the ALJ and the Commissioner of Education, noting that, the Commissioner of Education had

consistently held that “if a board chooses to file tenure charges of inefficiency against any teacher, the administration bears the heavy

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responsibility to render positive assistance to the teacher in an effort to overcome his inefficiencies.” The Court further noted that the State Board concurred with this view, when it stated

It is now settled that, under N.J.S.A. 18A:6-11, a local board of education is duty bound to assist a tenured teaching staff member, against whom it has filed charges of inefficiency, in improving his teaching performance before removing him from his teaching position....The rationale underlying this rule is that a teacher whose effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he is still capable of effective teaching. He can only avail himself of that opportunity if he understands clearly the basis for the criticism supporting the allegations of inefficiency and is offered constructive advice as to how he might restore his teaching skills.

Rowley, 205 N.J. Super. at 72-73.

The Court noted that the Commissioner of Education and State Board both agreed that the tenure inefficiency process requires “a cohesiveness effort before and after the filing of charges that enables the Board ultimately to measure a teacher’s improvement by a synthesis of observations,” and that they only disagreed upon whether or not the board had provided that assistance. Id. at 73.

Over the years, the Commissioner of Education and numerous administrative law judges have rendered decisions in tenure inefficiency

cases which provide a framework for assessing whether a teacher who has been charged with inefficiency has been given a fair opportunity to improve. In In Re Tenure Hearing of Zolton J. Fodor, Green Brook School District, 1984 S.L.D. 269 (March 2, 1984), aff'd, State Board of Education, 1984 S.L.D. 297 (July 11, 1984), on the issue of the statutory minimum 90 day period of time in which the teacher can correct and overcome any deficiencies or inefficiency, the ALJ noted that

No particular pattern or scheme of assistance or approach by a school board is required during the 90 day period. Each case must, therefore, be judged on its own merits. A determination must be made concerning whether the 90 day period was reasonably implemented so that the teacher had a fair opportunity to improve.

Fodor involved a teacher who taught middle school for over 20 years. Beginning in 1975, and after teaching for approximately 13 years, his annual evaluations noted classroom control problems, and parent complaints about him. After serving inefficiency charges, Fodor was given a 90 day improvement period, which concluded in September 1983, and his increment was withheld. Tenure charges followed.

At the hearing, 14 people testified for the District and Fodor testified on his own behalf. The ALJ concluded that there was evidence of numerous disciplinary/disruptive incidents in Fodor's classes from the 1979-1980 school year and forward, including fights, screaming and shouting, and

students moving too freely about the school when they should have been in Fodor's classroom. There was also testimony that Fodor had physically restrained students in his classes on a number of occasions during the 1982-1983 school year, and that students were observed climbing in and out of his 1st floor classroom windows.

Fodor argued that the District did not provide him with a real opportunity or the requisite assistance to correct his control deficiencies during the 90 day improvement period, and that whatever inefficiency or control problems he had did not warrant dismissal of a 20 year veteran teacher. Although the ALJ noted that Fodor had not received any formal classroom observations, seminars or workshops on discipline and no guidance from other teachers or administrators during the 90 day period, because of the ongoing nature of the of the alleged problems, dating back some 8 years, and the presumed notice Fodor received through his annual evaluations, it was reasonable for Fodor to understand what was expected of him and had, just prior to the 90 day period, prepared "Objectives to Improve Classroom Decorum and Discipline" to address those problems.

The ALJ noted that, despite the absence of District observations during the 90 day period, he did not believe that the District's failure to do so should be determinative, especially given that 2 increments had been

previously withheld and Mr. Fodor had a long history of corrective action plans before the 90 day period. In addition, he prepared his own plan for improving

classroom control which was directed at fixing the very problems which occurred during the 90 day period. Thus, the ALJ stated that he could only conclude that Fodor was incapable of implementing these objectives and that a new 90 day period would be futile, and the charges were therefore affirmed. In affirming the initial decision, the Commissioner noted that Fodor's lack of control in the classroom existed for years and was therefore of a permanent nature, and that the withholding of his increment on two separate occasions surely should have warned him of the District's concerns.

Similarly, in In Re Tenure Hearing of Stanley Slovney, Newark School District, 1984 S.L.D. 1764 (Nov. 19, 1984), a tenured high school social studies teacher had a history of unsatisfactory evaluations for the five years that preceded the filing of the charges, such as an inability to maintain discipline in the classroom, an inability to maintain an even temperament, a lack of classroom rules and organization, vague lesson plans with no objectives, no review of previous learning, no motivational techniques employed, and the fact that the only material used was the textbook which some students failed to bring to class. During the 90 day improvement period, Slovney's performance deteriorated further, with evidence of a lack

of any order in the class, and a refusal to accept help or criticism.

In the ALJ's Initial Decision, which was later affirmed by the Commissioner of Education, the court noted that "[t]he record as a whole shows a pattern of problems which persisted despite repeated and numerous recommendations

made to Slovney as to specific methods and techniques to improve his deficiencies.” She further noted that he failed to incorporate any recommendations, and refused to accept any responsibility for the problems in his classroom – instead blaming the school environment, principals and quality of students. She found a failure by Slovney to maintain order in his classes and establish proper discipline since the 1978-79 school year, as well as a failure to maintain an appropriate classroom environment, failure to properly communicate with students, and failure to use effective teaching techniques (noting specific examples of each).

Citing to N.J.S.A. 18A:6-12 (now N.J.S.A. 18A:6-11), the ALJ noted that Slovney had been afforded at least 90 days to correct any alleged inefficiencies, and that the testimony demonstrated that his inefficiencies had not abated, and thus the charge of inefficiency was sustained. She concluded that dismissal was the appropriate penalty since Slovney had been receiving unsatisfactory evaluations since the 1978-79 school year, and thus had numerous opportunities to correct his deficiencies. At one point, he was

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transferred to another school to give him a “clean slate”. He nevertheless “failed to heed [the board's] recommendations over the last five and a half years.” Noting his failure to improve in any specific areas following the 90 day period, and his obvious denial of any problem, she concluded that there was no other remedy available but removal.

In Re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (Jan. 12, 2009), adopted by Commissioner of Education (May 28, 2009) reached a similar conclusion. Ms. Ashe-Gilkes worked in the District for 15 years when she was served with inefficiency charges. Ms. Ashe-Gilkes had an unremarkable history until 2001 when her supervisors noticed a change in her classroom management, lateness and attendance, and her ability to communicate lessons in an efficient and effective manner. Her increments were withheld for three (3) consecutive years. During the 2007-08 school year, a 90 day Modified PIP was implemented listing many areas in which Ashe-Gilkes needed to improve. After the 90 day period, Ashe-Gilkes remained deficient in 18 of 31 performance areas.

The ALJ thereupon concluded, and the Commissioner affirmed, that the District had met its burden of establishing that she was an inefficient employee who did not resolve all of her deficiencies. The ALJ stressed that

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this conclusion was drawn from a total impression resulting from observations and evaluations made over a substantial period of time. He further stressed that the District did not act precipitously or prematurely in filing the tenure charges, but exercised considerable restraint by identifying areas of performance over several years that were unacceptable or in need of improvement. He indicated that Ashe-Gilkes was clearly aware of the District's assessment of her deficiencies through the withholding of her salary increments during 3 of the 4 years before the filing of the tenure charges. Finally, he noted that efforts to

improve Ashe-Gilkes' performance did not suddenly arise for the first time with the 90 day improvement plan, but were the culmination of several years of efforts to encourage her to improve. Since lesser measures to encourage her to cure her deficiencies, such as repeated increment withholdings, had proven unsuccessful, he concluded that her designation as an inefficient teacher warranted her dismissal as of the date of her suspension.

A similar conclusion was reached in In Re Tenure Hearing of Wesley Gilmer, State Operated School District of the City of Newark, 2011 WL 2237628 (May 6, 2011), adopted by Commissioner of Education (July 28, 2011). Wesley Gilmer began employment as a teacher with the Newark Public Schools in November 1997 where his performance was outstanding until the 2002-03 school year, at which time his observations and

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evaluations began to reflect several shortcomings in his performance. His observations and annual evaluations continued in a downward spiral through 2009, following several transfers to different schools and grade levels.

Inefficiency charges were filed against Gilmer on January 26, 2009, citing instructional, planning and pedagogical concerns that had been noted for several years, and he was placed on a 90 day improvement plan. The ALJ noted that Gilmer declined to meet and discuss the PIP and was uncooperative with administrative efforts to assist him. Because the alleged inefficiencies remained uncorrected following the 90 day improvement period, tenure charges were certified to the Commissioner of Education.

Following a hearing, the ALJ concluded that, during the 90 day improvement period, Gilmer was offered assistance from Resource Teacher Coordinators (RTC), subject-content coaches and district administrators, that he was enrolled in the Teacher Assistance Program workshops to assist struggling teachers, that he was afforded an opportunity to view a model lesson, and that he was repeatedly observed and evaluated by a number of administrators. The ALJ concluded that there were numerous shortcomings in Gilmer's instructional technique and classroom management which were not remedied during the 90 day improvement period. She further noted that the inefficiencies were present for years, and the District had employed

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progressive discipline by reprimanding Gilmer and withholding his increment prior to filing the tenure charges, and that, nevertheless, he appeared unwilling to improve his teaching performance.

Because Gilmer had already been counseled, transferred and reprimanded repeatedly, and had still not taken significant steps to improve his classroom performance, the ALJ concluded that dismissal from his tenured position of employment was the proper penalty. The Commissioner of Education adopted the Initial Decision, noting that in 3 consecutive school years Gilmer had received negative evaluations by several different evaluators.

It is apparent from all of these cases that to sustain tenure charges of

inefficiency, a school district needs to demonstrate much more than the fact that a teacher had one unsatisfactory year of teaching service, particularly in the case of a teacher who had twenty-two (22) prior years of exemplary teaching service. It is also apparent that the 90 period of improvement mandated by N.J.S.A. 18A:6-11 is a minimum period of improvement and that a determination must be made on a case by case basis whether, under the specific circumstances of each case, the minimum 90 day period was reasonably implemented so that the teacher had a fair opportunity to improve, as well as whether the teacher demonstrated a reasonable

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improvement based upon the amount of time given.

