

Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Edgard Chavez, :
 :
 :
State Operated School District of : **Agency Docket No. 269-9/12**
 :
The City of Newark, Essex County :

Award

Appearances:

**On behalf of State Operated School District of
The City of Newark, Essex County:**

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& John Atkin, Esquire
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On behalf of Edgard Chavez:

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Introduction

This matter arises from tenure charges of inefficiency against Edgard Chavez, (Respondent) by State Operated School District of The City of Newark, Essex County (the District) and an October 9, 2012 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to N.J.S.A. 18A:6-16 as amended by *P.L. 2112, c. 26*.

On November 30, 2012, in response to a request for extension of time for issuing an Award from the undersigned and citing circumstances caused by Hurricane Sandy and additional delay caused by a family emergency for the District's chief witness, the Department of Education granted an extension of time for the issuance of an Award in this matter to February 6, 2013.

The hearing in this matter opened telephonically on November 23, 2012 and continued thereafter in-person in Newark, New Jersey on December 20 and 21, 2012 and January 18, 2013. All present were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Edgard Chavez was present for the entire three days of live hearings and testified on his own behalf. At the close of the hearing on January 18, 2013, the record was left open until January 25, 2013 for submission of evidence relating to the District's use of a Tier Implementation Guidelines for teacher evaluations in the district. The parties elected to submit written post-hearing briefs, upon the receipt of which by the undersigned the dispute was deemed submitted at the close of business January 28, 2013.

This Award is made following my careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses

Issues

The parties were unable to jointly agree on a description of the issue or issues to be decided, but stipulated that the arbitrator has the authority to frame the issues presented based upon the record as a whole. The District proposed that the issue be described as whether or not the inefficiency charges brought against Respondent should be upheld or dismissed. In Respondent's view, the issues are whether the inefficiency charge brought against Respondent should be sustained, and if so, what penalty, if any, is appropriate.

Based upon the record as a whole, I find that this matter presents two issues. The first requires a determination of the appropriate process and standards to apply to the matter given that; (a) the underlying facts occurred prior to the effective date of the Teacher Effectiveness and Accountability for the Children of New Jersey Act, P.L. 2012, c. 26 amending N.J.S.A. 18A:6-16 (herein referred to as TEACHNJ or the Act) and (b) the referral of the matter to the undersigned occurred after the effective date of the Act.

The second issue presented concerns the underlying merits of the matter. I find the issue as to the merits may accurately be described as:

Has the District met its burden of establishing the truth of its tenure charges of inefficiency against Respondent and if so, is the appropriate remedy for such dismissal, or is the appropriate remedy for such reduction of salary?

Facts

Respondent has taught in the District for approximately twenty years. Although he holds an Instructional Certificate with an Elementary Teacher (K-8) endorsement, prior to August 2010 Respondent taught in the District's adult education program.

Throughout his time as an adult education teacher Respondent received either “satisfactory” annual evaluations for the early years of his tenure when the evaluation scale consisted of two grades (satisfactory and unsatisfactory) , or “proficient” annual evaluations thereafter on a four grade scale of distinguished, proficient, basic and unsatisfactory. In 2010 the District eliminated the adult education program and Respondent was assigned to teach Kindergarten at the District’s Lafayette Street School.

Upon reporting to the Lafayette Street School in August 2010, Respondent met with Principal Maria Merlo (Merlo). After discussing Respondent’s experience and background as well as the needs of the school, Merlo assigned Respondent to teach 6th Grade, departmentalized math using the District’s “Connected Math Program.” Respondent’s educational background and primary (although not exclusive) focus as an adult education teacher has been in mathematics. At the time of his August 2010 assignment, Respondent had never taught 6th Grade students and had no experience or training in the Connected Math Program.

Respondent was required to teach three 100-minute classes a day. The record establishes that Merlo was aware of the difficult nature of the transition Respondent faced from adult education and provided various means of assisting Respondent. Merlo would pop-in and observe his class nearly every day and offer suggestions to Respondent either at the time or later in private; particularly relating to engaging students and managing the classroom and student behavior. For a large portion of the second quarter, and the full third and fourth quarters of the 2010-11 school year, Merlo assigned the school’s math coach and the school’s technology coordinator to assist Respondent. Thus, for the last three quarters of the year the school’s math coach was in Respondent’s classroom for one

period twice a week, and from November 2010 to late April 2011, the schools technology coordinator was in his classroom for one period three times a week. The math coach and technology coordinator worked with Respondent by modeling lessons and making suggestions to Respondent relating to many of the demands faced by an elementary teacher generally and the related adjustments Respondent needed to make to transition from a traditional “teacher centered” manner of instruction to the “student centered” instructional strategy of the Connected Math Program.

