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*In the Matter of Tenure Hearing of*

**Davis Hannah,  
State-Operated School District  
of the City of Newark, Essex County**

Agency Docket No. 279-9/15

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**Ruling on Respondent's Motion to Dismiss**

**Tia Schneider Denenberg, Arbitrator**

**APPEARANCES**

**FOR THE PETITIONER:**

Theresa L. Moore, *Attorney*  
Riker, Danzig, Scherer, Hyland & Perretti, LLP

**FOR THE RESPONDENT:**

Genevieve Murphy-Bradacs, *Attorney*  
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

**BACKGROUND**

This matter is before the arbitrator for a decision on the motion to dismiss filed by Davis Hannah (Respondent) on December 2, 2015, along with a letter memorandum in support of the motion. On December 18, 2015, the State-Operated School District of the City of Newark (District) filed a letter memorandum in opposition to the motion to dismiss. On January 4, 2016, the Respondent filed a reply brief. On January 8, 2016, the District submitted a recent arbitration decision in support of its opposition to the motion to dismiss.

## **I. Statement of Facts**

The Respondent is a tenured art teacher who has been employed by the District since the 1998-1999 school year. He holds a New Jersey instructional certification with an endorsement to teach art. For the 2013-2014 and 2014-2015 school years, Mr. Hannah taught art at the elementary grade level at BRICK Peshine Academy.

The Respondent was rated “Partially Effective” in his 2013-2014 annual summative evaluation (Statement of Evidence, Exhibit 6). During the 2013-2014 school year, he received two unannounced, formal classroom observations—one of 25 minutes on November 18, 2013, and the other of 22 minutes two weeks later, on December 2, 2013 (Statement of Evidence, Exhibits 3 and 4). Also, administrators conducted informal “Learning Walks” in the Respondent’s classroom on December 21, 2013; January 27, 2014; February 4, 2014; and March 4, 2014 (Statement of Evidence, Exhibit 15).<sup>1</sup> The Respondent’s 2013-2014 annual summative evaluation described him as

very open to improving his practice during the Midyear Review. We discussed having weekly coaching sessions. A plan was put in place. Immediately, Mr., Hannah began to implement the strategies and suggestions given to him during the coaching sessions. Unfortunately, Mr. Hannah became ill and was hospitalized. Upon his return, NJASK testing took place and after that, the Arts teachers began planning for the Grease Production.

Since these ratings took place in that order, it was difficult for us to continue our coaching sessions. Out of fairness to Mr. Hannah, he should still be eligible for his increment even though his annual rating is Partially Effective.

Mr. Hannah has agreed to continue to be open to the feedback given for the 2014-2015 school year. He is a valuable team player and a great asset. Mr. Hannah is a hard worker and dedicated to becoming a Highly Effective teacher.

Statement of Evidence, Exhibit 6.

The Respondent was rated “Ineffective” in his 2014-2015 annual summative evaluation (Statement of Evidence, Exhibit 14). During the 2014-2015 school year, he received four formal classroom observations on October 6, 2014; January 6, 2015; March 19, 2015; and March 24, 2015 (Statement of Evidence, Exhibits 7, 9, 11, and 12). Administrators also conducted informal “Learning Walks” in his classroom on October 21, 2014; December

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<sup>1</sup> The District contends that an informal “Learning Walk” also was conducted in the Respondent’s classroom on October 21, 2013, but the record does not verify that incident (see Statement of Evidence, Exhibit 15).

16, 2014; January 6, 2015; and January 8, 2015 (Statement of Evidence, Exhibit 15). The summary portion of the Respondent's 2014-2015 annual summative evaluation was left blank (Statement of Evidence, Exhibit 14).

On August 20, 2015, the District filed tenure charges against the Respondent with the Commissioner of Education, pursuant to Section 25 of the TEACHNJ Act, N.J.S.A. 18A:6-17.3 (Certification, Exhibit A). On November 14, 2015, the Commissioner of Education forwarded the charges to arbitration, stating that he "is unable to determine that the evaluation process has not been followed" (Opposition at 1).