None of the reported tenure inefficiency cases reflect a situation like the one before us – where a tenured teacher with twenty-three (23) years of service is charged with inefficiency solely on the basis of one (1) Unsatisfactory annual evaluation and after demonstrating significant improvement following only the mandatory minimum 90 day improvement period. The assertions by the District that Mr. Newson did not demonstrate significant improvement unless he obtained a proficient or distinguished

rating on his annual evaluation is outrageous, patently unjust, and simply not supported by the law.

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The District has failed to sustain by the preponderance of the evidence the tenure charges of inefficiency against Mr. Newson, and as a result, no penalty/sanction should issue in this case. If, however, the arbitrator is inclined

to confer some form of penalty/sanction in this case, he must consider the concept of progressive discipline, generally applicable to public employees, including tenured teachers. See I/M/O Tenure Hearing of Gilbert Alvarez, OAL Dkt. No. EDU 10067-09 (March 5, 2010).

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Respondent avers that it is important to note the newly adopted TEACHNJ Act provides for the filing of tenure inefficiency charges only after a teacher is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and then is rated partially effective in an annual summative evaluation the following year.

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The doctrine of progressive discipline states that an employee's past record must be considered in determining the appropriate penalty against an employee. See West New York v. Bock, 38 N.J. 500 (1962). While West New York, supra, does not specifically use the phrase "progressive discipline," its facts strongly suggest that a record of progressive discipline should precede the ultimate penalty, which is removal. Subsequent administrative decisions have utilized the term, citing West New York as authority for the doctrine. See e.g., Smith v. Correctional Institution for Women, Clinton, OAL Dkt. No. CSV 7133-83 (April 30, 1984); Healy v. Camden County Fire, Police, OAL Dkt. No. CSV 2773-83 (1983), modified, NJ Civil Service Commission, (Sept. 30, 1983).

Courts will not adhere to rigid discipline guidelines in assessing penalties. Therefore, when ascertained the reasonableness of a sanction, courts have emphasized that consideration of the employee's past record should be reviewed for guidance, West New York, supra, 38 N.J. 523-524; Moorestown Tp. v. Armstrong, 89 N.J. Super. 560, 567 (App. Div. 1965), cert. den., 47 N.J. 80

(1966); Feldman v. Town of Irvington Fire Dep't., 162 N.J. Super. 177, 182 (App. Div. 1978). As the court aptly stated in In Re Tenure Hearing of Wesley Gilmer, State Operated School District of the City of Newark, *supra*, 2011 WL 2237628 (May 6, 2011), adopted by Commissioner of Education (July 28, 2011), “[f]actors to be taken into

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account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher’s prior record and present attitude and any harm or injurious effect that the conduct at issue will have on the proper administration of the schools.”

It is undisputed that prior to the 2011-2012 school year, Mr. Newson had never been subjected to any form of discipline whatsoever over a twenty-two (22) year period of employment with the District. His classroom observations and annual evaluations were all extremely positive, and he had never received an “Unsatisfactory” or “Basic” annual evaluation. Accordingly, under progressive discipline principles, any deficiency in Mr. Newson’s teaching performance during the 2011-2012 school year clearly does not warrant removal in this case, but a limited form of sanction, such as an increment withholding and/or suspension without pay for an extended period, such as the 120 day suspension without pay which occurred in connection with the certification of the tenure charges to the Commissioner of Education.

This is also clearly in line with the numerous tenure inefficiency cases cited in Point II above, in which tenured teachers were not removed after only

one year of unsatisfactory performance, but after the culmination of years of such repeated criticisms, continued and intensive professional

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development, and the implementation of lesser forms of discipline such as increment withholdings. In this case, Mr. Newson demonstrated that he made significant improvement during the 90 day period and, contrary to the assertions of the District, there is no evidence that he could not and would not improve even more in the implementation of “best pedagogical practices” if given additional time and more thorough and effective training.

Even if progressive discipline is not employed in this case, removal as a penalty is most certainly excessive. Generally, when deciding penalty/sanctions in a tenure proceeding, relevant factors to be considered by the court in the equation of whether dismissal or something less is appropriate include the nature and gravity of the offense, any extenuating or aggravating circumstances, and the harm or injurious effect that the conduct may have had on the proper administration of the school system. In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967).

Once again, the nature and gravity of the charges as alleged do not warrant removal in this case. The charges of inefficiency are limited to only one school year, during which Mr. Newson demonstrated a significant improvement in his teaching performance. Mr. Newson taught satisfactorily and proficiently for more than two decades in the District, and it was only during the 2011-2012 school year, under the supervision of a particularly

zealous group of administrators looking for a rapid change in school-wide teaching strategies, that his teaching performance was first criticized.

At the very least, the evidence presented at the hearing demonstrates that Mr. Newson conscientiously listened to and implemented supervisors' recommendations to him regarding his teaching style and requirements and significantly improved his classroom management skills, and was adequately performing his job duties as a high school Social Studies teacher during the applicable time period. Mr. Newson has always wanted his students, and by extension, the District to succeed. As such, any penalty less than dismissal such as an additional improvement period with more intensive training provided by the District, i.e., any reasonable assistance provided to Mr. Newson - - will allow Mr. Newson to continue to succeed in his employment with the District.

Finally, the District has failed to articulate the particular harm or injurious effect that any alleged deficiencies in Mr. Newson's teaching performance may have had on administration of the District and the education of his students. The charges, even if sustained, do not involve such a serious infraction that it warrants removal and the ending of twenty-three (23) years of service with the District. Simply put, Mr. Newson deserves a "second chance" to continue to teach in the District.

For the foregoing reasons, Owen Newson respectfully requests that the charges of inefficiency pending against him be dismissed in their entirety, and

that he be reinstated to employment as a teacher with the District, along with full back pay and all applicable benefits and emoluments.

V. STATEMENT OF THE CASE

By virtue of my bench ruling discussed at note 1, supra, the pre-Act provisions of the TENURE EMPLOYEES HEARING LAW at N.J.S.A.18A:6-10, control my resolution of this tenure charge based upon inefficiency grounds. The same provide inter alia, that: “[n]o person shall be dismissed or reduced in compensation, (a) if he or she shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state... except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only” See also N.J.S.A. 18A:28-5. However, as previously discussed, the procedural and other considerations of the TEACHNJ Act are binding and have been adhered to.

It is axiomatic and the parties agree that tenure laws were originally enacted and designed to establish a “competent and efficient school system,” and to protect teaching and other staff from dismissal for “unfounded, flimsy or political reasons.” See generally Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a tenured individual should therefore not be lightly removed. See In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 28, 2009). As the proponent of this tenure charge, Petitioner Newark

School District encumbers the initial burden of making a *prima facie* showing of the sufficiency of the charges by a preponderance of the credible evidence. See Cumberland Farms, Inc. v. Moffett 218 N.J. Super. 331, 341 (App. Div. 1987); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974 *cert.*

denied 65 N.J. 292 (1974); In re Phillips, 117 N.J. 567, 575 (1990); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); see also State v. Lewis, 67 N.J. 47 (1975) (defining *preponderance* as the “[g]reater weight of the credible evidence in the case.”); Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954).

In reaching my determination of whether to remove Mr. Newson from his tenured position in this instance, I am required to consider the totality of the circumstances, the nature of the act(s), and the impact on his career. See In re Fulcomer, 93 N.J. Super 404,421 (1967). Parenthetically, the evidence needed to meet a board’s burden is not to be taken frivolously and must be viewed on a case by case basis. In the Matter of Ziznewski, School District of Township of Edison, Middlesex County, OAL Docket No. EDU 4727-08 (May 5, 2010);

Following a careful analysis of the record evidence including all transcript volumes, with full consideration afforded the respective positions as supplemented by persuasive authority, I find that Petitioner’s prefatory showing was successfully rebutted by Respondent, requiring that the instant tenure charge be modified to a **WITHOLDING OF INCREMENT**.

The voluminous record evidence discloses that the material facts of this case are generally not in dispute, The procedural elements have been previously discussed. Along with the respective positions adopted in the pleadings, the same are incorporated by reference into the instant findings of fact, which include the following:

1) Owen Newson is a graduate of New York University, with a Bachelor of Art in history and a minor in sociology. He also received his Master's Degree in United States History from NYU. He began teaching in 1988 at a parochial school in East Orange, New Jersey, and then came to the Newark School District via the alternate route in 1989. See NEWSON Testimony, TII230,L1-13; TIII117L2-11.

2) While in Newark, Mr. Newson has taught United States History I & II, World History and a law course for a year. From his inception with the District in 1989, Mr. Newson taught at Malcom X. Shabazz High School until coming to Barringer during the 2010-2011 school year. Id. at L14-23.

