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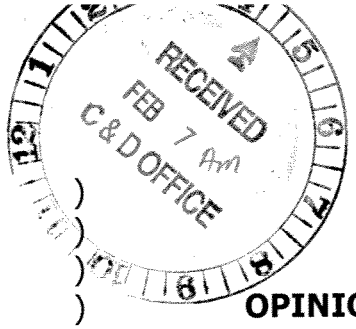

In the Matter of the **TENURE** Hearing)
)
of)
) **OPINION and AWARD**
LYNDERIA MANSFIELD)
"Respondent")
)
and) AGENCY DOCKET NO. 273-9/12
)
STATE OPERATED SCHOOL DISTRICT)
OF THE CITY OF NEWARK,)
ESSEX COUNTY)
"Petitioner")
_____)

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein.

The hearings were held on November 27, 28, December 5 and 11, 2012 and January 11 and 18, 2013 at the Law offices of either Zazzali, Fagella, Nowak, Kleinbaum & Friedman or Adams, Stern, Gutierrez & Lattiboudere, LLC in Newark, New Jersey. Both parties were afforded full opportunity to present all the necessary proofs and evidence. A verbatim transcript was made and all witnesses were sworn. Briefs were received as agreed.

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR LYNDERIA MANSFIELD:

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One Riverfront Plaza, Suite 320
Newark, NJ 07102-5410

APPEARING FOR THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY:

Derlys Gutierrez, Esq.
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BACKGROUND:

The matter arose as a result of tenure charges filed against Respondent, Lynderia Mansfield. According to a letter dated October 1, 2012 from M. Kathleen Duncan, Director of Bureau of Controversies and Disputes, the charges were reviewed and "deemed sufficient, if true, to warrant dismissal or reduction in salary."

The TEACHNJ Act, which was signed into law on August 6, 2012, states at item 18 that

> This act shall take effect in the 2012-2013 school year, except that section 17 of this act shall take effect immediately. The Department of Education shall take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of this act.

Section 17 provides that each board of education shall adopt a rubric approved by the commissioner and that the State Board of Education shall promulgate regulations to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals and vice principals. The Act sets forth minimum standards for the rubric of each school district. Further, the Act indicated that each board of education will implement a pilot program no later than January 31, 2013 to test and refine the evaluation rubric and that beginning with the 2013-2014 school year the board of education shall ensure implementation of the approved, adopted evaluation rubric in the district. Therefore, the question is which rubric should be applied to tenure charges that had already been filed prior to the passage of this Act?

Upon being assigned this matter and after speaking to the advocates, this Arbitrator contacted the Bureau of Controversies and Disputes and was advised that the

old rubric applies; that the District has to prove inefficiency and that the Arbitrator is not to substitute her judgment for that of the evaluators.

Further, the legislators provided for this circumstance in Section 18 of the Act wherein it states that

> Any tenure charge transmitted to the Office of Administrative Law pursuant to N.J.S. 18A:6-16 prior to the effective date of P.L. 2012, c.26 (C.18A:6-117 et al.) shall be determined in accordance with the provision of subarticle B of Article 2 of chapter 6 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10 et seq,. as the same read prior to the effective date of P.L. 2012, c.26 (C.18A:6-117 et al.)

Subarticle B of Article 2 of chapter 6 of N.J.S. 18A:6-10 Dismissal and reduction in Compensation of Persons under Tenure in Public School System states that

> No person shall be dismissed or reduced in compensation, . . .
>
> except for inefficiency, incapacity, unbecoming conduct or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as this subarticle provided.

In the instant matter, the charges of inefficiency[1] were filed against the Respondent prior to the effective date of P.L. 2012, c.26 and, therefore, the rubric, which was in place at the time the charges were filed, and the language of subarticle B of Article 2 of chapter 6 of N.J.S. 18A:6-10 will be applied by this Arbitrator.

POSITIONS OF THE PARTIES:

The Petitioner's position is that the standard of review of this case should be that set forth in the new tenure law, "TEACHNJ Act;" that despite the Arbitrator's rule during the hearing that the old standard of review would be applied, the District submits respectfully that the Arbitrator's ruling contradicts the TEACHNJ Act and that the standard to be applied is that of the new tenure law. It is the Petitioner's position that the Department of Education no longer has the jurisdiction to determine the standard of review and that under the Act's clear and limited standard of review, the inefficiency charges must be upheld. Under this standard of review, the Arbitrator can only consider four criteria as set forth in the Act and a two-step analysis must be utilized.

TEACHNJ Act immediately eliminated the 90-day improvement period for charges filed prior to its implementation and it does not continue the old standards for charges filed with the Department of Education after August 2012. Further, the Petitioner asserts that the new evaluation rubrics are not required to be implemented until the 2013-2014 school year and that the argument that the Act's standard of review should only be applied after implementation of the new rubrics contradicts the language of the Act and the Legislature's intention. The Petitioner's position is that all authority was transferred to arbitrators who have been provided with a clear standard of review to utilize and that a determination to the contrary would create a safe-harbor for all tenured employees for several years.

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[1] Attached as Exhibit A.

According to the Petitioner, Respondent cannot prove the four factors, which should be considered by the Arbitrator. The evaluations were conducted properly; Respondent was given a corrective action plan, not only a 90-day improvement plan; there is no evidence in the record that there was a mistake in fact in the evaluations; there is no proof that the charges were brought for any inappropriate reasons and the District's actions were neither arbitrary nor capricious.