The record establishes that after an initial period of months, during which time Merlo believed Respondent should have completed his adjustment to his assignment, Merlo became disappointed in Respondent’s progress in learning and implementing the connected math teaching program, in engaging students, and in Respondent’s lack of control of his students. At the end of the 2010-2011 school year, Merlo gave Respondent an annual evaluation rating of 63%, what Merlo described as the very low end of the “basic” rating.

For the 2011-2012 school year Respondent was again initially informed that he would be assigned a Kindergarten class and that assignment was again changed to 6th Grade Math when he first met with Merlo about the coming school year in late August 2011. Respondent was given further assistance for that school year such as opportunities to observe other teachers in their classrooms and assistance from Alicia Fernandez, the math coach of the previous year, who was assigned to work with Respondent on a full-time, one-on-one basis during the first two weeks of the year and thereafter to be in the classroom one full class period per day for the remainder of the first quarter and two classes per day for the rest of the school year.

On June 1, 2012, Merlo issued Respondent an Annual Teacher Performance Evaluation with an overall “Summative Performance Evaluation” rating of “Unsatisfactory” and recommended withholding of Respondent’s increment.

On March 26, 2012 the District served Respondent with notice that the District intended to file inefficiency tenure charges against him. At that time, and consistent with then-existing controlling law, Merlo gave Respondent a fourteen page, ninety-day improvement plan. The evidence establishes that throughout the ninety-day improvement plan period the administration of the Lafayette Street School gave Respondent daily guidance and assistance and made a good faith effort to help him improve his performance in areas that had been identified as wanting. On July 23, 2012 the District served inefficiency charges on Respondent asserting that Respondent had improved in a few of the areas identified in his earlier charges, but had not improved in other areas. Respondent answered the charges on August 20, 2012. On September 12, 2012 the District certified the charges to the Commissioner and notified Respondent that he was suspended without pay for 120 days, per applicable law. Respondent filed an answer to the charges on October 1, 2012 and on October 9, 2012 the tenure charges were referred to the undersigned.

Procedural Issues

As discussed above, the parties disagreed as to the appropriate standards to apply in the matter because the underlying facts presented took place prior to the enactment of TEACHNJ.

Respondent

Respondent primarily argues that the matter should be decided under the standards and processes that governed teacher tenure inefficiency charges prior to the enactment of TEACHNJ because the portions of the new law specifically addressing inefficiency charges and enumerating four factors an arbitrator may consider in such a case (Section 23¹) is limited to employee inefficiency charges filed pursuant to Section 25 of the Act. Section 25, in turn, is not controlling of the instant matter, Respondent asserts, because that Section provides terms for mandatory filing of inefficiency charges where teachers have been rated “ineffective” or “partially ineffective” in annual evaluations for at least two years, and further mandates that such evaluations must have been conducted in accordance with a rubric approved by the Commissioner of Education;

¹ Section 23 provides:

a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 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 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 are arbitrary and capricious.

b. In the event 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.

b. The board of education shall have the ultimate 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 written decision within 45 days of the start of the hearing.

rubrics the Act does not require until the 2013-2014 school year. Considering in this matter that there was no such approved rubric and the subject inefficiency charges were not filed under the mandatory provisions of Section 25, Respondent reasons, this matter does not satisfy the prerequisite requirements for consideration under the narrow factors of Section 23. Since the standards of Section 23 do not apply, Respondent concludes, it stands to reason that the pre-TEACHNJ procedural requirements and legal standards should apply.