3) At Shabazz, Mr. Newson was regularly observed and evaluated with spot observations, formal observations and then an annual evaluation. Id. at 231L16-18. The parties have stipulated to the fact that Respondent's exhibits in this regard say what they say. A sampling of these includes the following: May 12, 2010 TEACHER ANNUAL PERFORMANCE EVALUATION ("Proficient" on all components in each domain, with COMMENTS "[t]he teacher is encouraged to continue working, reflecting, and communicating with the parents and school staff to ensure the greatest student development and achievement."); May 18, 2009

ANNUAL TEACHER EVALUATION REPORT ("Proficient" in all components of each domain. COMMENTS on DOMAIN 3 included: "[t]he teacher has demonstrated: the ability to communicate clearly, effectively, and appropriately using standard English; the effective use of flexible questions to stimulate class discussion and participation; the use of verbal and written feedback to the students and the use of appropriate teaching strategies; the need to increase the elevation of student achievement towards or above selected benchmarks."); May 6, 2008 ANNUAL TEACHER EVALUATION REPORT ("Proficient" in all components of all domains. DOMAIN 3 INSTRUCTION COMMENTS included: "[t]he teacher has demonstrated: the ability to communicate clearly, effectively, and appropriately using standard

English; the effective use of high level questions to stimulate class discussion and participation; the use of verbal and written feedback to the students and the use of appropriate teaching strategies; the ability to effectively alter/adjust the teaching process as necessitated by unexpected questions and other extemporaneous experiences in the classroom.”); May 16, 2007 ANNUAL TEACHER EVALUATION REPORT (“Proficient” in all components of each domain. The COMMENTS in DOMAIN 3 mirrored those of the 2008 evaluation); June 3, 2006 ANNUAL TEACHER EVALUATION REPORT (“Proficient” in all components of each domain, with DOMAIN 3 INSTRUCTION comments again consistent with those made by Supervisor Knight in 2007 and 2008.); June 3, 2006 ANNUAL TEACHER EVALUATION REPORT (“Proficient” in all components of each domain, with the SUPERVISOR’S COMMENTS for DOMAIN 3 indicating Mr. Newson has demonstrated: “[t]hat he communicates clearly, effectively, and appropriately using standard English; the use of effective verbal and written feedback to the students in a timely manner; his ability to effectively alter/adjust the teaching process as necessitated by unexpected student questions and other extemporaneous experiences in the classroom.”); June 3, 2004 ANNUAL TEACHER EVALUATION REPORT (“Proficient” in all components of each domain, with SUMMARY COMMENTS stating: “Mr. Newson is an

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effective planner and implementor of learning experiences that accentuate the academic experiences of his students. He enjoys bringing maps to life through art in his classroom. He is knowledgeable and is a master of the content. He is able to get along well with his students and his classes are sometimes alive with discussions and debate on current events. He uses a variety of methods to assess the academic performance of his students. Additionally, he frequently provides interesting writing prompts for his students. Mr. Newson continues to be a valuable and cooperative member of the Social Studies department.”); June 9, 2003 SUMMARY EVALUATION of “Satisfactory;” June 13, 2001 SUMMARY EVALUATION of “Satisfactory;” June 6, 2000 SUMMARY EVALUATION of “Satisfactory;” See Respondent Exhibit at Bates Stamp ON-0004-0005; ON-0006-0007; ON-0008-0009; ON-0010-0011; ON-0012-0013; ON-0014-0015; ON-0016-0017; ON-0018-0022; ON-0023-0025; ON-0026-0028; see also April 15, 2010 FORMATIVE TEACHER OBSERVATION (“Proficient”

assessment overall); September 22, 2009 FORMATIVE TEACHER OBSERVATION (“Proficient” rating); April 21, 2009 FORMATIVE TEACHER OBSERVATION (“Proficient”); November 26, 2008 FORMATIVE TEACHER OBSERVATION (“Proficient”); April 23, 2008 FORMATIVE TEACHER OBSERVATION (“Proficient”); November 27, 2007 FORMATIVE TEACHER OBSERVATION (“Unsatisfactory” with rebuttal by Mr. Newson as to course pacing.); March 7, 2007 FORMATIVE TEACHER OBSERVATION (“Proficient”); November 15, 2006 FORMATIVE TEACHER OBSERVATION (“Proficient”); June 12, 2006 FORMATIVE TEACHER OBSERVATION (“Proficient”); April 6, 2006 FORMATIVE TEACHER OBSERVATION (“Proficient”); March 22, 2005 FORMATIVE TEACHER EVALUATION (“Proficient”); November 9, 2004 FORMATIVE TEACHER OBSERVATION (“Proficient”); December 22, 2003 FORMATIVE TEACHER OBSERVATION (“Proficient”); March 31, 2003 TEACHER OBSERVATION REPORT (“Satisfactory”); Id at ON-0032-0034; ON-0035-0037; ON-0038-0040; ON-0041-0042; ON-0043-0045. ON-0046-0047; ON-0048-0049;

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ON-0051-0052; ON-0054-0057; ON-0058-0061; ON-0062-0064; ON-0065-0068; ON-0069-0072; ON-0073-0076; ON-0077-0079.

4) In October 2010, Shonda Davis was appointed principal at Barringer following a series of events. The principal who had brought Ms. Davis in as a Science/Language Department Chair was demoted with a new principal hired from Nevada. He ended up exhausting all of his leave within the first month of school and left the building at a time when there was utter chaos. This was described as between five and seven full-blown riots every day (20-30 students, blood everywhere). There were three different lunch periods with three food fights each day. There is both a very diverse and unique population at Barringer: Bloods, Crips, Latin Kings, Netas, other gangs. The school also made the newspapers at least three times, for an alleged stabbing; an alleged rape; and a student-led protest as a result of the foregoing conditions.

5) Within about a month of so, Ms. Davis and the administration were able to somewhat restore the building to somewhat of a safe environment and there were roughly one hundred student suspensions per month. This number was

dramatically reduced by the end of the year to somewhere between ten and twenty suspensions, depending on the month. Transition time between classes was reduced from thirty minutes to about eight by December, and ultimately down to four or five minutes toward the end of the year. Year 1 of her principalship was therefore about restoring safety and security. See DAVIS Testimony, T132L14-25; 33L1-25. 34L1-25; 35L1-4.

6) Year 2 was the 2011-2012 school year, with the administrative focus primarily on the things that were happening in the classroom. An instructional and operational cabinet formed. The former had a mandate to adopt a laser-like focus on instruction in the classroom. The end result was that Barringer mathematics scores went up 19.7% statewide, while language arts scores

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rose 14.2%. Id. at 35L5-14; 18-25; 36L1-2.

7) Barringer High is a SIG school, which is a \$6,000,000 grant awarded over three years. One of the criteria for the grant was that by a certain time frame, 75% of the instructional staff should have been deemed proficient or distinguished. Id. At 36L8-15.

8) Following a determination that there was no congruence between teacher ratings, things that evaluators saw in observations and test scores, Ms. Davis undertook a restructuring commencing with the elimination of key members of the administrative team who were deemed ineffective or highly ineffective. One of the affected individuals was Mr. Newson's former Social Studies Department Chair Denise Vega-Moore. During the summer that preceded the 2011-2012 school year, Ms. Davis then conducted interviews and Ms. Wallace was hired, initially as the Social Studies Department chairperson and later promoted her to vice principal Id. at 37L1-20; 40L10-16.

9) During the 2010-2011 school year at Barringer, Denise Vega-Moore was the Social Studies Department Chair. In his June 15, 2011 ANNUAL PERFORMANCE EVALUATION, Ms. Vega-Moore rated Mr. Newson "Proficient" in all components of all four domains See Respondent Exhibit Bates Stamp ON-0001; ON-0002. In awarding a total score of 132 (83%), the chairperson noted that "Mr. Newson is a very knowledgeable teacher who

incorporates his life experiences into his everyday history lessons. Infusing more 'student-centered' activities selected according to the student population would enhance how his instruction is received." Ibid; see also April 11, 2011 FORMATIVE TEACHER OBSERVATION ("Proficient" rating overall). Id. at ON-0029-0031;

10) Student schedules at Barringer High School are arranged by block, meaning that there would be an "A" Block and a "B" Block, which would alternate each day. See PHELPS Testimony, TIII370L5-22.

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11) On September 19, 2011 Christina Wallace, who was then the Social Studies Department Chairperson conducted a SPOT OBSERVATION of Mr. Newson's Block 2B Social Studies class. See Petitioner Exhibit 3. This contained a rubric score of 2 ("The instructional objective is posted but is missing and/or does not meet two or more of the following components and/or criteria: behavior; specific; measurable; observable."

12) During a September 23, 2011 LESSON PLAN REVIEW conducted by Ms. Wallace, Mr. Newson's US History 1 + II lesson plan was found unsatisfactory, with the required revisions made by September 27, 2011. See Petitioner Exhibit 4. Under SUGGESTIONS FOR IMPROVEMENT AND GROWTH, Ms. Wallace made Comments related to Domain 1, and went on to state that there must be clear, specific, measurable objectives with all 5 components, as well as that the curriculum guide and directives must be followed.

13) Ms. Wallace conducted a SPOT OBSERVATION of Mr. Newson's 2B US History II class on September 23, 2011. This resulted in a rubric score of 2, and cited unclear condition and the lack of specific, measurable components or criteria. See Petitioner Exhibit 7.

14) On September 26, 2011, Ms. Wallace issued a Letter of Warning to Mr. Newson, for NEGLECT OF DUTY, LESSON PLANNING, INSUBORDINATION, related to a September 16, 2011 request that lesson plans from September 19-23, 2011 be revised and resubmitted. According to the document, the directive was not followed, and the suggestions for improvement not

reflected in the lesson plans submitted on September 21, 2011. See Petitioner Exhibit 5.

15) An additional Letter of Warning for NEGLECT OF DUTY issued on September 26, 2011, related to Mr. Newson's failure to submit his lesson plans on time September 21st, and instead providing them on the 23rd. See Petitioner Exhibit 6.

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16) On September 29, 2011, Ms. Wallace undertook a SPOT OBSERVATION of Mr. Newson's Block 2B US History II class. The resulting rubric score of 2, included a finding of deficiency in the learning and specific components. See Petitioner Exhibit 8.

17) On October 14, 2011, a SPOT OBSERVATION of Mr. Newson's Block 2 US History 2 class. was done by Ms. Wallace. A rubric score of 3 was given, with comments made related to the learning component being unclear. See Petitioner Exhibit 9.

18) On October 17, 2011, Mr. Newson was issued a Letter of Warning for NEGLECT OF DUTY/PROFESSIONAL RESPONSIBILITY FOR GRADE BOOKS by Ms. Wallace. See Petitioner Exhibit 10. This related to a failure to post at least five grades and assignments for each student in the Power teacher grade Book. See Petitioner Exhibit 10.

19) During an October 18, 2011 LESSON PLAN REVIEW done by Ms. Wallace, a rating of unsatisfactory was given. The suggestions for improvement, included inter alia, planning lessons according to the attached curriculum and pacing guides, with engaging student activities related to their learning styles and backgrounds developed. See Petitioner Exhibit 11.