Further, it is the Petitioner's position that it did "adhere substantially" to the new procedures by complying with the rubrics and requirements for evaluation of tenured teaching staff members in effect prior to the Act's adoption. The available ratings of distinguished, proficient, basic and unsatisfactory are comparable to the Act's ratings of highly effective, effective, partially ineffective and ineffective. Similarly, the procedure utilized by the District was substantially similar to that required by the Act. Respondent was given a Teacher Improvement Plan with sufficient notice that the District intended to certify charges, which is comparable to the corrective action plan required by the Act. Further, the statute precludes the Arbitrator from second guessing the District's evaluations of classroom performance and the District does not have to prove inefficiency by a preponderance of the evidence without regard to the current statutory standards.

In the alternative, the District asserts that it has proven by a preponderance of the evidence the charges against Respondent. It has given Respondent support throughout the years and throughout the period of improvement to assist her with her teaching performance and gave her sufficient notice that her attendance and promptness had to improve. Each year since at least 2006 her attendance has been an issue noted on her

annual evaluations. Despite this assistance and numerous professional development workshops, Respondent did not improve her attendance or teaching performance and due to her failure to make corrections, Petitioner asks this Arbitrator to uphold the inefficiency charges.

Respondent's position is that the Arbitrator ruled on the record that the substantive criteria and rubrics established in the tenure act prior to its amendment for proving inefficiency applied in this case and that she should sustain her earlier ruling. TEACHNJ provides for the promulgation of regulations of evaluation rubrics but at the time this case was filed, no such rubrics were in effect. Therefore, Respondent cannot be held to the new standard and her performance cannot be evaluated under standards that were not even in effect.

Section 23 of TEACHNJ applies to inefficiency charges that are based upon evaluations conducted under Section 25 of the Act and Section 25 sets forth the Superintendent's duty to file tenure charges when an employee is rated ineffective or partially ineffective in an annual summative evaluation and in the following year is rated ineffective in the annual evaluation. It is Respondent's position that Section 25 refers to an evaluation rubric that was not established at the time these charges were filed and therefore the four defenses defined in Section 23 cannot apply in this case.

Further, if the new evaluation standards are applied, any evaluations which do not comply with the provision in Section 25(d) cannot be considered, rendering the District's exhibits inadmissible. Additionally, Section 25(b) requires that the board must forward a written charge to the commissioner within 30 days, which was not done in this matter.

Therefore, if the evaluative rubric section of TEACHNJ were applied, the charges must be dismissed and if Section 25(b) is applied, the charges were untimely and must be dismissed.

Finally, as to the revised TEACHNJ Act, even if the Arbitrator reverses her earlier decision, and Respondent's defenses were limited to the enumerated four set forth in TEACHNJ, the charges must be dismissed as arbitrary and capricious as they fail to adhere to evaluation procedures and guidelines and because the evaluations contain clear mistakes of fact.

Respondent's position is that the burden is on the District to prove the tenure charges and that it failed to prove the inefficiency charges by a preponderance of the evidence and warrants dismissal of all charges. In fact, Respondent's performance was effective as a teacher, administering her duties to the best of her abilities while District administrators were sloppy at best and certainly not diligent in providing her the requisite support. They embarked on a ruthless, sloppy and failed campaign against her. Until 2010 Respondent never received an unsatisfactory evaluation and even that evaluation was fraught with inconsistencies and inaccuracies.

It is Respondent's position that the District is statutorily required to adhere to very specific procedures but it did not comply. The tenure act requires exacting individualized assistance during the 90-day period but the record shows that no such rigorous assistance was provided. Almost all of the professional development activities in the 90-day plan were not developed for her individually or to remedy her alleged deficiencies. Additionally, the master teacher was the only one who offered some limited language arts coaching in

limited areas and she did not raise any concerns on the visitation logs that Respondent was unable to perform the lessons. No administrator met with Respondent or offered any other specific support or referred her to any other coaches or master teachers.

It is Respondent's position that the District did not offer her a full 90 days to improve due spring break, attendance at observations, mandatory court appearance, approved bereavement leave for her father's funeral, end of year break down of classrooms and inspections of the schools by State officials. In actuality, due to these excused and legitimate days off, Respondent had 74 days rather than the 90 days in the improvement period. To expect a teacher to complete these goals in a condensed time period is not only unlawful but virtually impossible.

While the District testified that it was diligent in helping her and reminding her about documents, professional development, absences and tardiness, Principal Wanda Brooks-Long could not verify how or whether Respondent ever received the memos and she could not verify that Respondent was on her e-mail list. Vice Principal Brown's testimony was similarly incredible that she could not provide an explanation as to how lesson plans or benchmark test scores were processed. In contrast, Respondent provided a coherent explanation of the chain of command with respect to these procedures. Mr. Queli could not recall much of anything though he remembered two letters bearing his name before he was even assigned to Peshine. On rebuttal, Dr. Brooks-Long tried to explain away the documents by blaming a clerk.

Further, Respondent claimed that any references to alleged DYFS incidents are irrelevant as there were never any findings of guilt by either DYFS or the District and that

the ongoing reporting of Respondent only served to add further interruption to her professional life and attempts at improving.

Respondent did not mix church and State. Any reference to G-d in songs does not render the songs religious as evidenced by the presence of the word G-d in the National Anthem, Pledge of Allegiance and the Star Spangled Banner. Further, there was no rule or policy prohibiting music.