The District

The District asserts that Section 23 applies and that because the facts involved here took place prior to the effective date of TEACHNJ, when the District could not have know the requirements of a law that did not then exist, the procedural issue before the arbitrator is whether or not the District “substantially complied” with the requirements of Section 23 of the Act. If Respondent is correct and Section 23 does not apply, the District argues, such would effectively create a four year “safe harbor” for all tenured employees while school districts throughout the state establish new evaluation rubrics and apply them for a minimum of two years. Such a result, the District argues, would be contrary to the goal of prompt resolution of efficiency charges underlying the relevant sections of the Act. Additionally, the District maintains, under the Act the Commissioner of Education would not have been authorized to refer this matter to an arbitrator unless the Commissioner found no procedural error.

Findings Relating to Procedural Issues

An Arbitrator's Authority is Limited, and Under the Circumstance of this Matter does not Include Reviewing Respondent's Charges Under Section 23 of TEACHNJ

The authority of an arbitrator is strictly limited by the grant of authority he or she receives from either the parties in the case of typical labor arbitration or, as is the case here, by statute. In regard to the procedural issues present, although I find that I have authority under TEACHNJ to hear and decide this matter, I find that, consistent with the argument of Respondent, I do not have authority to determine this matter under Section 23 of TEACHNJ. As a result, the standard of review and other provisions of that Section do not control.

When read in conjunction, the plain terms of Sections 23 and Section 25 of the Act establish that the process described in Section 23 is reserved for those cases pursued under Section 25. Section 25 pointedly limits its breadth by providing that "the only evaluations which may be used for purposes of this section are those conducted in accordance with a rubric adopted by the board and approved by the commissioner ...". There is no dispute here; the evaluation of Respondent at issue was not performed in accordance with such a rubric. As a consequence, the prerequisite requirements for consideration of the tenure charges against Respondent under the four factors of Section 23 have not been satisfied. Section 23 of TEACHNJ does not control this matter.

The Standards and Procedures Existing Prior to the Effective Date of TEACHNJ do not Control

However, contrary to the argument of Respondent, the fact that Section 23 does not apply to this matter does not mean that I must apply the procedures and standards used prior to the effective date of TEACHNJ. In this regard, the Act also provides in Section 18 that tenure charges transmitted to the Office of Administrative Law and pending as of the effective date of TEACHNJ will continue to be determined under the law “as read prior to the effective date of” the Act. Importantly, the legislature did not similarly provide for such application of the old law for post-enactment charges of inefficiency that do not meet the prerequisites for consideration under Section 23. Applying well recognized principles of statutory interpretation, the failure of the legislature to do for charges referred after the effective date of the law what it did for charges referred prior to such date, supports a conclusion that the legislature did not intend that the procedures and standards existing prior to the effective date of TEACHNJ would apply to efficiency charges, such as the instant charge, not already transmitted to the Office of Administrative Law as of the effective date of TEACHNJ. The legislature did not intend that the efficiency charge at issue would be subject to the very same procedures and standards of review as used by the Office of Administrative Law prior to the effective date of TEACHNJ.

The Standard of Review for this Matter

The fact that I do not have authority to decide this matter under Section 23, nor authority to decide the matter pursuant to the law as read prior to the effective date of TEACHNJ, does not mean I am without authority to decide the matter. In this regard, TEACHNJ provides more broad authority for arbitrator review of tenure charges than that narrowly provided in Section 23. Section 22 of the Act provides, among other things, for the establishment of an arbitrator panel, rules for exchange of information by the parties, timelines for arbitration, use of the American Arbitration Association labor arbitration rules and, importantly to the issue of authority granted arbitrators by the statute, that; “The Commissioner of Education shall maintain a panel of 25 permanent arbitrators *to hear matters pursuant to N.J.S. 18A:6-16.*” (Emphasis added.) The plain meaning of such language supports a conclusion that the Act grants authority to arbitrators to consider all types of tenure charges, including efficiency charges beyond merely those governed by Section 23.

Rather than apply the procedures and standards of Section 23 or of the law prior to the effective date of TEACHNJ, the language of Section 8 of Act defines my authority. That Section generally provides that upon receipt of any type of tenure charge and response:

[i]f ...[the Commissioner] 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 22...for further proceedings...

In this matter, applying the terms of the Act, the Commissioner reviewed the tenure charges of the District at issue herein and the response of Respondent to those

charges and as reported by letter to the parties dated October 9, 2012, administratively determined that;

“...the tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction of salary.”

(Emphasis added.)