20) A SPOT OBSERVATION also occurred on October 18th. In Mr. Newson's Block II Social Studies class, with a rubric score of 3 given, due to an unclear condition related to the instructional objective. See Petitioner Exhibit 12.

21) On October 20, 2011, Ms. Wallace conducted an announced FORMATIVE TEACHER OBSERVATION of Mr. Newson, following the October 18, 2011 Pre-Observation Conference. See Petitioner Exhibit 13. This resulted in

an overall assessment of 32 points out of a potential 108, for a score of 30%, resulting in an UNSATISFACTORY assessment overall. The OBSERVATION SCORING SUMMARY

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FORM indicates the following: DOMAIN 1: PLANNING AND PREPARATION: Basic scores of 7 for 1(a) Demonstrating knowledge of content and pedagogy & 1(d) Designing coherent instruction; Unsatisfactory scores of 0 for 1(b) Demonstrating knowledge of students; 1(c) Implementing curricular goals and objectives; 1(e) Assessing student learning. The Domain 1 total was 14. DOMAIN 2 CLASSROOM ENVIRONMENT contained a Basic score of 1 for 2(e) Organizing physical space, with Unsatisfactory scores of 0 for 2(a) Creating an environment of respect and rapport; 2(b) Managing student behavior; 2(c) Managing classroom procedures; 2(d) Establishing a culture for learning. These resulted in a total Domain 2 score of 1. DOMAIN 3: INSTRUCTION included a Basic score of 7 in 3(a) Communicating clearly and accurately, with Unsatisfactory scores of 0 for 3(b) Using questioning and discussion techniques with flexibility and responsiveness; 3(c) Engaging students in learning; 3(d) Providing feedback to students; 3(e) Attaining student achievement That meets or exceeds performance benchmarks. This yielded a Domain 3 score of 7. DOMAIN 4 PROFESSIONAL RESPONSIBILITIES was deemed as N/A with no score assessed. At the Post-Observation Conference held with Mr. Newson on October 25, 2011, a TEACHER OBSERVATION & PERFORMANCE EVALUATION INTERVENTION PLAN was developed. Ibid. This focused on Domain 2 components 2(b) (Managing student behaviors & 2(c) Managing classroom procedures) and contained the action(s) to be taken, with timelines culminating on November 25, 2011, and the responsible person(s).

22) A SPOT OBSERVATION of Mr. Newson's Bloc 4 Social Studies class was done on October 30, 2011, that yielded a rubric score of 3. Included among the comments made by Ms. Wallace was a query of what students were walking away with learning, as it was unclear in the objective. See Petitioner Exhibit 14.

23) During the period from roughly November 2011

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through February 2012, instructors and administrators at Barringer were being trained in using the framework of *Danielson* in part by viewing PD 360 videos, and incorporating the techniques into their lessons. Additionally, all Barringer evaluators went through weekly trainings in conjunction with cabinet meetings, while teachers had between twelve and twenty-five hours of training. While the evaluative tool itself did not change, there was a focus on the components in the tools. See, LOPES Testimony, TII98L2-9; 16-18; DAVIS Testimony, TI46L21-25, 47L15-17; 52L16-18; WALLACE Testimony, TI151L9-11; see also, GOMEZ-RIVERA Testimony, TIV34L1-25.35L1-16.

24) In conjunction with a November 21, 2011 LESSON PLAN REVIEW undertaken by Ms. Wallace, a determination was made that Mr. Newson's lesson plan's were unsatisfactory, with suggestions proffered that meaningful learning activities must be included, with T.A.P.S illustrated for each lesson with times. The lesson plans were also found to be incomplete, as they were only submitted for US History II. See Petitioner Exhibit 15.

25) Mr. Newson's November 28, 2011 LESSON PLAN REVIEW was classified unsatisfactory, with Respondent directed that "[y]ou must include times of all components and T.A.P.S. in each lesson; you must explain what you and your students will do; you cannot show the Patriot for 2 whole blocks as it is fiction." See Petitioner Exhibit 16.

26) An unannounced FORMATIVE TEACHER OBSERVATION of Mr. Newson's US History 1 Social Studies class occurred on December 6, 2011. See Petitioner Exhibit 17. By virtue of the overall assessment of 9 PTS of a possible 72 (13%), Ms. Wallace rated the observation Unsatisfactory. The OBSERVATION SCORING SUMMARY FORM established that Domains 1 and 4 were not observed at that time. Under DOMAIN 2, Mr. Newson received a total score of 2, which was the

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result of being found proficient in 2(e) Organizing physical space. A 0 was received in all other components 2(a) through 2(d) of the domain. Under DOMAIN 3, Respondent

got a basic for 3(d) Providing feedback to students, with a 0 in 3(a), 3(b), 3(c), 3(e). At the Post-Observation Conference conducted by Ms. Wallace On December 12, 2011, another INTERVENTION PLAN was developed, with a December 21, 2011 date. The focus of the same was 2(c) Managing Classroom Procedures and 2(d) Establishing a culture for learning. This set actions to be taken with a timeline of January 3, 2012 through January 24, 2012. Under RESPONSIBLE PERSONS, Respondent was advised to see identified classrooms for models of 2(c) and 2(d), respectively. Ibid.

27) On December 14, 2011, Mr. Newson received a Letter of Warning INSURBORDINATION/FAILURE TO FOLLOW INSTRUCTIONS. This provided that: “[o]n November 29, 2011, you were directed by Principal Davis and myself not to show the entire film ‘The Patriot.’ I also wrote this directive in your lesson plans. This directive has been ignored as evidenced by your submission of assessments and your grade book. You have not included the suggestions I made for improvement of lesson plans. You continued to show the film and assess students on information from the film.” See Petitioner Exhibit 20. The potential for further disciplinary action in the form of an increment withholding or tenure charges was also articulated.

28) On December 14, 2011, Ms. Wallace sent Mr. Newson a Memorandum which was captioned CONCERNS TO BE ADDRESSED IMMEDIATELY, which laid out a number of Items with a corresponding time frame. See Petitioner Exhibit 21. These included: cover the 4 holes in the back of the classroom #232 with posters; put up print-rich materials that reflect ALL American history; put up the assignment and rubric with the posters in the hall display; ensure the students clean up after their classes; call the parent of the student you sent to me for cursing and set-up a parent-teacher

conference; re-teach the units on WWI and the Revolutionary War, follow the NPS curriculum guide, and submit revised assessments; read about the Harlem Renaissance and re-teach your students about African Americans in the North. [*emphasis in original document*].

29) On December 14, 2011, Mr. Newson was issued a second Letter of Warning by Ms. Wallace for INSUBORDINATION/FAILURE TO COMPLY WITH SCHOOL POLICIES. See Petitioner Exhibit 22. This reported that on November 2, 2011, the Social Studies Department was directed to include the T.A.P.S. and the break down of the 80 minutes in the lesson plans. An additional memo given to Respondent on December 5, 2011 stating the requirements of the plan was also referenced. Mr. Newson was thereafter accused of ignoring this directive as evidenced by the weekly submission of lesson plans and failure to implement the comments and suggestions given. See Petitioner Exhibit 22.

30) In or about early February 2012, Ms. Wallace assumed her vice principal's duties exclusively, and Antonio Lopes took over as Social Studies Coordinator. See NEWSON Testimony, TIII63L12-25. Mr. Lopes did a LESSON PLAN REVIEW for Mr. Newson on February 5, 2012. See Petitioner Exhibit 27. The lesson plans were deemed Satisfactory, with recommendations made to develop lessons and/or objectives that incorporate high level thinking activities; elaborating on 2b + 2c; and consider spending a day/lesson for the Black History activity instead of just 15 minutes. Numerous comments were also made by the coordinator on the individual LESSON PLAN FORMAT(S).

31) In connection with a February 10, 2012 LESSON PLAN REVIEW, Mr. Lopes indicated that Respondent Newson's lesson plans were Satisfactory, with the following offered as suggestions: develop activities that incorporate only material from current unit of study; include the time/T.A.P.S. and additional information on the role of the teacher throughout the various activities;

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submit copies of assessment for review. Mr. Lopes further required the lesson plans to be revised to permit the submission of a revised quiz. See Petitioner Exhibit 28.

32) On February 14, 2012, Ms. Wallace completed the TEACHER'S MID-YEAR PERFORMANCE REVIEW for Mr. Newson. See Petitioner Exhibit 29. Under DOMAIN 1, this listed a Basic rating for Component 1(A) & 1(C), with Unsatisfactory ratings registered for 1(B), 1(D), 1(E). The COMMENTS portion in part commended Mr. Newson for his

general knowledge of the subject matter, but maintained that he did not research or utilize best practices, such as those from the National Council for History Education. Notice was also taken that while workshops had been attended with support provided from both the workshops and his supervisor, Mr. Newson continued to use learning assessments and activities that were several years old and ask students only lower-level questions based on rote memorization. For DOMAIN 2, there were Basic ratings for 2(B), 2(C) 2(E), with a finding of Unsatisfactory for 2(A) & 2(D). The COMMENTS recognized the fact that Mr. Newson had made attempts to improve on the classroom environment, but allowed that there were still classroom interactions with negative overtones such as sarcasm, put-downs, or conflict. Ms. Wallace further urged that Respondent was not consistent with his attitudes and expectations in all classes, with the classroom environment reflecting low expectations. Mr. Newson was rated Basic in DOMAIN 3 under 3(A) & 3(D), with Unsatisfactory findings for 3(B), 3(C), 3(E). The COMMENTS portion for this domain concludes that while Mr. Newson's oral and written communications do not contain errors, they may not be completely appropriate or require further explanation. His primary method of teaching was also characterized as lecture and reading from the text, which are the lowest form of learning. Poor use of questioning and discussion was also mentioned later on. In DOMAIN 4, Ms. Wallace rated Respondent Basic in 4(B), 4(E), 4(F) and 4(G), with an Unsatisfactory rating attached to 4(A) 4(C) and 4(D). Comments made for this domain included

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that Mr. Newson does not reflect accurately on how lessons may be improved, and that although he has acknowledged some areas of improvement provided either by Ms. Wallace or the Master Teacher, he has not provided any of his own suggestions. In conclusion, Ms. Wallace offered in the SUMMARY that "Mr. Newson needs to reflect, research, and observe other teachers who are implementing the suggestions for improvement. He must also utilize the strategies and historical analysis skills provided through the district TAGH and workshops. Mr. Newson is resistant and defensive to change and not collegiate in working with his supervisors or other teachers. He must also respect the students and their families. He needs to see the potential in our students and have higher expectations." A Professional Development Plan was

also indicated, which would list targets for the remainder of the school year, and include: research-based student engagement strategies; learning about students learning styles and interests, and creating lessons that reflect this knowledge; reading articles and books about teaching students of color. On February 14, 2012, Mr. Lopes performed a SPOT OBSERVATION of Respondent's Block 3 class. See Petitioner Exhibit 30. This determined that most students were passive listeners; 2 students by the door had their heads down; of the 13 students in the class, 7 were on task while 6 were off task. The SPOT OBSERVATION FEEDBACK FORM, which was completed on February 17, 2012, praised the good role play activity conducted by Mr. Newson, and listed the failure to have a rubric for grading as a specific area of weakness.