As for absenteeism and tardiness, to be grounds for termination absenteeism must be prolonged and excessive. In the instant matter, Respondent's absences and alleged tardiness were not excessive and she did not have a pattern of truly excessive absences such that tenure charges should be sustained. Each employee is entitled to 15 sick days and 3 personal days per year and in 2011-2012, Respondent was barely over that time and bereavement dates were improperly marked as unexcused. Although she was absent for 2010-2011, she was on an excused, District approved leave of absence, which should not be held against her. As to her attendance in earlier years, the District failed to introduce sufficient evidence that proved that she was excessively absent or, if she was excessively absent, that it made efforts to elicit meaningful change. Further, no District witness could confirm whether Respondent actually received the attendance memos.

It is well settled that where the evaluation process is fatally flawed, as it is here, it must be deemed invalid. The blatant factual error in the 2012 final evaluation issued by Dr. Brooks-Long concerning the students' DRA reading progress cannot be overlooked and renders the evaluation invalid. Further, to the extent that the District acknowledged significant improvement in Respondent's performance and made clear mistakes in the

2012 annual evaluation, which if corrected, would likely alter the overall annual rating, coupled with all of the significant procedural violations and unproven and misplaced claims, the tenure charges must be dismissed. Mr. Queli's observations are incomplete and void of any meaningful information. He lacked credibility and memory of the events and confirmed his inability to execute his responsibilities as a vice principal.

According to the 2009-2010 Evaluation Guidebook, R-5, during the 90-day period, the school administrator must monitor the teacher with ten observations done weekly, six of which must be informal and four of which must be formal. These procedures were not followed in 2012. Rather, there were only eight observations plus one Intervention Plan, following the notice of inefficiency charges and some of these were not signed and incomplete, took place on a date Respondent was absent, void of any substantive critique and one was nearly identical to a prior observation. Such blatant violation of its own procedures is grounds enough to justify the dismissal of all charges.

Further, a close review of three evaluations, R-15 (2008), R-20 (2009) and P-30, (2010 when Respondent was on a leave of absence) reveal that they are nearly verbatim identical to each other and yet Respondent was awarded overall marks ranging from proficient to unsatisfactory. These evaluations are fatally flawed.

Finally, Respondent's position is that the District has failed to prove tenure charges; that no penalty should be issued in this case and that another arbitrator found that gross discrepancies and contradictions in annual evaluations, similar to this instance, proved that the employer was arbitrary and capricious. In another tenure matter, the teacher was reinstated in part due to improvement during the 90-day period and inaccuracies in

observation reports. However, if this Arbitrator is inclined to sustain the charges, a lesser penalty than discharge should be imposed in accordance with the doctrine of progressive discipline. Termination is too severe a penalty under the circumstances especially given the factual inaccuracies and incomplete analysis in the various observations/evaluations; that Respondent was not given the requisite assistance by the District to specifically help her to improve; that she was well intended in working toward improving; that she has never been formally disciplined for any inappropriate behavior and that she has achieved remarkable improvements as noted by her supervisor.

Therefore, Respondent asks this Arbitrator to dismiss the charges and to reinstate her to a teaching position together with back pay, benefits and emoluments retroactive to the date the tenure charges were filed. Alternatively, in the event that any of the charges are upheld, the mitigating factors warrant a conclusion that progressive discipline be invoked and a less severe penalty be imposed under the circumstances.

OPINION:

Respondent received the following annual evaluations:

2005-2006	Basic, P-55
2006-2007	Proficient, P-56
2007-2008	Basic, R-15
2008-2009	Proficient, R-20
2009-2010	Unsatisfactory, P-30
2010-2011	On Approved Leave of Absence
2011-2012	Unsatisfactory, P-15

Since the 2005-2006 school year Respondent has had issues with attendance and punctuality. No attendance records were entered into the record of the hearing

from the 2005 though 2008 school years and, therefore, it is not known the extent of her absenteeism or tardiness. However, in her annual evaluations for each of these school years Respondent received an unsatisfactory for promptness/attendance as illustrated on P-55, P-56 and R-15. Therefore, Respondent should have known that, according to the District, she had a continual problem with attendance and she had a responsibility to correct that deficiency.

Similarly, Respondent received an unsatisfactory rating for promptness/attendance on her annual reviews for the 2008 through 2012 school years.[2] In fact, P-44 and P-43 indicated that Respondent was absent 22 days and tardy on 52 days during the 2008-2009 school; P-42 and P-39 revealed that Respondent was absent 23 days and tardy 68 days[3] during the 2009-2010 school year[4] and P-3 demonstrated that during the 2011-2012 school year she had 9 unexcused absences in addition to her contractual limit of 15 days and was tardy 19 times for the full year.

Attendance is one of an employer's most difficult problems. The only way an employer can succeed is if its employees come to work regularly and on time. Employers have a right to expect good attendance from its employees. Additionally, employees have a responsibility, and perhaps their first responsibility, to arrive at work in plenty of time to punch in before the shift begins and to come to work everyday. Employees may be given a certain number of sick days in a contract but that does not

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[2] Respondent was on an approved leave of absence during the 2010-2011 school year.

[3] P-39 indicated 56 tardies through February 25 and P-41 listed another 12 tardies until March 26, 2010.

[4] Respondent only worked through March 26, 2010 that school year and then was on an approved leave of absence for the balance of the school year.

mean that every employee has to use every sick day. They are there as a benefit when an employee is actually sick but not as a right to be abused.

