

STATE OF NEW JERSEY  
COMMISSIONER OF EDUCATION

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In the Matter of the Tenure Charges Against  
ANTOINETTE MODRAK, EDWARD J. MACK,  
AND PHYLLIS MACK

and

BOARD OF EDUCATION OF LINDEN PUBLIC SCHOOLS

Agency Docket No.: 288-9/14

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INTERIM AWARD OF ARBITRATOR

The undersigned was appointed on October 6, 2014 as Arbitrator pursuant to the TEACHNJ Act, N.J.S.A. 18A:6-17, to hear each of the tenure charges involving the three Respondents – Antoinette Modrak, Edward Mack, and Phyllis Mack. Shortly after being notified by the Commissioner of Education's Office of Controversies and Disputes that I had been appointed, counsel for the Linden Board of Education, having previously requested that the matters be heard by the same arbitrator, also requested that each matter

be heard individually so that no Respondent would be present during the testimony of the other Respondents. Respondents acquiesced to the tenure charges being heard by the same arbitrator, provided that the matter be consolidated into a single unified proceeding so that Respondents could hear all of the testimony regarding the tenure charges against them, which arose out of a series of interrelated incidents.

In an Interim Award dated December 12, 2014, the undersigned Arbitrator, ruling on a matter of first impression under the new TEACHNJ statute, ordered that the matter proceed as a single integrated hearing at which the Respondents, as parties, would be able to attend and hear all of the testimony. Non-party witnesses could, of course, be excluded as provided for by the Labor Arbitration Rules of the American Arbitration Association, which are incorporated by reference in the TEACHNJ statute to govern the conduct of tenure charge hearings. On or about December 18, 2014, the Linden Board of Education conveyed to the Respondents the documents required by N.J.S.A. 18A:6-17.1(b) (3), which provides that:

Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, 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 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 of 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.

Respondent Antoinette Modrak, and subsequently Respondents Edward Mack and Phyllis Mack, filed Motions to Dismiss the instant tenure charges because the Linden Board of Education had failed to provide the requisite information mandated under 18A:6-17.1(b)(3), "upon referral of the case to arbitration." Respondents submitted briefs and certifications in support of their Motions, and the Linden Board of Education submitted a brief and supporting material in opposition to the Motion. The Arbitrator has considered all of the materials submitted by the parties in deciding the Motions to Dismiss. The absence of specific reference to a particular document or case submitted by the Petitioner or Respondents in this ruling should not be construed as omission to read each of the cases and to consider all of the arguments submitted by the parties. Having thoroughly weighed all of the arguments and proofs submitted by the parties, and for the reasons set forth below, Respondents' Motions to Dismiss must be denied.

Although N.J.S.A. 18A:6-17.1(b)(3) requires that "the employing board of education shall provide all evidence 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 employee or the employee's representative," this obligation is predicated upon "referral of the case for

arbitration.” Respondents’ Motions presume that the tenure charges against the Respondents were “referred” to arbitration when the Arbitrator was initially notified that he had been appointed by the Commissioner of Education to hear all three tenure charge disputes. This assertion, upon which Respondents position is predicated, requires careful analysis.

That the statutory term “referral” in N.J.S.A. 18A:6-17.1(b)(3) does not refer to the decision of a board of education to pursue tenure charges after receiving the response of the charged employee, or to the submission of tenure charges brought by a board of education to the Commissioner of Education for purposes of appointing an arbitrator, can readily be inferred from the nature of the obligation, as was ceded by Respondents in their Motions. A matter cannot be deemed to have been “referred” for arbitration until an arbitrator has been identified with specificity, has agreed to hear the case in the absence of any disqualifying conflicts or scheduling unavailability to meet the statutory time limits, and the parties have been notified of the arbitrator’s appointment as the person to adjudicate the charges. Only upon final appointment of, and acceptance by, the person who will actually adjudicate the propriety of the tenure charges is authority to decide the case established and a mechanism created for resolving preliminary issues regarding production of documents and evidence required by N.J.S.A. 18A:6-17.1(b)(3) and for dealing with other procedural aspects of tenure arbitration proceedings.

The identity of the arbitrator, or arbitrators, to whom tenure charges against the Respondents in the instant case were to be referred was not definitely determined until this Arbitrator issued my Interim Award, dated December 12, 2014, which the parties received on December 15, 2014. Until the Interim Award was issued, no final determination had been made, nor was it clear to the parties, which arbitrator would be hearing each Respondent's case, particularly as the issue of consolidation of multiple tenure charges before a single arbitrator under the TEACHNJ statute is an issue of first impression under the new statute. Moreover, at least one Respondent had suggested that this Arbitrator relinquish two or all three of the cases if sequestration of parties as requested by the Board was granted.

In order to create an equitable process for determining whether the Board's proposed procedure or the Respondents' proposed procedure should be followed, a conference call was convened by the Arbitrator during which all parties were afforded ample opportunity to make suggestions about the manner in which these preliminary issues should be resolved. The parties were in agreement that the three sets of tenure charges should be heard by a single arbitrator in order to avoid inconsistent results. They disputed whether there should be three separate hearings, which would preclude each Respondent from hearing the testimony offered by the other Respondents, or as Respondents preferred, the matter should be integrated into a consolidated single procedure.

The parties' counsel thereafter consulted privately among themselves, and advised the Arbitrator that they would draft and execute a Memorandum of Agreement granting the Arbitrator authority to determine the issues of consolidation and sequestration. Under this Memorandum of Agreement, authority to determine issues relating to consolidation was explicitly granted to the undersigned Arbitrator, with the explicit provision that the parties would retain certain limited rights to appeal from the decision of the Arbitrator regarding consolidation.