33) On February 19, 2012, Mr. Lopes issued a Letter of Warning NEGLECT OF DUTY to Mr. Newson, for failing to submit his lesson plans on time for the week of February 20, 2012. See Petitioner Exhibit 31.

34) Pursuant to a February 21, 2012 LESSON PLAN REVIEW, Mr. Lopes found that Respondent's lesson plans were submitted on time and were satisfactory. Suggestions included submitting a test for review and revising one of the instructional objectives with a more

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concrete use of accuracy. See Petitioner Exhibit 32.

35) A SPOT OBSERVATION was done by Mr. Lopes on February 21, 2012. Ibid. This found that 8 students were on task while 4 were not. The SPOT OBSERVATION FEEDBACK FORM contained praise for Mr. Newson for starting to incorporate suggestions in the lesson plans, e.g. a graphic organizer, and asked several questions which served as a quiz. Suggestions offered were to continue to use rubrics in future projects, lessons and activities; to develop activities to increase student engagement; and to allow students to teach each other and come up to the board. A February 24, 2012 LESSON PLAN REVIEW Mr. Lopes did indicated that the lesson plans were submitted on time, and satisfactory. Good use of activities (poster and role play) to increase student participation and engagement was noted, with suggestions made as follow: create rubric for New Deal poster project; include higher

order thinking questions for discussion; modify assessment. See Petitioner Exhibit 35.

36) During a SPOT OBSERVATION of Mr. Newson's Block A1 Social Studies class which took place on March 2, 2012, Mr. Lopes stated that 6 students were on task, and 3 were off task. The SPOT OBSERVATION FEEDBACK FORM completed March 2, 2012 allowed that "[t]eacher is incorporating some higher order thinking questions,... Mr. Newson needs to develop additional questions in addition to the ones used in class to increase student engagement". A specific area of weakness was listed as using extension questions for deeper understanding and comprehension. See Petitioner Exhibit 36.

37) According to Mr. Lopes' March 10, 2012 LESSON PLAN REVIEW, Respondent's lesson plans were submitted on time and were satisfactory. Based upon suggestions made however, revisions were necessary. See Petitioner Exhibit 37.

38) In connection with a March 13, 2012 SPOT

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OBSERVATION, a finding was made by Mr. Lopes that 4 students were on task while 5 were not. Notes confirmed that students were completing a quiz; took notes from a presentation given by the teacher on World War II; during the presentation, the teacher used various questions to engage students to build on prior knowledge, with 4 students participating in the discussion. See Petitioner Exhibit 38.

39) The SPOT OBSERVATION FEEDBACK FORM executed by Mr. Lopes on March 15, 2012 found that the teacher was making progress with using extension questions when presenting information on World War II, and praised Mr. Newson for placing the desks in a "U" shape to facilitate discussion. The one specific area of weakness urged the Respondent to continue to use extension questions for deeper understanding and comprehension. See Petitioner Exhibit 39.

40) The March 16, 2012 LESSON PLAN REVIEW of Mr. Lopes demonstrated that Respondent's lesson plans were timely and satisfactory. See Petitioner Exhibit 40.

41) On March 24, 2012, Mr. Newson was issued a Letter of Warning NEGLECT OF DUTY by Mr. Lopes, based upon the untimely submission of lesson plans for the week of March 26, 2012. See Petitioner Exhibit 41.

42) On the morning of March 26, 2012, Mr. Newson was advised by Principal Davis that tenure charges on the grounds of inefficiency would be filed against him. Dana Chibbaro, is the Director Newark Public Schools Department of Academic Services, Office of Social Studies/Multicultural Education, and was asked by Mr. Lopes to do an observation of Mr. Newson. Ms. Wallace also was involved in a previous Email or two as well and had made the initial contact. See CHIBBARO Testimony TII182L11-17; 218L1-25. By letter dated March 26, 2012, she memorialized a discussion held with Mr. Newson in his classroom in the presence of Mr. Lopes. This recounted that a Pre-Observation Summary Conference had been

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scheduled; that Mr. Newson however was clearly upset that he had received the tenure charge paperwork that morning, stating “[y]ou and this conference are the last thing I want to deal with right now;” that Mr. Newson had informed her having the conference would be a waste of time as he was going to take a personal day the following morning, March 27, 2012; and that the Respondent had stated he did not need a Pre-Observation Conference, and that she could conduct an observation any time she wanted to without one. See Petitioner Exhibit 42.

43) At the time that the tenure charges were filed, Mr. Newson was also provided with a 90 DAY TEACHER IMPROVEMENT PLAN developed by Ms. Davis, Ms. Wallace and Mr. Lopes. This listed the area of inefficiency by domain; stated support activities/resources; and articulated a series of completion dates until the conclusion of the 2011-2012 school year. See Petitioner Exhibit 69. Mr. Newson complied with the requirements of the PIP, watching videos, reading articles, answering the online questions posed in the PD 360 videos and observing other teachers. See DAVIS Testimony, TI84L22-25; see also NEWSON Testimony, TIII61L16-20.

44) Based upon the unavailability of his NTU attorney, Mr. Newson did not take a personal day on March 27, 2012, and instead reported to school. Ms. Chibbaro called Barringer that morning to determine whether or not the Respondent was in attendance, and then later appeared to conduct the observation. This took place from 1:18-2:40 p.m., and resulted in an overall assessment of 41% or Unsatisfactory. See Petitioner Exhibit 44. The following were the scores and a summary of comments for the respective domains.

DOMAIN 1 was ranked 18 points, with 1(a) a Basic score of 7; 1(c) a Basic score of 4; 1(d) a Basic score of 7; 1(b) and 1(e) both were rated as 0. Recommendations for Domain 1 were that Mr. Newson should view the PD360 topic "TEACHING IN THE BLOCK;" that a learning profile inventory and interest survey should be conducted to better understand the needs of his students; and that Mr.

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Newson review Richard Marzano's work on EFFECTIVE STUDENT ENGAGEMENT and Carol Ann Tomlinson's work on DIFFERENTIATION. On DOMAIN 2, a total score of 5 was achieved, with component 2(b) rated a Basic score of 4, and 2(e) a Basic score of 1. Components 2(a), 2(c), 2(d) were given 0. Recommendations for this domain likewise commended educational source materials to Respondent. DOMAIN 3 represented a total score of 21, with Basic scores of 7 awarded for 3(a), 3(c), 3(d), and 0 given for components 3(b) and 3(e). The sole recommendation made for this domain was that Mr. Newson visit the classrooms of distinguished social studies teachers in the District. No rating was generated for DOMAIN 4, which was deemed N/A.

45) On March 30, 2012, Mr. Newson issued a rebuttal to the observation conducted. In part, this noted that the class in which the observation was conducted is his most challenging class, and further argued: Domain 1: "[t]he lesson included differentiation as evidenced by the drawing component of the poster and two different readings at different reading levels on the nullification crisis... Also, the students worked in pairs and could assist each other. Also, the teacher visited each pair during poster creation and gave advice, hints and direction." Domain 2: "[i]nappropriate language when heard by teacher was addressed... The girl who did not remove her hat was checked off for non-cooperation as evidenced by classroom behavioral charts. This consequence becomes part of an overall class

participation grade at the end of the cycle... The student who was a major behavioral problem is well known to administrators. He has been suspended numerous times, assigned detentions, parents have been called and conferenced, he has even received guidance from the school social worker. His behavior has not changed... Any time I see a cell phone out or being used I address the behavior.” Domain 3: “I think it is appropriate to explain the directions numerous times to students who do not understand. I think it is appropriate to offer a bonus (check pass) to encourage participation...” Ibid.

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46) A SPOT OBSERVATION FEEDBACK FORM related to an observation of Mr. Newson’s Block A1 class by Mr. Lopes on March 29, 2012 lists 6 students on task and 6 students off task, with a “2” rating for STUDENT ENGAGEMENT Activities and Assignments, Discussion Techniques and Student Participation. See Petitioner Exhibit 45.

47) On April 17, 2012, Mr. Lopes completed a SPOT OBSERVATION FEEDBACK FORM for Block A2. See Petitioner Exhibit 50. This determined that all 13 students were on task and rated OBJECTIVE QUALITY a “4;” STUDENT ENGAGEMENT Activities and Assignments & Student Participation a “3;” and N/A for Discussion Techniques, as students were completing a Learning Styles Inventory. The April 19, 2012 SPOT OBSERVATION FEEDBACK FORM notated that all 12 students were on task, with identical scores for OBJECTIVE QUALITY and STUDENT ENGAGEMENT. See Petitioner Exhibit 51.

48) On April 21, 2012, Mr. Newson was issued a Letter of Warning NEGLECT OF DUTY due to the tardy submission of his lesson plans for the week of April 23, 2012. See Petitioner Exhibit 52.