## II. Contentions of the Parties

### The Respondent Contends:

The Respondent maintains that the tenure charges should be dismissed because the District failed to adhere to the evaluation procedures prescribed by Section 25 of TEACHNJ. New Jersey statute and regulation require that allegations of inefficiency be rejected if the evaluation process has not been followed. In support of his contention, the Respondent cites arbitral decisions, dismissing tenure charges because a school district failed to conduct a proper evaluation.

More specifically, the Respondent cites N.J.A.C. 6A:10-4.4(c) as setting forth the following mandatory evaluation procedures:

**Each teacher shall be observed** as described in this section, **at least three times during each school year but not less than once during each semester.** For all teachers, **at least one of the required observations shall be announced and preceded by a pre-conference,** and at least one of the required observations shall be unannounced....

N.J.A.C. 6A:10-4.4(c) (emphasis supplied by the Respondent).

The District's own evaluation guide, titled "Framework for Effective Teaching," similarly requires a minimum of three observations annually, including at least one announced observation, and dictates that "[a]ll teachers must be observed at least once in each semester" (Certification, Exhibit E).

According to the Respondent, the 2013-2014 annual summative evaluation is flawed and, as a matter of law, may not form the basis of the instant charges because, during that

school year, he: (1) did not receive at least three observations, the minimum number required by law (Certification, Exhibit B ¶¶3-6); (2) did not receive at least one announced observation, preceded by a pre-conference, as required by law (Certification, Exhibit C at 1); and (3) was not observed at least once each semester, as required by law (Certification, Exhibit D at 1). The District does not dispute these facts, as is apparent from the Statement of Evidence that it filed.

The Respondent asserts that each of these procedural violations, standing alone, constitutes a serious failure to adhere to the evaluation process, since they undermine the integrity of his 2013-2014 summative evaluation. When the violations are viewed together, it becomes clear that the District completely disregarded its obligation to observe and evaluate the Respondent fairly and in accordance with the uniform regulatory requirements applicable to all teachers. Such an egregiously defective evaluation warrants the immediate dismissal of the charges, the Respondent argues.

Further, answering arguments presented in the District's opposition, the Respondent asserts that the arbitrator has jurisdiction to consider and resolve the motion to dismiss at the pre-hearing stage. In support, the Respondent cites arbitral decisions holding that motions to dismiss premised upon a district's failure to comply with statutory and regulatory procedural requirements are properly within the jurisdiction of the arbitrator. In addition, the Respondent contends that the Commissioner's statement—that he is unable to determine that the evaluation process has not been followed—is not dispositive and does not preclude an arbitrator from addressing a district's compliance with required statutory procedures.

The Respondent also disputes the District's claim that its failure to formally observe him in accordance with the requirements of N.J.A.C. 6A:10-4.4(c) is mitigated by its conduct of "learning walks" throughout the year. According to the Respondent, there is no statutory or regulatory authority that permits a school district to substitute such informal evaluation methods for the formal classroom observations required by law.

Finally, the Respondent disputes the District's contention that a tenure charge cannot be dismissed absent a determination that the District's failure to follow the evaluation process "materially affected the outcome of the evaluation" in the relevant school year. N.J.A.C. 6A:3-5.1(c) does not contain such a requirement and plainly dictates that any failure to abide by the evaluation procedures prohibits the tenure charges from being moved to the next stage of the filing process, including to an arbitration proceeding. The language quoted by the District is in Section 23 of the TEACHNJ Act (N.J.S.A. 18A:6-

17.2), titled “Considerations for arbitrator in rendering decision.” According to the Respondent, that section, which limits the issues that an arbitrator can consider and the defenses an employee can raise at an arbitration hearing, applies only to decisions on the substantive merits of a tenure charge after an arbitration hearing has concluded.

In sum, the Respondent contends that N.J.S.A. 18A:6-17.2 has no bearing on the pre-hearing motion to dismiss, which essentially seeks a ruling on a procedural arbitrability issue. The instant motion seeks dismissal of the tenure charges on the ground that the procedural conditions leading to arbitration—namely, that the District must comply with the evaluation procedures required by law—have not been met. In the absence of any factual dispute regarding the District’s failure to evaluate the teacher in the manner required by law, the motion to dismiss must be granted, according to the Respondent.