Based upon the language of the controlling statute, administrative determination by the Commissioner and referral of this matter to the undersigned, I find that:

1. Section 23 of TEACHNJ does not control this matter.
2. The procedures and standards of review governing efficiency tenure charges prior to the effective date of TEACHNJ are not applicable to this matter.
3. The authority granted the arbitrator in this matter by the Act is limited to determining whether or not the District has shown, by a preponderance of the evidence, that the tenure charges filed against Respondent “are true.”²

The Merits

The inefficiency charges filed by the District assert that from October 2010 Respondent demonstrated an inability to “completely and responsibly execute his duties as a teacher” and “failed to improve in certain areas despite provisions of a ninety (90) day improvement period, and despite the provision of support and assistance.” The charges then go on to assert Respondent’s failings in areas of teaching effectiveness, establishing a culture of learning, preparing and executing teaching plans, engaging

² Consequently, because the charges have been deemed sufficient by the Commissioner, I find I need not determine whether or not the District complied with claimed controlling procedures and process, or whether the District was required to comply with a tier evaluation system, or other issues raised by the parties that are not arguably incorporated into the tenure charges themselves.

students, knowing students, assessing student learning, managing the classroom, classroom procedures and student behavior, and a plethora of other areas.

Based upon a complete and careful evaluation of the evidence offered in this matter, and thoughtful consideration of the arguments presented by the parties, I find that the District has met its burden of establishing the truth of the tenure charges at issue.

I base my finding that the District has established the truth of its tenure charges primarily upon the credible testimony of the District's witnesses.³ I found the witnesses offered by the District, including school administrators, teachers and District staff, to be forthcoming and cooperative in their testimony, they showed no hint of animosity toward Respondent, exhibited no pleasure in testifying against him and appeared genuinely interested in helping Respondent develop the tools and skills necessary for his success. When the testimony of these credited witnesses is combined, they described an almost daily effort by the District over a two school-year period to assist Respondent in developing the knowledge and skills needed to teach sixth grade math; including his learning the three-step lesson process of connected math, the importance of preparation and ingenuity, the need to know ones students, the manner and means of creating an environment that manages student behavior and promotes learning, keeping goods

³ At the close of the testimonial portion of the hearing and in its post-hearing brief the District offered a number of documents, including copies of letters of reprimand, mini observations and quarterly grade and student file reviews, that had not been previously offered into evidence in the interest of saving time. Respondent objected to the introductions of the exhibits because it did not have the opportunity to cross-examine District witnesses on the documents or examine Respondent on the documents. (Respondent did not question the authenticity or relevance of the documents.) I find that the subject documents should not be admitted into the record, but note that such does not contradict any testimony received in the record that arguable references the documents or events they purport to memorialize.

records and folders, grading, providing feedback to students, organizing the classroom space, and many other things.

After two years of such focused effort and assistance by the District as well as written reprimands, observations and evaluations that he never challenged, Respondent continued to struggle. Respondent continued to have difficulty with, among other things, the preparation and design of lesson plans and differentiating his plans to meet the differing needs of different groups of students; he continued to have difficulty with managing class time; he continued to have difficulty establishing and enforcing procedures and routines of his students; his classroom continued to be disrupted by student behavior; he had a difficult time creating an atmosphere in his classroom conducive to learning; and his students struggled to learn. Upon overall review of the record, and acknowledging that I have no reason to question the professional judgments and evaluations of the educators involved herein, when comparing Respondent's performance early in the 2010-2011 school year to his performance late in the 2011-2012 school year, I find that such a comparison establishes that Respondent failed to show improvement of any significance through the course of his two school years of teaching at Lafayette Street School.

Conclusion

The record establishes that the District took extraordinary efforts to assist Respondent in making a transition from an adult education teacher to a sixth grade math teacher. Although there are no issues relating to Respondent's knowledge of mathematics, the evidence establishes that despite continuing efforts by personnel at the Lafayette Street School and the District, Respondent has been unable to completely and responsibly execute his duties as a teacher. I am not persuaded by any mitigating circumstances that Respondent's termination should be reduced to a reduction in salary. Consequently, I find that the District has met its burden of establishing that its inefficiency charges against Respondent are true.

Respondent's discharge is sustained.



Dated: February 6, 2013

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 269-9/12 sustaining tenure charges on Wednesday, February 6, 2013.



Timothy J Brown