In a school setting when a teacher calls in sick the morning of the absence, there are several ramifications. First of all, someone has to be called to cover the class for that absent employee. Secondly, and of significance, the substitute teacher is not the person who works with the students each day and not the teacher who knows the students, their abilities and where they are on the learning spectrum. In all schools, but particularly in this District, continuity is of the utmost importance so that the students can achieve set goals. Each day students have a substitute teacher means that they are not making as much progress as they would with their regular teacher, no matter the ability of the substitute.

Respondent asserted that she was only absent a few days over the contractual benefit. However, this was year after year and the District does not have to continually tolerate such poor attendance. Further, she claimed that she was late because there was a long line at the Kronos clock. However, in the opinion of this Arbitrator, this is an unacceptable excuse. She knew that her hours were 8:20 a.m. to 3:05 p.m. and if there was a line at the clock, she had the responsibility to either get to school earlier or use a different entrance to clock in.

In the opinion of this Arbitrator, Respondent was clearly put on notice that her attendance was poor when she received an unsatisfactory rating for promptness/attendance during six annual reviews. She had a responsibility to correct this unacceptable behavior.

Several areas of Respondent's teaching abilities were cited in the charges. One involved testing. Students are tested three times per year, fall, mid-year and late spring, using the Diagnostic Reading Assessment (DRA), a reading comprehension test, to measure a child's comprehension and fluency.

Petitioner submitted a two-page document entitled Step 1 Class Profile-Grade 1 and Step 2 Classroom Summary Sheet-Grade 1, P-23, which Vice Principal Camille Brown testified are the required forms to be submitted to her after the DRA tests are administered. Step 1 supported the testimony that there are three reading tests given during the year; one in the fall, one mid-year and one in the spring. Based on the tests, each of the eight students in the class is given a reading level.

In Respondent's Annual Performance Evaluation dated June 22, 2012, P-15, Dr. Brooks-Long rated Respondent as unsatisfactory in Domain 3(E), "Attaining Student Achievement that Meets or Exceeds Performance Benchmarks." In the comment's section Dr. Brooks-Long wrote

> Ms. Mansfield did not meet the expected benchmark of 2 levels of growth comparing DRA I to DRA III. Eight students were tested (sic) two students met DRA benchmark (25%). Students did not make significant growth.[5]

However, Ms. Brown testified that

> Benchmark meant that if you look at their grade level peers, what the expectation is for a first grader, that's benchmark performance which is 16. But if you look at a year's growth, this is where I began, I began at "A," I began at kindergarten level but now I'm at the beginning of first grade. So that's a year's growth."

[5] DRA I was administered at the beginning of the year and DRA III was administered in the spring of the year.

The record established that Respondent started teaching 1st grade at Peshine School on January 16, 2012. Further, Ms. Brown testified that mid-year is January/February and that mid-year testing was done about the same time that Respondent started teaching 1st grade. Ms. Brown also acknowledged that some of the students in Respondent's class were low level readers.

Also entered into the record of the hearing was R-33, DRA Level Correlation Chart, which indicated, as it pertains to this matter, the reading levels for grades kindergarten and 1st grade. The chart revealed that a kindergarten student would be reading at levels 1, 2 or 3; that a 1st grader would be at levels 3-6 in the beginning of the school year; at levels 8-12 in the middle of the school year and at levels 14-16 at the end of 1st grade.

As stated by Dr. Brooks-Long, and as she noted on the evaluation, P-15, only two students, or 25% of the students listed on P-23 reached level 16 in Respondent's class during the 2011-2012 school year. However, equally as important was Ms. Brown's testimony that it is relevant to look at the growth of the student.

With these terms in mind, an evaluation of P-23 and R-33 convinced this Arbitrator that most of Respondent's students made significant progress. Respondent cannot be responsible for the growth or lack thereof for the students from the fall to the mid-year testing because she was not their teacher until the middle of January 2012. Therefore, an evaluation of the progress of her students must be measured between the mid-year and the spring testing.

P-23 and R-33 indicated the following data:

- Two students, #s 1, NG, and 3, FW, were at level 16 in the spring and clearly are on grade level.
- #2, KB, was at level 3 at mid-year and level 10 in the spring, which advanced the student five levels.
- #s 4, ES, and 5, HF, were at level 2 at mid-year and level 4 in the spring, which advanced the students two levels each.
- #6, JM, was at level 3 at mid-year and level 12 in the spring, which advanced the student six levels.
- #7, TN, was at level "A," beginning of kindergarten level, at mid-year and level 2 in the spring, which advanced the student.
- #8, NC, was at level 4 at mid-year and level 8 in the spring, which advanced the student three levels.

Therefore, the record established a mistake in fact in the analysis of the level of achievement of these students. While they have more challenges ahead and while they all did not meet the benchmark of 16 at the end of 1st grade level, most of the students made significant growth in their reading ability and, contrary on the statement on the evaluation, P-15, each student did grow at least two levels during the time Respondent was their 1st grade teacher. Respondent should have received at least a Basic in Domain 3(E), which would have given her seven more points or a total of 90 points rather than the 83 she was given. 90 points out of a total of 132 would have placed Respondent at 68%, or at a Basic level rather than at an Unsatisfactory level. As Respondent testified, "Basic lets me know that I need more improvement but an unsatisfactory is an unsatisfactory and that's the worst to me."