**The District Contends:**

As an initial matter, the District challenges the Respondent’s argument that the charge is defective on its face by noting that the Commissioner stated that he was “unable to determine that the evaluation process has not been followed” (Opposition at 1). The District contends that if the charge were clearly defective, the Commissioner would have dismissed the charge outright.

Secondly, the District asserts that the claims made in the motion should be weighed after a hearing. The motion alleges, in essence, that the District did not follow its teacher performance evaluation process in the 2013-14 school year. According to the District, whether a teacher’s evaluation adhered substantially to the evaluation process is one of four defenses that TEACHNJ permits respondents to raise in response to a tenure charge of inefficiency. N.J.S.A. 18A:6-17.2(a)(1). That issue implicates findings of fact that can be made only after a hearing. Where, as here, the facts are in dispute, summary decision cannot be entered.

Third, the District contends, it is unclear on what authority the Respondent seeks summary decision. Citing an arbitral decision, the District asserts that the rules of the American Arbitration Association (AAA) which apply to tenure charges of inefficiency—see N.J.S.A. 18A: 6-17.1(c)—do not provide for entry of summary decision. The only authority cited in the Respondent’s Notice of Motion is N.J.A.C. 6A:3-5.3(a)1, which addresses filing a motion to dismiss “in lieu of an answer to the charges.” Since the Respondent has filed an answer, that rule is inapposite here.

As to the merits of the motion to dismiss, the District asserts that when considering a district's failure to comply substantially with its teacher evaluation process, an arbitrator must perform a two-step analysis pursuant to N.J.S.A. 18A:6-17.2(b):

1. Determine whether or not the employee's evaluation failed to adhere substantially to the evaluation process; and, if so,
2. Determine if that fact materially affected the outcome of the evaluation.

The District emphasizes that the tenure charges are based on two years of summative evaluations of the Respondent's performance. The District acknowledges that in 2013-2014 the Respondent did not receive one formal observation to which he was entitled. However, the District asserts that this failure, in the context of the many formal and informal observations which occurred in a period of two years, cannot be said to have materially affected the outcome of his evaluation. After 2013-2014, he acquired a corrective action plan to improve his performance (Statement of Evidence, Exhibit 8), following two formal and multiple informal observations, plus a mid-year evaluation (Statement of Evidence, Exhibit 5). The same analysis, according to the District, holds true for the Respondent's claim that an announced observation was omitted in 2013-2014, and he was not observed at least once in each semester, as called for in N.J.A.C. 6A:10-4.4(c).

Further, the District contends that the arbitral awards dismissing tenure charges are unavailing because, unlike here, those dismissals were issued after disputed facts were resolved at arbitration hearings. The District also contests the Respondent's reliance on another arbitration award, in which the arbitrator addressed a pre-hearing motion for summary decision as a matter of discretion, given the importance and relative novelty of the legal principles involved. Here, the District contends, there is nothing novel about the issue presented by the motion. The disputed facts as to whether the District adhered substantially to the evaluation process present the fundamental issue on which a hearing should be based, and this issue should not be determined on a motion for summary decision.

For the foregoing reasons, the District argues that the Respondent's motion for summary decision should be held in abeyance, pending a hearing on the charge. Alternatively, if the arbitrator decides the motion on its merits, it should be denied because the District adhered substantially to the evaluation process in 2013-2014 and 2014-2015, and any procedural flaw did not materially affect the outcome of the Respondent's evaluation.

## DISCUSSION

The threshold issue is whether the arbitrator has the authority to rule on the Respondent's motion to dismiss charges at this early stage of the proceeding. The arbitrator relies here on her decision on January 30, 2015, in another Newark case, involving a teacher's motion to dismiss tenure charges before the arbitration hearing.

In *Marie Ebert, State-Operated School District of the City of Newark, Essex County*, Agency Docket No. 267-9/14 (*Ebert*), a respondent teacher filed a pre-hearing motion to dismiss tenure charges on the ground that the District did not make timely disclosure to her of evidence due before the scheduled hearing. The District put forward there, as it does here, arguments based on procedural arbitrability. It claimed that the arbitrator could not consider the motion because the Commissioner had already determined that the charges could be brought to arbitration and because any ruling on a motion to dismiss had to be based on a full evidentiary hearing.