49) During an April 23, 2012 SPOT OBSERVATION conducted by Mr. Lopes in Block A2, 9 out of 11 students were viewed as on task. Under OBJECTIVE QUALITY, Mr. Newson received a “4” for a clearly stated instructional objective; a “3” for Activities and Assignments under STUDENT ENGAGEMENT, and a “2” in Discussion Techniques and Student Participation. See Petitioner Exhibit 53.

50) On April 26, 2012, Mr. Newson received a “4” in OBJECTIVE QUALITY, a “3” for Discussion Techniques, and a “2” in Activities and Assignments & Student Participation, concerning a spot observation Mr. Lopes had in his Block B2 class. It was recorded by the coordinator that 10 of 11 students were on task, and that several probing questions were asked to engage

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students and that a smart board was also used. See Petitioner Exhibit 54.

51) On May 4, 2012, Mr. Lopes did an unannounced FORMATIVE TEACHER EVALUATION of Mr. Newson in his Block 2B class. See Petitioner Exhibit 56. This culminated in an overall assessment of 52/72 points or 72% for a Basic rating. Only DOMAIN 2 and DOMAIN 3 were assessed at that time. With respect to the former, all were rated Basic, with components 2(a) through 2(d) receiving a “4” for the same, and 2(e) a “1.” While noting teacher strengths of using examples and analogies to connect to students, challenges were also recognized, for example, 2(a) correct/address student comments and speak to student individually instead of in front of the whole class; 2(b) teacher makes an effort to establish standards of conduct for students, monitor student behavior, and respond to student misbehavior, but these efforts are not always successful. For the latter, all components in Domain 3 received a Basic rating of “7.” Under STRENGTHS, Mr. Lopes recalled that some students were engaged, and it was evident that those who were engaged were activating prior knowledge. CHALLENGES, enumerated in part: 3(a) teacher’s oral and written communication does not contain errors but may not be completely appropriate or may require further explanation to avoid confusion; 3(b) teacher’s use of questioning and discussion techniques is uneven with some high level questions and limited student participation; 3(c) teacher is partially engaging students in the learning due to the teacher’s inconsistent representation of content and limited use of appropriate activities, materials, lesson structure, and/or student grouping; 3(d) teacher’s verbal and/or written feedback to students is uneven, and its timeliness and/or accuracy is inconsistent; 3(e)

teacher's facilitation of the lesson promotes students' partial achievement of the curricular objective(s), as evidenced by assessments and/or performance evaluation. The 90 day TEACHER IMPROVEMENT PLAN satisfied the statutory criteria established by N.J.S.A 18A:6-11 and provided Mr.

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Newson with multiple opportunities to correct the cited inefficiencies, with numerous administrative and other District employees providing support to him. See IMPROVEMENT PLAN CHRONOLOGY, Petitioner Exhibit 68. Respondent also received ongoing assistance from District Master Teacher Pat Wing as early as January 6, 2012 as illustrated by the string of Emails found in Petitioner Exhibit 74.

52) On May 17, 2012, then-Barringer English Department Chairperson Terry Jefferson conducted an unannounced FORMATIVE TEACHER OBSERVATION of Mr. Newson's U.S. History 1 class at the request of Ms. Wallace. While providing background information to Ms. Jefferson, Ms. Wallace expressed her belief that Mr. Newson was a racist, and that she did not feel he needed to be in the classroom with the children.. See JEFFERSON Testimony, TIII291L17-21. The formal observation was assessed overall as Basic by Ms. Jefferson, with a score of 63% based on 45/72 points. See Petitioner Exhibit 59.

53) Like the previous formal observation done by Mr. Lopes, this only pertained to DOMAINS 2 + 3. In each, Respondent was marked Basic, culminating in a score of 16 for Domain 2 and 29 for Domain 3. For Domain 2, STRENGTHS were listed as 2(a) respectful classroom interactions, with 2(b) no discipline issues or classroom disruptions observed. Under CHALLENGES, Ms. Jefferson included: 2(c) "Mr. Newson is encouraged to plan his time more wisely and hold off on passing out certain materials that may interfere with the task at hand... Mr. Newson is encouraged to be more strategic about the times students are allowed to leave the classroom as to avoid loss of instructional time as well as time on task;" 2(d) "Mr. Newson is encouraged to place timely student work on the board with effective teacher feedback...However, Mr. Newson worked the problem out himself on the board and even though he asked a few questions, he often answered the

questions without giving students an opportunity to figure out the answer for themselves... Another example of Mr.

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Newson's low expectations for student achievement could be seen in his attempt to incorporate technology into his lesson. Firstly, Mr. Newson is to be commended for using the Smart Board to give students an idea of the layout of the regions of the Civil War. However, at no time did he let students try it for themselves... No content based word walls. No library area observed;" 2(e) "Mr. Newson's use of space supports the learning." For Domain 3, the chairperson included: "[t]eacher communicated clearly and accurately" as a 3(a) STRENGTH. For CHALLENGES, Ms. Jefferson submitted: 3(b) "Mr. Newson asked approximately 24 questions, however, elicited limited student response... Mr. Newson asked some high level questions... However, Mr. Newson asked a lot of vocabulary based questions that called on students' prior knowledge, but there was no evidence that students had covered any of the prior knowledge with the teacher nor did they have knowledge of the answers on their own... Mr. Newson erroneously explained to students that the reason they were taking the CRT was to see how they compared to other classes. However, the purpose for this criterion reference test is to measure how well students learned a particular skill or body of content;" 3(c) "Mr. Newson did too much talking, and much of the discussion was teacher led with students speaking only when Mr. Newson posed a direct question;" 3(d) "Mr. Newson must provide more opportunities for students to engage in class discussions, academic arguments, and activities that require them to defend their ideas;" 3(e) "There was no formative assessment observed wherein students demonstrated their abilities to accomplish the objective as written above... Mr. Newson did not implement effective check for understanding to ascertain the level to which students met the objective, if at all."

54) On June 14, 2012, Mr. Lopes completed the ANNUAL TEACHER PERFORMANCE EVALUATION for Mr. Newson, which encompassed the entire 2011-2012 school year. See Petitioner Exhibit 67. The SUMMATIVE PERFORMANCE EVALUATION RATING was 48% 63/172, which triggered a rating of Unsatisfactory. The respective

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scores for each domain included: DOMAIN 1 (18) 1(A), 1(C), 1(D) Basic, with 1(B) and 1(E) Unsatisfactory. SUPERVISOR'S COMMENTS made for this domain were inter alia, "Mr. Newson is to be commended for his general knowledge of the subject matter, and in depth knowledge of certain content areas. However, his lessons reflected limited pedagogical approaches, evidenced by a reliance on the text/ workbook and little use of ancillary materials. Mr. Newson did not always utilize best practices for teaching history such as those from National Council for History Education. For most of the school year, Mr. Newson chose not to use these research-based best practices, and continued to use learning activities and assessments that were several years old. Mr. Newson seldom integrated research-based best practices that included instructional strategies that allowed for interdisciplinary connections. Mr. Newson has made some limited improvement as a result of completing segments of PD360, support from his supervisor and observing other teachers..." DOMAIN 2 (13) contained basic ratings for components 2(A), 2(B), 2(C), 2(E), with 2(D) ranked Unsatisfactory. Some of the related comments made by Mr. Lopes for this domain were: "Overall, Mr. Newson has made attempts to improve on the classroom environment such as meeting with his supervisor and Mr. Brown (Vice Principal). However, there were still classroom interactions [that] are inappropriate with negative overtones such as sarcasm, put-downs, or conflict as evidenced by spot observations, informal and formal observations. Standards of conduct appear to have been established, and most student seem to understand them. However, some student behavior was poor and resulted in disciplinary referrals... In some of his classes, the classroom interactions were generally appropriate with occasional displays of insensitivity. However, Mr. Newson was not consistent with his attitudes and expectations for all classes. He made an effort to establish standards of conduct for students, monitor student behavior, and respond to student misbehavior, but these efforts are not always successful." DOMAIN 3 (22) included a rating of Proficient for 3(A), and Basic for

3(B) and 3(D). Also found were Unsatisfactory ratings for components 3(C) and 3(E). In that regard, Mr. Lopes commented: "Mr. Newson communicated clearly and accurately. His primary method of teaching was lecture and reading from the text, which are the lowest forms of

learning... The teacher did not engage all students in the learning process as evidenced by the lack of lesson structure and/or inappropriate student grouping as evidenced in observed formal evaluations. Teacher's verbal and/or written feedback to students was uneven, and its timelines and/or accuracy was inconsistent..." Finally, DOMAIN 4 (10) had Proficient ratings for components 4(A), 4(B), 4(E), 4(G), Basic for components 4(C) and 4(D), and Unsatisfactory for 4(F). Related comments concerned Respondent's attendance of 14 days absent with 2 tardy; 54 hours of professional development as evidenced by the certificates of attendance; perceived deficiencies attendant to the student folders, contact logs, etc.

55) The ANNUAL was a summative evaluation which took into account the entire 2011-2012 school year, as well as any complaints or issues that were cited earlier in the year. See LOPES Testimony, TII107L9-13; 116L12-17; 162L22-25; 163L1-2. On June 14, 2012, Respondent filed a rebuttal to the ANNUAL, which was the first "Unsatisfactory" evaluation he had received during his tenure with the Newark School District. See NEWSON Testimony, TIIIL11-23; see also Respondent Exhibit Bates Stamp 0394.

56) A determination was made based upon the Respondent's ANNUAL TEACHER PERFORMANCE EVALUATION that there was no significant growth on the part of Mr. Newson as Barringer administration was looking for something more than just moving toward a "Basic." Moreover, "Proficient" or "Distinguished" was what was expected of all teachers. See LOPES Testimony, TII114, L4-17; 153L1-2 168L1-8. Moreover, "Basic" was deemed in need of improvement. See WALLACE Testimony, TI30L1-2. Tenure charges were later certified against Mr. Newson.