Another issue for the District was that Respondent did not turn in lesson plans on time. Ms. Brown testified that each teacher is responsible for submitting bi-weekly lesson plans. However, one key statement by Ms. Brown corroborated Respondent's testimony, which was that each teacher submitted the lesson plans to Ms. Smallwood,

who took the lead in 1st grade operations, and that Ms. Smallwood then submitted them to Ms. Brown for the three grade level teachers, Respondent, Ms. Lewis and Ms. Smallwood. In fact, Ms. Brown stated, "they did submit them together." R-32 is just such an example of a compilation of lesson plans, prepared by each teacher and submitted together to Ms. Brown by Ms. Smallwood. Further, R-8 and R-10 are additional examples of lesson plans, similar in format to R-32, submitted by the three teachers with Ms. Brown's initials at the bottom, indicating that she received them. Ms. Brown acknowledged that she had initialed these documents. While Respondent might not have submitted lesson plans once in a while, it was clear to this Arbitrator that other teachers did not submit them either. Ms. Brown testified that when she sent memo, R-7, which indicated that Respondent's lesson plan was not submitted on time, she would have sent that same memo to the other 1st grade teachers.

Further, Ms. Brown issued Respondent a memo on March 19, 2012, P-17, in which she stated that she had not received lesson plans, which were due on March 16, 2012. She testified that she was looking for lesson plans that were due on March 16 for March 19 to 30, 2012. R-9, lesson plans for the week of March 18, 2012, indicated that they were initialed by the principal. Therefore, they were received by administration. Based on the testimony and documentation, this Arbitrator must conclude that Respondent fulfilled her responsibility to submit plans as was the practice in the department.

A related issue involved a charge that Respondent did not submit support activities during the period of her 90-day improvement plan, P-6 through P-13. Dr.

Brooks-Long testified that she authored these documents, which were exactly the same except for the date, and that her secretary would type them. However, Dr. Brooks-Long acknowledged that there was no proof that Respondent actually received these memos and that she did not know how she got them or when she received them. Respondent testified that she never received these memos.

These memos indicated that Respondent failed to submit documentation required to support her 90-day Improvement Plan for different weeks from April 16, 2012 through June 4, 2012. The memos indicated that "As stipulated in our Improvement Plan, it is imperative these documents are submitted on a weekly basis in order to assist you with your plan." However, a review of P-1, the Improvement Plan, makes no mention of weekly submission of documents. The first six pages of the Plan indicated Support Activities/Resources and a completion date of June 25, 2012. There is no mention of weekly submissions. The next seven pages list dates of observations and support and who would provide them. However, there is no mention that Respondent is responsible for weekly submissions.

Further, Respondent testified and Ms. Brown confirmed that at the meeting on March 26, 2012 when Respondent was given the Improvement Plan, there was no discussion about the Plan. As stated by Ms. Brown, "It was just presented . . . I don't remember it being discussed." In fact, Respondent confirmed that she was just handed the Plan and that neither she nor her Union representative were permitted to ask questions. Therefore, this Arbitrator must conclude that there was no way for Respondent to have known that weekly documentation was required.

The record established that during the 90-day Improvement Plan Respondent was supposed to receive support and guidance to meet the goals. However, Ms. Brown's testimony was very vague regarding the support given to Respondent. She stated that she met at least once to discuss improving her teaching skills and then said she recalled meeting with her at least 2-3 times. However, she acknowledged that she did not model a lesson for her and that is the job of master teacher and stated, "I'm not going to say we had enormous amount of conversations (about her teaching ability). I look at support as what a master teacher does." When asked if anyone gave her professional support during her 90-day plan, Ms. Brown testified that the master teacher provided this.

According to the 90-Day Plan, Respondent was to receive support from a master teacher and, in fact, Master Teacher Lisa Pizzuta testified that she provided literary support to Respondent. P-22 demonstrated that Ms. Pizzuta met with and coached Respondent on April 12, 13, 27, May 4, 14 and May 17, 2012.

Additionally, when Ms. Brown completed P-20, Teacher Observation & Performance Evaluation, Intervention Plan, she listed three areas of help for Respondent. While Respondent received coaching from the master teacher, Respondent's unrefuted testimony was that she did not receive help in the two other areas Ms. Brown indicated on this document; Professional Development with Writer's Workshop and Guided Reading and Lesson plan submission inclusive of higher order thinking questions. Even Ms. Brown acknowledged that there were only eleven more

days of school when she met with Respondent to discuss this plan. Realistically, these goals could not have been achieved.

Further, the Improvement Plan specifically listed other staff members who would provide the required support to help Respondent achieve the goals set for her and improve her teaching skills. P-1 listed the following specialists who would provide feedback and give guidance to Respondent in addition to the master teacher: Administrator, Technology Coordinator and Peer Support Teacher. However, the record established that Respondent did not receive support from these other staff members.

A text entitled "Skillful Teacher" was to have been provided to Respondent under the 90-day Improvement Plan but Ms. Brown stated that she never gave Respondent this text. In fact, Respondent credibly testified that Dr. Brooks-Long never explained how to fulfill the requirements in the Plan; that there is a technology coordinator, Mrs. DeBruhl, but that she never provided Respondent with such support; that no administrator inquired about her progression on the Plan and that there was no peer support teacher but that the only support she received was from Ms. Pizzuta.