Both claims were rejected by the arbitrator in *Ebert*:

Consideration of the relevant statutory provisions leads to the conclusion that the Respondent's motion to dismiss is properly before the Arbitrator.

It is clear from the provisions of TEACHNJ, and is undisputed by the parties, that a chief purpose of the legislation was to expedite the processing of teacher tenure cases. To this end, N.J.S.A. 18A:6-17.3 states that upon receipt of a charge of teacher inefficiency, the Commissioner shall examine the charge, and the teacher shall have 10 days to submit a written response. Within five days from the deadline for a written response, the Commissioner must refer the case to an arbitrator, unless he or she determines that the evaluation process has not been followed. Thus, the Commissioner's determination must be made within a brief period.

The term "evaluation" is defined in N.J.S.A. 18A:6-119 as a process

based on the individual's job description, professional standards and Statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, conducted and prepared by an individual employed in the district in a supervisory role and capacity and possessing a school administrator certificate, principal certificate, or supervisor certificate.

The Legislature also defined the factors that an arbitrator may consider in analyzing the "evaluation process." Under N.J.S.A. 18A:6-17.2a.1, the arbitrator shall consider whether "the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan." If the employee is able to demonstrate

such a failure, the arbitrator must determine if it materially affected the outcome. If it did not, the arbitrator renders a decision in favor of the board, and the employee is dismissed. N.J.S.A 18A:6-17.2b.

Thus, the Legislature created distinctive roles for both the Commissioner and an arbitrator in reviewing the evaluation process. The Legislature clearly intended the Commissioner to decide within five days whether a District had taken the requisite steps for completing an evaluation, whereas the arbitrator was asked to determine whether those steps were carried out correctly and in accordance with the prescribed standards. This construction of the legislation gives meaningful purpose and effect to both its language and intent.

The Respondent's motion to dismiss presents several arguments challenging the way her evaluation was conducted, which is the domain of the arbitrator. . . . [The] arguments submitted in the motion are properly before the Arbitrator and will be addressed to the extent necessary.

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Contrary to the [District's] argument, holding a full evidentiary hearing is not a prerequisite to considering the motion to dismiss. Nothing in the relevant statutory provisions limits an arbitrator's ability to resolve motions before holding a hearing. Indeed, demanding a full evidentiary hearing before ruling on potentially dispositive motions could unnecessarily prolong tenure disputes, ignoring the expressed desire of the Legislature to expedite them.

[*Ebert* at 7-8 (footnotes omitted) and 18.]

The same reasoning and conclusions are warranted here with respect to both of the District's procedural arguments. First, the Commissioner's statement — that he was unable to determine that the District had not followed the evaluation process — does not preclude the arbitrator from determining whether each step of the process was carried out correctly and in accordance with the prescribed standards. Second, nothing in the relevant statutory provisions limits an arbitrator's ability to rule on motions before holding a hearing. Similarly, nothing in the AAA rules cited by the District precludes an arbitrator from resolving dispositive motions prior to a hearing in appropriate circumstances. As stated in *Ebert*, requiring a full evidentiary hearing before ruling on potentially dispositive motions could unnecessarily prolong tenure disputes, thwarting the expressed desire of the Legislature to expedite their resolution.

The District contends that there are disputed facts in this case which require a hearing before acting on the motion. The District's Statement of Evidence concedes, however, that in 2013-2014 the Respondent was denied several entitlements: one formal observation, one announced observation, and at least one observation in each semester, as N.J.A.C. 6A:10-4.4(c) requires. The District's opposition to the motion is, therefore, premised not on disputed facts but on an argument of law — that the District's observations of the Respondent over the two-year period under review satisfied the statutory requirements. This statutory claim can be considered without a hearing.



Having found that the motion to dismiss may be submitted at this stage of the proceeding, the arbitrator turns to the merits of the motion. In enacting TEACHNJ, the legislature stated with clarity and precision the minimum requirements for evaluating a teacher:

Each teacher shall be observed as described in this section, at least three times during each school year but not less than once during each semester. For all teachers, at least one of the required observations shall be announced and preceded by a pre-conference, and at least one of the required observations shall be unannounced....