However, it was at least implicit in the discussion during the preliminary hearing conducted by telephone conference call that procedural matters-- including scheduling of hearings, exchange of evidence and witness lists-- and other preliminary procedural concerns would not be fully scheduled, much less fully addressed and complied with, until the Arbitrator had issued an Interim Award determining the issues of consolidation and sequestration. This event did not occur until December 12, 2014, and not communicated to the parties until December 15, 2014. The Arbitrator's Interim Award established a single integrated procedure and denied sequestration of Respondents, but did not immediately resolve the issue of the order in which Respondents' charges would be addressed.

The Board transmitted the documents required by the statute to the Respondents on or about December 18, 2014, well within the statutorily established time limits. Therefore, there is no legal or equitable basis under the TEACHNJ statute or any governing rule of law or equity that mandates granting Respondents' Motions to Dismiss.

The execution of the Memorandum of Agreement, and the assurances conveyed by the parties in the presence of the Arbitrator during several preliminary conference calls, clearly created a reasonable expectation by the Linden Board of Education, and what reasonably should have been a mutual understanding, that compliance with the procedural requirements of the TEACHNJ statute, particularly N.J.S.A. 18A:6-17.1(b) (3), would be held in abeyance until this Arbitrator had decided in which, if any, cases he would continue to serve as the arbitrator and to what degree the tenure charge hearings would be consolidated as an integrated proceeding, as well as what opportunity, if any, the Respondents would be granted to hear all witnesses including each other.

Until the Interim Award was issued on or about December 15, 2014, no party knew who the arbitrator would be in their matter, and how these three sets of tenure charges would be adjudicated. Therefore, referral to arbitration, as contemplated by the new TEACHNJ statute, was not completely or meaningfully accomplished until the Interim Award was issued.

Consequently, the Linden Board of Education did not fail timely to produce required documents and information in violation of any clear or unambiguous standard established by the TEACHNJ statute.

Neither did the Board's premature, and thus erroneous, submission of a demand for production of documents create any legal or equitable basis to foreclose further administration or litigation of these tenure charges. Respondents could simply refuse to comply with the Board's demand for the production of documents until after the procedural posture of the three sets of tenure charges had been clarified and the matters were ready for referral for adjudication to either one, two, or three arbitrators, either as independently conducted cases or as one consolidated matter.

Respondents cited an award by Arbitrator Edmund Gerber in the Cuff case. However, the Cuff decision is not on point, as it deals with the exclusion of evidence that was not provided within the statutorily determined ten-day time frame after the matter has been properly referred to arbitration. If the Linden Board of Education had failed to comply with the applicable time requirement after receiving the Interim Award on December 15, 2014, then the principles espoused in the Cuff decision might properly be cited as a basis for excluding additional evidence, other than for the purposes of impeachment, as specifically provided by the TEACHNJ statute.

The Linden Board of Education's brief opposing Respondents' Motions to Dismiss raised and analyzed several grounds for denying the motion, including laches, unclean hands, public policy, and absence of prejudice. Each of these arguments has been considered thoroughly in reaching the Arbitrator's determination regarding Respondents' Motions to Dismiss. Significant weight was, however, afforded to the absence of any explicit definition of 'referral' in the body of the statute. Based on the analysis set forth above, such referral could not reasonably be deemed to have occurred before the issuance of the Interim Award on December 12, if not the receipt of the Award on or about December 15, 2014 because the preliminary procedural issues raised by both parties precluded identification not only of which arbitrator would hear each case, but also whether the Board had to present one integrated case in a consolidated proceeding or three separate cases. Thus, the Board could not determine with reasonable specificity what materials should be provided to whom until the issues of consolidation and sequestration had been definitively determined.

Furthermore, the District reasonably relied on the representations made among counsel at the preliminary conference regarding the authority of the Arbitrator to determine the procedural posture of the tenure charges, including consolidation and sequestration, and thus properly deferred providing the information required by N.J.S.A. 18A:6-17.1(b)(3) until the Arbitrator's determination of the dispute regarding consolidation and sequestration and my

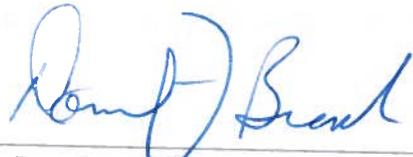
assertion of jurisdiction over all three cases was finalized by the issuance of the Interim Award.

For all these reasons, the Respondents' Motions to Dismiss are hereby denied. The matter shall proceed to hearing as previously scheduled on February 5 and 6, 2015.

The Arbitrator hereby retains jurisdiction for the purpose of resolving any disputes regarding the tenure charges filed by the Board of Education of Linden Public Schools against Antoinette Modrak, Edward Mack and Phyllis Mack.

January 8, 2015

Princeton, NJ

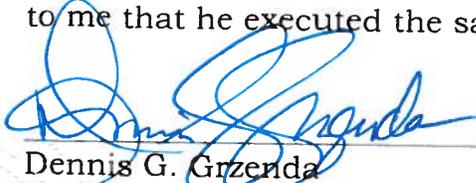


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Daniel F. Brent, Arbitrator

State of New Jersey  
County of Mercer

On this 9<sup>th</sup> day of January, 2015 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.



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Dennis G. Grzenda  
Notary Public of the State of New Jersey

**DENNIS G. GRZENDA**  
A Notary Public of New Jersey  
My Commission Expires October 18, 2019