Additionally, the Improvement Plan Chronology page listed ten formal and informal evaluations, which would be conducted during certain weeks from March 26, 2012 through June 11, 2012, and indicated that on June 18, 2012 the annual evaluation would be conducted. Informal and Formal observations were completed for Respondent during her 90-day Improvement Plan.[6]

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[6] During the 2009-2010 school year two observations were scheduled, on May 4 and 13, 2010 by Principal Handfield, who should have known that Respondent was on a Board approved leave of absence, which led this Arbitrator to question the District's treatment of Respondent.

Most of the observations were performed by Mr. Queli. However, his Feedback Summary dated April 24, 2012, P-26, comments on P-27 dated March 28, 2012 and on P-24, dated May 29, 2012 could not, in the opinion of this Arbitrator, be considered support or helpful. Further, this Arbitrator discounted the observations performed by Mr. Queli because of his unresponsiveness at the hearing. He did not even remember what his notes meant and if he could not explain them, how could they be considered helpful to Respondent's growth as a teacher? There was absolutely nothing in his testimony that was considered in making this decision. In fact, two verbal warnings he allegedly authored, R-13 and R-14, were dated before he was even employed at Peshine School. Dr. Brooks-Long testified that these letters were erroneously placed in Respondent's file and she blamed a new clerk who was in the building at the time. However, this Arbitrator was not convinced. Further, two observations, P-14 and P-25, were exactly the same except for the dates and times and one comment in the "strengths" section. Therefore, this Arbitrator must conclude that besides the support given by the master teacher, Respondent was not afforded the opportunities and guidance that the 90-day Plan was designed to achieve.

Even before tenure charges were served on Respondent, she attended professional development sessions to improve her teaching skills.[7] The record established that she attended a Staff Development session on February 15, 2012 and received a certificate for 3 hours of training, R-36 and R-37; that she attended NJ PASS Grades 1 & 2, Turn Key Training on February 29, 2012, R-35; that she participated in

[7] Additionally, Respondent had signed up for summer workshops in August 2012 but did not participate because of the tenure charges, R-31.

NJ Pass Grades 1 & 2 on February 2, 2012, R-38; that she attended professional development sessions on February 1, January 18 and 19, 2012 and that she attended Running Record Training on January 25, 2012, R-40.

Further, regarding additional training, Respondent's unrefuted testimony was that when she arrived at school on May 31, 2012, the secretary, Tiffany Paylor-Sowah, told her that she was supposed to visit other schools on May 31 and June 1, 2012 to attend observations. Respondent had not been previously informed. P-41 indicated that at 10:43 a.m. on May 31, 2012, Ms. Paylor-Sowah sent Respondent an e-mail regarding reporting to another school for classroom observations. Respondent did attend this two-day session. Clearly Respondent was not informed in advance of her responsibility to attend the observations. This e-mail was sent after Respondent was told by the secretary to go to the other school and after Respondent went to the school on May 31.

There was also an issue about Respondent not receiving e-mails from Dr. Brooks-Long and, in fact, Dr. Brooks-Long testified that she did not recall if she sent Respondent e-mails and did not remember if she typically sent e-mails to other employees. In contrast, Respondent was very clear that she was not included on e-mails sent by Dr. Brooks-Long to other staff members; that she tried to correct the situation by contacting Ms. Brown and the technical coordinator but still Respondent did not receive those e-mails, which were sent to other teachers but not to her. Respondent's unrefuted testimony was that eventually she asked Ms. Smallwood about e-mails others received; that Ms. Smallwood would give her the information requested and then Respondent would take back the response to Ms. Smallwood and she would

send the information so that it could be e-mailed to Dr. Brooks-Long. This Arbitrator was convinced that Respondent was not properly kept in the loop regarding her responsibilities and she had to devise ways to fulfill her requirements.

Charges were filed against Respondent to the Division of Youth and Family Services (DYFS). The record established that Dr. Brooks-Long reported the Grievant to DYFS several times for alleged child abuse but that each time DYFS determined that there was no proof to sustain such a charge.

Additionally, in a Formal Observation, P-31, dated March 18, 2010, Dorothy Handfield, Principal at Belmont Runyon when Respondent was a kindergarten teacher there, rated Respondent unsatisfactory in Domain 4(g) and wrote that

> Mrs. Mansfield received a letter dated on 01/11/10 that directed Mrs. Mansfield to stop and desist from having students "froggy hops," "jumping jacks" and "jumps and turns" in class. The letter was based on the physical abuse allegations against Mrs. Mansfield.

The record established that there was no proof of any child abuse.[8] In fact, P-46, a Report of Incident dated January 4, 2010 written by Ms. Handfield, indicated that a parent had complained about the "froggies;" that Ms. Handfield called DYFS and was told that "the allegations did not arise (sic) to abuse." Despite this notification from DYFS on January 4, 2010, Ms. Handfield still referred to this abuse allegation in the March 18, 2010 observation giving the impression that there was physical abuse.

Further, P-30, an Annual Performance Evaluation dated June 15, 2010 performed at the end of the 2009-2010 school year, indicated in Domain 4,G that "three separate allegations of physical abuse were made against Mrs. Mansfield this school year" and in

this category Respondent was given an unsatisfactory. Once again, while there was testimony regarding abuse cases to DYFS involving Respondent, there was no evidence that any of these charges had merit. Each time a report was sent to DYFS it was dismissed. Including statements in evaluation and observations, such as above, might lead someone who is reading them to perhaps assume that the allegations were true, of which there was no proof. Innuendo is not the same as proof. In the opinion of this Arbitrator, only proven charges should be included in an evaluation. Otherwise, a person's reputation could be inappropriately maligned.