N.J.A.C. 6A:10-4.4(c).

These minimum requirements are reiterated in the District's own evaluation guide, titled "Framework for Effective Teaching," which also requires a minimum of three observations annually, including at least one announced observation, and mandates at least one observation in each semester.

The Respondent's 2013-2014 annual summative evaluation fell short of the statutory requirements in three distinct respects. First, he was observed only twice, not three times—the minimum allowed by law. Second, he was not observed during both semesters, as required by law.<sup>2</sup> Third, he was not provided with an observation that was announced and preceded by a pre-conference.

The requirements set forth in N.J.A.C. 6A:10-4.4(c) are not ambiguous, complex, or onerous.<sup>3</sup> They are plainly intended to establish a sufficient basis for judging a teacher's performance during a school year and to assure the teacher due process by specifying how he or she will be evaluated. In this instance, the District clearly did not carry out the obligatory steps prescribed by law. At no point during the evaluation process or subsequently has it offered any justification for its failure to do so.

As noted above, *Ebert* stated:

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<sup>2</sup> His two observations during the 2013-2014 school year occurred within two weeks of each other, during the first semester of the school year.

<sup>3</sup> The Legislature was as forthright in this respect as it was in a related provision (N.J.S.A. 18A:6-17.1b3), requiring districts to provide teachers with all evidence upon referral of tenure charges to arbitration. The comment in *Ebert* about that provision applies with equal force here: "The Legislature could not have more lucidly articulated the District's obligation" [*Ebert* at 16].

The Legislature also defined the factors that an arbitrator may consider in analyzing the "evaluation process." Under N.J.S.A. 18A:6-17.2a.1, the arbitrator shall consider whether "the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan." If the employee is able to demonstrate such a failure, the arbitrator must determine if it materially affected the outcome.

[*Ebert* at 8.]

There can be no doubt that the District's evaluation of the Respondent in 2013-2014 failed to adhere substantially to the evaluation process and that this unexplained error materially affected the outcome of his evaluation. Although there was no contention that the 2014-2015 process was defective, ignoring the minimum statutory requirements in 2013-2014 deprived the Respondent of due process protections explicitly set forth in the Legislature's enactment of TEACHNJ. In these circumstances, the motion to dismiss the tenure charges must be granted.<sup>4</sup>

  
**Tia Schneider Dennenberg**  
*Arbitrator*

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<sup>4</sup> Both the District and the Respondent cite other arbitrators' decisions in support of their respective positions. Those decisions are not dispositive here but have been given due consideration. As *Ebert* observed:

The awards are informative, but the controlling consideration is the Legislature's intent, as evidenced in the statutory provisions. Since the TEACHNJ Act established a permanent panel of 25 [recently enlarged by the Legislature to 50] arbitrators to hear tenure charges, it is to be expected that awards may reach contradictory interpretations of the legislation. The awards are subject to judicial review, which may ultimately resolve conflicts among them. Until then, the awards ought not to be regarded as final for purposes of collateral estoppel.

[*Ebert* at 7 n.4.]

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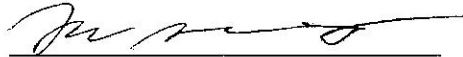
Agency Docket No. 279-9/15

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**Ruling of Arbitrator**

*The undersigned arbitrator, having been appointed pursuant to P.L. 2012, c. 26, rules as follows:*

Respondent's motion to dismiss the tenure charges is granted. Davis Hannah shall be reinstated as a teacher with full back pay and benefits.

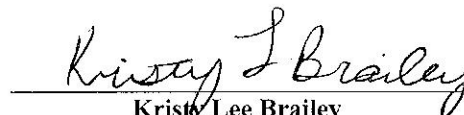


**Tia Schneider Denenberg**  
*Arbitrator*

**Dated:** February 6, 2016

*State of New York*  
*County of Columbia*

*On this 6th day of February, 2016, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.*



**Kristy Lee Brailey**  
*Notary Public State of New York*  
*No. 01BR6326865*  
*Qualified in Columbia County*  
*Commission Expires June 29, 2019*