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57) In reaching the conclusion that tenure charges should be preferred against Mr. Newson neither Ms. Davis, Ms. Wallace nor Mr. Lopes took into account the fact that he had never been rated unsatisfactory before; had been previously rated "Proficient" or had a total of twenty-three (23) years with the Newark School District. Rather, documentation based on the evaluation was reviewed as with all teachers, and it was up to Principal Davis to make a recommendation whether to go forward with the tenure charge. They also talked about the overall trend as to what was observed during the 90 days and what was the ANNUAL

EVALUATION. See LOPES Testimony, TII168L1-25. As such, no intermediate step, such as withholding an increment was considered. See WALLACE Testimony, TI297L23-25, 298L1-21.

58) On August 10, 2012, Respondent sent a STATEMENT OF EVIDENCE UNDER OATH in opposition to the charges of inefficiency. See Respondent Exhibit 83; NEWSON testimony, TIII135L16-25; 136L1-25; 137L1-25; 138L1-25; 139L1-25; 140L1-25.

59) The tier system for classifying teachers on inefficiency grounds within the Newark School District was present in the 2009-2010, 2010-2011 Guidebooks but was eliminated in the 2011-2012 Guidebook. See Respondent Exhibit 10; Bates Stamp 0094; see also DAVIS testimony, TI107L14-24. There was some confusion associated with this change, as the Newark Teacher's Union was fielding calls from instructors and administrators alike. Eventually, the new 2011-2012 Guidebook was provided to the NTU in late January 2012. See CAPUTO Testimony, TIV6L2-25; 7L1-25; 8L1-25; 9L1-25; 10L1-25; 13L13-21.

The record is replete with testimony related to the challenges presented to the teaching profession at Barringer High School. Principal Davis chronicled the relatively chaotic state of affairs when she took over

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the administrative helm during the 2010-2011 school year. The principal detailed the tension related to rival gangs, which frequently resulted in fights or even riots. Respondent and a rebuttal witness likewise provided their perspectives on the unique nature of instruction. Mr. Gomez-Rivera, in fact pegged the reading level of most Barringer students to be around 3rd grade, and urged that it was almost impossible for teachers to get materials.

According to Ms. Davis, once order had been restored, the focus of the new administration during the 2011-2012 school year then turned to educational improvement and enhanced expectations for the instructional staff among others. The principal confirmed during her testimony that this has resulted in increased test scores on a state wide basis.

An arbitrator hearing tenure cases under the ACT is well advised not to substitute his judgment for educational assessments made by board administrators, which are entitled to substantial deference. See Harvey v. State Operated School District of the City of Newark, OAL Docket No. EDU 10914-96N, 1998 N.J. AGEN. LEXIS 453 (OAL, August 21, 1998). In Harvey, Chief ALJ Harned found that evaluations of performance were a matter of professional judgment and necessarily highly subjective. Rather, in order to challenge the “correctness” of evaluations, a teaching staff member must allege facts to show the evaluation was made in bad faith; was the

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result of personal animosity or bias; or was in other ways improper. Id. at pp. 16-17 *quoting* Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County, 1968 S.L.D. 7, 10, 11-12 *affirmed* by State Board of Education, *affirmed* by Appellate Division, 1969 S.L.D. 202.

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The evidentiary record contains no indicia of arbitrary, capricious, bad faith, or biased evaluation techniques being employed by the District’s evaluators during the 2011-2012 school year with respect to Mr. Newson’s teaching

performance, and credible testimony in connection with the same was provided at the hearings by Principal Davis, Vice Principal Wallace, Department Chair Lopes, and Director Chibarro. The positions adopted by the Petitioner relative to Respondent's shortcomings are also buttressed by the findings of fact that have been previously set forth with great specificity. On balance, suffice it to say that as Respondent was slow in embracing the theories of differentiated instruction, learning style inventories, and other

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Respondent has maintained that Ms. Wallace was less than objective in her dealings with Mr. Newson, and called Ms. Jefferson in rebuttal to testify inter alia that she had spoken to Ms. Wallace regarding background information on Respondent, in preparation for her formal observation of him. According to the testimony, the vice principal advised Ms. Jefferson that she believed Mr. Newson to be a racist, who "should not be around our children." Even a cursory review of the record indicates that Ms. Wallace was particularly aggressive in her supervision of Respondent, at one point sending him multiple Letters of Warning at the same time. That said, the comments made and shortcomings noted were consistent with those reached by other evaluators. As such, I find that the Respondent has failed to carry his burden in establishing this affirmative defense by a preponderance of the credible evidence.

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best practices, acceptance of responsibility proved an elusive concept.

The District initially posits that Mr. Newson was rated unsatisfactory and/or basic in all areas assessed in Domain 1 of the evaluation tool in every Formative Observation during the 2011-2012 school year. These domain areas correspond to charges (a), (b), (c), (l) and (m). In fact, even after the 90 day improvement period and being provided with months of support from a Master Teacher prior to the 90 day improvement period, Mr. Newson had not improved even minimally in two of the Domain 1 areas, knowledge of his students and assessing student learning. See Petitioner Exhibit 67.

Under Domain 2, Petitioner submits that Respondent was rated unsatisfactory and/or basic in all areas assessed in every Formative Observation, which corresponds to charges (d), (e), (f) and (n) of the tenure charge. See Petitioner Exhibits 13, 17, 29, 44, 56, 59, 67. Charge (n), which essentially assesses whether the teacher creates an environment so that students can be engaged in learning, was rated unsatisfactory in all observations and evaluations except for one occasion, where it was rated a basic by Mr. Lopes, the Newark School District follows. Even then, Mr. Lopes noted in his May 4th observation that a number of Respondent's students were not engaged throughout the lesson. Respondent's consistent failure to meaningfully engage his students was also noted by Mr. Lopes in

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a number of his spot observations, no matter the class period observed.

Petitioner asserts that the constant failure of Respondent to engage his students was deemed unsatisfactory/basic when assessing areas contained in Domain 3 by all evaluators. Reliance is placed upon the testimony of Vice Principal Wallace, that Domain 3 is the most highly weighted area of the evaluative tool, because it focuses on instruction. And even after the 90 day period and months of support from the Master Teacher, no improvement was made. From Petitioner's perspective, it is particularly significant in Domain 3 that Mr. Newson failed to use other techniques for teaching other than teacher driven

instruction, which did not keep his students engaged. This had been noted by all of the evaluators during formative observations.

Petitioner additionally contends that the testimony of the District's Director of Social Studies, Dana Chibbaro, was consistent with the comments and observations of the three other evaluators. This cited Respondent's admission to Ms. Wallace and acknowledged in his testimony, that as far as he was concerned, it was only his job to deliver the instruction, and not his job to ensure that the students were engaged in it. Therefore, if he was given the right kind of kids, he would be an excellent teacher. Instead, as recounted by Mr. Lopes and Ms. Wallace during their

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observations both formative and spot, Respondent's lesson was not engaging for the students which was evidenced by the fact that "four students were obviously engaging in inappropriate language across the room. There were numerous students that were texting on their phone. There were two students engaged in taking pictures of each other with their phones."

The District urges that finally, as also noted by all evaluators, Ms. Chibbaro indicated that in Respondent's lesson, "[m]ost of the activities were absolutely teacher-directed not student centered, which is obviously not going to get the kind of student engagement that you want, ... and there was no attempt to differentiate instruction... nor did it appear that Mr. Newson knew what the learning profiles of the students were." Ms. Chibbaro additionally noted that there

were no checks for understanding and respondent didn't even take anecdotal notes on students, which is another way to assess.

Petitioner allows that as such, Respondent's annual evaluation reflects the following as to Domain 3: "[h]is primary method was to lecture and reading from the text, which are the lowest forms of learning... he has stated that since students need to listen to lectures in college, then this is the best way to teach... As a result, the teacher did not engage all students in the learning process as evidenced by the lack of learning structure. See

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Petitioner Exhibit 67. The argument is made that respondent's own testimony supports his apparent belief that teacher driven instruction is appropriate and that it was not his job to engage his students. The Newark School District proffers that for example, during his direct testimony Mr. Newson related a conversation with Ms. Wallace, wherein he stated "[y]ou can lead a horse to water, but you can't make him drink." He elaborated during his testimony that this analogy demonstrates the reality of urban education: even though the teacher can present the material, he has no control over what the students actually learn. And although Respondent suggested in his direct examination that this statement was philosophical, his testimony on cross, belies that fact.

As to the remainder of the tenure charges (k), (o), (p) and (q), the Newark School District avers that these demonstrate Respondent's lack of respect for the process his superiors have put in place to support him as a teacher. On numerous occasions, Mr. Newson failed to submit his lesson plans on time or

submitted them incomplete. See Petitioner Exhibits 4, 5, 6, 15, 16, 20, 22, 31, 41, 52. Emphasis is placed upon the fact that some of these failures even occurred during the 90 day period of support, when Respondent knew that NPS was evaluating whether to certify tenure charges against him for inefficiency. Further, Petitioner pleads, warning letters contained within respondent's personnel file indicate that he was

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insubordinate on a number of occasions including: when he failed to revise his lesson plans as directed; failed to input grades in a timely fashion as directed; and failed to follow a directive to not show an entire fictional movie as a lesson. See Petitioner Exhibit 20.

The Newark School District determines that in terms of Respondent's skill, he readily admitted during cross-examination to be aware of Bloom's Taxonomy and the Best Practices of teaching. However, the testimonial and documentary evidence also demonstrates that Mr. Newson failed to implement these well established practices with his students. Instead, these practices were characterized as either too hard in that it takes too much time to implement them or claims that the students' abilities do not justify these approaches.

Petitioner recalls that Respondent's failure to differentiate instruction was also observed by his prior department chair at Barringer, Ms. Vega-Moore. But again, instead of implementing her recommendation to review his assessment methods in order to better differentiate between his students' learning ability and improve overall student performance, Respondent again makes excuses. See

Respondent Exhibit Bates Stamp 001-2. In this regard, Respondent testified that he did not have to implement his supervisor's recommendations even if they would help his students, apparently because

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he was rated proficient. Respondent's failure to implement his supervisor's recommendations whether he was rated proficient, unsatisfactory or basic was a common theme. When cross-examined on these failures, excuses would be made by Mr. Newson.