In October 2008, P-45, Ms. Handfield met with Respondent to discuss a mother's alleged concern regarding the students performing "froggies" each day. Respondent explained to Ms. Handfield that the kids did "froggies" and other jumping exercises as part of the mathematics lesson. Ms Handfield wrote that a mathematics coach will discuss other means of implementing the mathematics curriculum. However, no evidence was presented that Respondent was given any assistance in this matter. Further, Ms. Handfield testified that she called DYFS but "it didn't lead to anything." At the hearing, Respondent's unrefuted testimony was that as far back as 2005-2006 school year, she learned through her then principal the idea of using jumping activities to better utilize their energy as well as to count; that she incorporated the practice into her classroom and that prior to Ms. Handfield coming to Belmont Runyon no administrator or parent had complained about this exercise.

[8] The issue of "froggies" will be addressed later in this Award.

In September 2009, Ms. Handfield wrote another Report of Incident, P-48, as a result of another alleged concern about Respondent's treatment of students. DYFS was contacted and Respondent was removed from the classroom but was returned to the classroom on December 8, 2009, when DYFS determined, R-21, that the "charges of physical abuse made against you were unfounded."

Further, an undated Report of Incident, R-22, described to Ms. Handfield in early to mid-December 2009, referred to alleged abuse perpetrated by Respondent during the 2005-2006 school year. Despite the lapse of time, Ms. Handfield spoke to Respondent on January 5, 2010 about this matter and Ms. Handfield was advised by the District's Legal Department to contact DYFS. According to Respondent, she was removed from the classroom again but she was notified by DYFS that the charges were unfounded and she returned to the classroom in February 2010 and she stopped using "froggies."

Respondent testified that during the 2008-2009 and 2009-2010 school years the kindergarten students did not have a gym period. However, despite this unrefuted testimony, if a teacher is directed to stop an activity, it is the teacher's responsibility to follow that directive. This Arbitrator must agree that Respondent should have stopped instructing the students to do "froggies" the first time she was told in 2008. It was not until the January 11, 2010 letter, P-51, that Respondent was told that if she continued doing "froggies" in class it may lead to disciplinary actions and it was undisputed that Respondent did stop using "froggies" when she was returned to the classroom in February 2010.

However, Respondent must understand her responsibility to follow directives the first time. It did not matter that a former principal in a different school had suggested "froggies" to her. She was now in a new school and if a supervisor directed her not to continue the exercise, that was what she was to follow.

Finally, Respondent received a letter dated December 27, 2011, R-28, from the Department of Children and Families, Institutional Abuse Investigation Unit, which stated that "physical abuse . . . is unfounded," regarding an alleged incident at Pershine Avenue Elementary School on November 17, 2011. Respondent was returned to the classroom in early 2012 sometime after the winter break.

Most importantly, the record established that all complaints to DYFS alleging that Respondent was abusing children were unfounded; that there was no direct testimony that any of these incidents occurred and one of the complaints was lodged four years after it allegedly happened. This is too serious of a matter to base a decision on uncorroborated hearsay. There was absolutely no evidence to conclude that Respondent was abusive to students. In fact, it appeared to this Arbitrator that the repeated reports to DYFS when Respondent was not allowed in the classroom and was made to sit in an office was inappropriate.

Another issue was the separation of church and State as it related to Respondent's activities in the classroom. It was undisputed that Donnie McLurkin is a gospel singer and that Respondent was playing one of his songs in her classroom, the lyrics of which were entered as R-23. However, several factors led this Arbitrator to conclude that this charge was unsustainable. First of all, Ms. Handfield admitted that

teachers can play music in class and that she did not know if there is a written policy that teachers cannot play gospel music. Secondly, Respondent testified and the words of the song support her testimony, that this song is inspirational. The title "Yes You Can" gives the students encouragement; that sometimes one may lose but should not be defeated; that you can do anything if you try and believe; that trials will just make you strong and that you can do all things through your faith. While there was mention of G-d, there was no reference to a particular G-d and the word faith meant that any faith could get you through difficult times.

It is undisputed that there is separation of church and State and that teachers are not permitted to pray with students in school. However, regarding the accusation of praying in class, there was no direct proof that Respondent mentioned "Jesus Christ our Savior" in class. In fact, Respondent testified that she did not use those words. Once again, an alleged complaint from a parent or comments from students or from Ms. Rice, a fellow teacher who did not testify, cannot be used to sustain discipline without direct proof.

The Charge of Inefficiency, Exhibit A attached, signed by Dr. Brooks-Long, claimed that Respondent's classroom performance as a teacher and her evaluations had not improved and was the basis for the removal. As directed by the Bureau of Controversies and Disputes, this Arbitrator did not second guess the ratings given to Respondent. However, errors or mistakes in the calculation of the rating are important to consider.

Several factors led this Arbitrator to conclude that the charge of inefficiency was not proven and that in fact Respondent had improved her performance as a teacher. As mentioned above, the error in Domain 3(E) led to an increase in the points that should have been awarded to Respondent in the June 22, 2012 Annual Teacher Evaluation, P-15 and that since she should have received a total of 90 points out of a possible 132 points, her overall percentage should have been 68%, which was a basic rating.

Even accepting the total score of 83 out of a possible 132, on P-15, if one were to calculate this percentage, it should have been 63% or a basic rating, not unsatisfactory. The calculation comes out to 62.87% and, as all other calculations were rounded up, this calculation should also have been rounded up to 63%, not down to 62% as was done for this evaluation.[9] In this manner and to be consistent, Respondent should have been rated basic for her June 22, 2012 Annual Performance Evaluation.

Additionally, as pointed out by Respondent, there is no such option to assign a score of "4" for Domain 1(d) on P-2, March 20, 2012 Observation. Rather, Respondent should have received either a "7" basic; "8" proficient or "9" distinguished. This error would not have changed the overall rating of unsatisfactory but is simply an example of another mistake made by the District when completing forms.

Further, when Dr. Brooks-Long was asked why she checked "continued employment" after the June 22, 2012 evaluation even though she rated Respondent as unsatisfactory, she stated that "there's no area to mark tenure charges" and that we

[9] See P-19, a Formal Observation, performed by Dr. Brooks-Long on May 30, 2012. If one were to divide the total 87 points by the possible total of 132, the percentage would 65.9%, which Dr. Brooks-Long correctly rounded up to 66%. There was no explanation as to why she rounded down the percentage in P-15.

only recommend tenure charges to the Assistant Superintendent. However, this Arbitrator cannot agree that there was no place to mark tenure charges. On the last page of P-15 after the rating, there is an area for Recommendation for Next School Year in which Dr. Brooks-Long checked "continue employment." However, the next section says "Other Recommendation(s)." Surely, Dr. Brooks-Long could have written in something in keeping with the District's next step of filing tenure charges. This Arbitrator was not convinced that the principal was prohibited from writing a more accurate recommendation than "continue employment."

Finally, this Arbitrator compared three documents (P-30, 2009-2010 annual evaluation; P-2, March 20, 2012 observation and P-15, 2011-2012 annual evaluation) to determine if Respondent did not improve her teaching skills as charged.

When comparing the June 2010 Annual Evaluation, P-30, with the June 2012 Annual Evaluation, P-15,[10] there was clearly a significant improvement in Respondent's teaching rating. In 2010, she scored 39 points out of 132 or 30% whereas in 2012, she scored 83 points out of 132 or 63%, even without considering the error made in Domain 3(E). Further, Dr. Brooks-Long wrote in the 2012 evaluation for Domain 1 that Respondent "made growth as prescribed by her 90 (sic) action plan" and for Domain 2, the principal wrote Respondent "has made significant growth as prescribed by her 90 (sic) action plan. Kudos!" A total of 83 points is certainly a significant improvement from the 39 points Respondent received in 2010.

[10] Respondent was on an approved leave of absence during the 2010-2011 school year and therefore did not receive an annual evaluation for that school year.

A further aid to recognizing Respondent's improvement can be realized by the following chart and analysis of the three documents, P-30, P-2 and P-15, and demonstrates the accuracy of Dr. Brooks-Long's statement of July 23, 2012 when she issued the charges that Respondent had demonstrated growth. In fact, the chart further proves that from March 2012 to June 2012, during her 90-Day Improvement Plan, of the 22 categories, Respondent improved in 10, stayed the same in 11 and did not decrease in any category.

Comparison Chart

	P-30 June 2010	P-2 March 2012	P-15 June 2012	IMPROVED FROM March 2012
Domain 1(A)	U	B	B	
Domain 1(B)	B	B	B	
Domain 1(C)	U	B	B	
Domain 1(D)	U	B	B	
Domain 1(E)	U	U	B	X
Domain 2(A)	U	B	P	X
Domain 2(B)	U	B	P	X
Domain 2(C)	B	B	P	X
Domain 2(D)	B	U	B	X
Domain 2(E)	P	B	P	X
Domain 3(A)	B	B	B	
Domain 3(B)	B	B	B	
Domain 3(C)	U	B	B	
Domain 3(D)	B	B	B	
Domain 3(E)	U	U	U	
Domain 4(A)	U	U	U	
Domain 4(B)	B	no score	P	X
Domain 4(C)	B	P	P	
Domain 4(D)	B	no score	B	X
Domain 4(E)	B	U	B	X
Domain 4(F)	U	U	U	
Domain 4(G)	U	no score	P	X

B = Basic
U = Unsatisfactory
P = Proficient
X = Improvement

Therefore, it must be concluded that though Respondent has more areas in which she can improve and though she is still rated a basic overall, it is clear from the record that she has made strides to becoming a more proficient teacher.

Finally, even if the facts in this matter were reviewed under the four criteria established by TEACHNJ Act, only one of which had to be demonstrated, this Arbitrator would have reached the same conclusion. In the opinion of this Arbitrator, there was a flawed corrective action plan; there was evidence in the record that there were mistakes in fact in the evaluations and the District's actions were arbitrary and capricious.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator must decide that the District did not meet its burden and did not prove the inefficiency charges sufficient to warrant termination.

In consonance with the proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

A W A R D

1. The Charge of poor attendance shall be sustained.

2. All other Charges are dismissed.

3. Respondent shall be reinstated immediately as a tenured teacher in the District except that she shall receive a ninety (90) day penalty for her unacceptable attendance.

4. Respondent shall receive back pay, benefits and made whole for all time off after the ninety (90) day suspension.

Mattye M. Gandel

Mattye M. Gandel

Dated: February 6, 2013

State of New Jersey)
:SS
County of Essex)

On the 6th day of February 2013 before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

TANIA CASTRO
Commission # 2417480
Notary Public, State of New Jersey
My Commission Expires
February 17, 2017