Additional reference is then made to the fact that Mr. Newson was told by Ms. Wallace early on that he should conduct a learning style inventory in order to better engage his students and differentiate instruction. Instead, Respondent claimed he complied by providing a survey concerning his students likes and dislikes, but then had to admit that he did not even attempt to comply with this recommendation until April of 2012, once tenure charges were served, because he had a philosophical issue with determining how students learned.

In answer to a recurring theme in Respondent's case at hearing, Petitioner correctly counters that case law does not establish that Ms. Wallace's failure to "model" the techniques by teaching a class for Respondent vitiates the fundamental fairness of the 90 Day PIP. See e. g. Gilmer v. State Operated School District of the City of Newark, OAL Docket No. EDU 13895-08; OAL Docket No. EDU 13560-09, 2011 N.J. AGEN. LEXIS 300 at 63 (OAL May 6, 2011). Moreover, the exhaustive IMPROVEMENT PLAN CHRONOLOGY developed by the Petitioner and found

at its Exhibit 68 bears stark testimony to the assistance provided to Mr. Newson throughout the period, which was not limited to: lesson plan feedback/review; pre-observation conferences; formal observations; post-observation conferences; spot observations; web links for class use; learning styles inventory; free online workshops; peer observation; and utilization of the Library of Congress website. These activities underpin Petitioner's position that this is not a case where the school district failed to provide any or sufficient support to a teacher it was contemplating filing tenure charges against.

Respondent has underlined the fact that the plan was not jointly developed, however, no citation has been presented to support the presumed argument that this renders it procedurally infirm. The record also discloses that Mr. Newson was provided with the opportunity for input once it was provided to him. However, given that he was "flabbergasted" by the presentation of tenure charges, as he described during his testimony, it is understandable that he was unprepared to offer any constructive considerations to be added. It also bears recognizing that Master Teacher Pat Wing assisted Mr. Newson on an ongoing basis during the 2011-2012 school year, beginning in January. And as established by the Email correspondence at Petitioner Exhibit 74, some of the issues that were discussed were differentiated learning and best practices. I also recognize that Respondent challenged the duration of the 90 day period based upon

the school calendar, but believe it substantially complied with the District's obligations and any deficiency was *de minimis*.

On the bases of the foregoing considerations and notwithstanding Respondent's able arguments to the contrary, I accordingly conclude that the Newark School District complied with its statutory and regulatory obligations regarding the 90 day improvement period, and that a *prima facie* showing of the sufficiency of the charges has been made. See generally N.J.S.A. 18A:6-11; N.J.A.C. 6A:3-5.1(c); see also Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super 65 (Appellate Div. 1985); Green Brook School District v. Fodor, 1984 S.L.D. 269, 284, affirmed, State Board, 1984 S.L.D. 297.

This shifts the burden to Mr. Newson to attempt to establish affirmative defenses. In reply, Respondent makes a number of convincing arguments. The record supports the initial position advanced that during the 2011-2012 school year, a marked change took place in the way Mr. Newson's teaching performance was observed and evaluated. In past years, his supervisors may have recommended that he increase the amount of "print rich" materials in his room; display more graded student work; incorporate more student-driven activities; and differentiate his instruction based upon student learning styles.

However, prior to the Fall of 2011, Respondent contends Mr. Newson had never been told that these were mandatory requirements for every lesson taught in order for him to be rated a proficient teacher. To that end, Ms. Davis testified to

her laser-like focus on what was happening in the classroom, particularly concerning staff evaluation. Wholesale elimination of administrators deemed partially effective or ineffective took place. And while it is certainly true that the *Danielson* framework that provided the basis for the evaluations of staff continued to exist, no serious argument may be made that the supervisory application of the same was not muscular, emphatic, and urgent.

The renewed emphasis placed upon *Danielson* is evidenced by the fact that three days of training were conducted for the administrators initially, with ongoing reinforcement at weekly cabinet meetings. Instructors were provided with training from November to February, as Mr. Gomez-Rivera recalled. The situation was only exacerbated by the confusion generated by the District's new Guide Book, which removed the tier system previously used for teacher inefficiency charges. NTU Rep. Caputo provided testimony on this point, which was not challenged by Petitioner.

Enhanced expectations of excellence for educators are laudable goals particularly in urban areas, and are currently serving as a lightning rod for

changes to tenure laws throughout our country. The implicit caveat in this instance, however, is that the application of the same may not be used to eviscerate the fundamental fairness and due process considerations that underlie our tenure statute. The gravamen of an inefficiency charge is that while a teacher has the capacity to perform ably, he nonetheless failed to do

so. See generally Gilmer v. State Operated School District of the City of Newark, OAL Docket No. EDU 13895-08; OAL Docket No. EDU 13560-09, 2011 N.J. AGENCY LEXIS 300 at p. 60; see also In the Matter of Antonio Lewis, Superintendent, Asbury Park School District, OAL Docket No. EDU 921-04 (April 4, 2004), *adopted* Commissioner of Education (June 7, 2004).

Respondent correctly argues that during the 90 day improvement period (and even before) Mr. Newson's ratings were significantly higher, and progress was made. The February 14, 2012 spot observation noted 7 students on task with 6 not. The February 21, 2010 spot observation had 8 on task and 4 not, with a comment made by Mr. Lopes that Mr. Newson had "[s]tarted to incorporate suggestions." On March 2, 2012, the ratio was 6 to 3, with the chairman noting that "[t]eacher is incorporating some higher order thinking questions." During the April 19, 2010 spot observation, all 12 students were found to be on task, and on April 23, 2012 9 of 11 were engaged. On April 26, 2012 10-11 students were on task, and Mr. Lopes

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indicated that "[t]he students were engaged, with probing questions asked to engage students. A Smart Board was also used."

Further, Mr. Lopes' unannounced formal observation conducted May 4, 2012 contained an overall rating of 72%, which falls at the upper range of the "Basic" assessment (63-75%). Domain 2 had a score of 17 and Domain 3 35, respectively. This represents improvement in components 2(a), 2(c) and 2(e) of Domain 2, which Mr. Chibbaro rated 0 "Unsatisfactory," as

well as components 3(b), 3(e) of Domain 3, which were also rated 0 by the director. Notice also must be taken that Ms. Jefferson undertook a later formal observation on May 17, 2012, which resulted in another “Basic.” As to the ANNUAL, I share the view of Respondent and credit the argument that because it encompassed Mr. Newson’s performance over the entire 2011-2012 academic year, it did not accurately reflect the progress made during the 90 day improvement period by virtue of being weighted down by the initial “Unsatisfactory” findings.

That is not to imply that Mr. Newson does not have to continue to make significant progress if he is to retain his teaching position. However, the totality of the circumstances in this case establish that Respondent is a 23 year tenured teacher, and except for one “Unsatisfactory” formative

observation in 2007, has for the last 10 years received “Proficient” ratings with an occasional “Satisfactory” early on. There is no question that Principal Davis and her instructional cabinet relied solely on the 2011-2012 year results when concluding that a recommendation to certify tenure charges should be made. And while some improvement was grudgingly acknowledged upon cross, it did not rise to the level of “Proficient” or “Distinguished.”

Such a misplaced application of our State’s tenure law on inefficiency is clearly at variance with the case law. Rather, that stands for the collective

proposition in this discrete instance, that a senior instructor such as Mr. Newson may not be summarily removed from his tenured position after only one year of an “Unsatisfactory” evaluation, even in the face of continuing shortcomings. Additionally, a scheme of progressive discipline is generally imposed in an attempt to require the teacher to modify his behavior and correct the inefficiencies. See generally I/M/O Tenure Hearing of Gilbert Alvarez, OAL Docket No. EDU 10067-09 (March 5, 2010); Green Brook School District v. Fodor, OAL Docket No. EDU 8407-83 (January 13, 1984); In the Matter of the Tenure Hearing of Claudia Ashe-Gilkes, School District of the City of East Orange, OAL Docket No. EDU 07135-08 (January 12, 2009); In Re Tenure Hearing of Wesley Gilmer, State Operated School District of the City of Newark, 2011 WL 2237628 (May 6,

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2011) *adopted* by Commissioner of Education (July 28, 2011); School District of the City of Newark, Essex County, v. Stanley Slovney, OAL Docket No. EDU 1269-84 (1984).

It is also worth noting as Respondent has cogently maintained in brief, that Petitioner’s desired result of removing Mr. Newson’s tenure would not even be cognizable under the new evaluation provisions of the ACT once the regulations are promulgated. Moreover, (26] 25 states in pertinent part:

- (1) The superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

- (2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in an annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

In conclusion, the totality of the foregoing considerations requires a finding that while the Newark School District did establish continued

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educational difficulties on the part of Mr. Newson, including Letters of Warning for a variety of reasons, it failed to prove the sufficiency of the tenure charges in this case. The discipline shall accordingly be reduced to the **WITHOLDING** of Mr. Newson's increment during the 2011-2012 school year, with his return to duty and being otherwise made whole. IT IS SO ORDERED.

VI. CONCLUSION

The Petitioner has failed to establish the sufficiency of the inefficiency tenure charge by a preponderance of the credible evidence.

AWARD

THE TENURE CHARGE SHALL BE MODIFIED TO A WITHOLDING OF MR. NEWSON'S 2011-2012 SALARY INCREMENT. RESPONDENT SHALL BE IMMEDIATELY RETURNED TO DUTY WITH FULL SENIORITY AND BENEFITS, AND OTHERWISE MADE WHOLE. JURISDICTION SHALL BE RETAINED SOLELY TO ASSIST THE PARTIES IN THE EVENT THAT ANY REMEDIAL ISSUES ARISE. THIS CONTAINS THE PROVISIONS OF THE ENTIRE AWARD.

Dated: January 10, 2013 _____
NORTH BERGEN, N.J. MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

