284-15

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

TENURE HEARING

In the Matter of the Arbitration Between
STATE-OPERATED SCHOOL DISTRICT
CITY OF NEWARK, NJ

PETITIONER

And

TONI LENZ

RESPONDENT

Agency Docket 97 4/15

DECISION ON

MOTION TO DISMISS

TENURE CHARGES

ARBITRATOR — GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER
RAMON RIVERA, ESQ. — COUNSEL FOR PETITIONER
SHANA T. DON, ESQ. — COUNSEL FOR PETITIONER

FOR THE RESPONDENT
NANCY OXFELD, ESQ. — COUNSEL FOR RESPONDENT

BACKGROUND

On August 27, 2014, Lynn Irby-Jackson, employed by the Petitioner as the Principal of Arts High School, filed a Notice of Inefficiency against the Respondent. That Notice of Efficiency included twenty-one (21) separate counts of an inability of the Respondent to *"completely and reasonably execute her duties as a teacher for the period of October 12, 2012 to the present."*

On January 17, 2015, the undersigned rendered an Award, docket 289-9/14,in the matter of The State-Operated School District of the City of Newark and Toni Lenz. The Respondent was charged with inefficiency and I accepted the Respondent's Motion to Dismiss the Tenure Charges in their entirety and returned Ms. Lenz to her teaching position with full back pay and benefits.

On March 6, 2015, the Petitioner filed Amended Tenure Charges against the Respondent. Those charges are the same charges that were filed against the Respondent in 2014. The only difference is that in 2014 under subsection G, *"the Respondent has failed to establish a culture of learning is also repeated in subsection H."* Except for that typographical error, the charges are the same. In fact, the statement of evidence submitted for the Amended Charges is dated August 27, 2014, the same date as in docket 289-9/14.

On March 19, 2015, counsel for the Respondent submitted answers to the tenure charges of inefficiency, which included ten separate defenses and asked that the tenure charges be dismissed.

On April 30, 2015, I was appointed to the instant matter by the Department of Education identifying this case as docket 97 4/15.

On June 5, 2015, the Arbitrator had a conference call with Shana Don, representing the Petitioner and Nancy Oxfeld, representing the Respondent.

On June 17, 2015, Kathleen Duncan, Director of the Bureau of Controversies and Disputes for the Department of Education, sent a letter to Ms. Don and Ms. Oxfeld, with a copy to the Arbitrator. In that letter, she indicated that the above-captioned tenure charges (97 4/15) are being *"processed with respect to Section 8, inefficiency charges only – were reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the Arbitrator of Respondent's defenses and any motions to be filed with the Arbitrator."* She further indicated that the Arbitrator is to utilize the preponderance of evidence standard in this matter.

On June 19, 2015, Ramon Rivera, also counsel for the Petitioner, submitted a motion to the Commissioner of Education for emergent relief. The Petitioner argued that the application for interim relief of staying the tenure matter must be granted because the District satisfies the requirement set forth in N.J.A.C. 6A:3-1.6. Additionally, the Petitioner has filed a Notice of Appeal with the Appellate Division on the following issues:

"1. The Commissioner of Education transferred the Tenure Hearing to the same Arbitrator who heard the parties' previous tenure charges, Gerard Restaino, in violation of N.J.S.A. 18A:6-17.1; and

2. The Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the tenure charges in violation of N.J.S.A. 18A:6-16."

On July 15, 2015, Commissioner of Education, David C. Hespe, denied the Petitioner's request for emergent relief. The Commissioner determined that he lacks jurisdiction to hear and decide Petitioner's motion for emergent relief. This determination shall not preclude the parties from seeking the desired relief before the

Arbitrator pursuant to N.J.A.C. 6A:3-5.5(b). The section of N.J.A.C. provides, *"Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the Arbitrator."*

The parties and the Arbitrator had agreed upon the following briefing schedule: Respondent's Motion to Dismiss and supporting briefs to be filed on July 10, 2015. Petitioner's reply to the Respondent's Motion to Dismiss and Motion to Compel Arbitration Hearing and supporting brief is to be filed on July 17, 2015. Respondent's reply to the Petitioner's Motion to Compel Arbitration is to be filed on July 27, 2015. The record reflects that the Respondent did not submit a reply to the District's response to Respondent's Motion to Dismiss. Those dates were also transmitted to the Department of Education.

On July 10, 2015, the Respondent submitted a brief in support of the Notice of Motion for Summary Judgment. On July 17, 2015, the Petitioner submitted its brief in opposition to the Respondent's Motion to Dismiss the Tenure Charges.

These are the essential uncontroverted facts in the mater at bar and the matter now comes to me for resolution.

RELEVANT STATUTORY PROVISIONS:

5. N.J.S. 18A:6-11 is amended to read as follows:

Written charges, statement of evidence; filing; statement of position by employee; certification of determination; notice.

18A:6-11. Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an

opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statement of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board find that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. The consideration and actions of the board as to any charge shall not take place at a public meeting.

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

Proceedings before commissioner; written response; determination.

18A:6-16. Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's in the proceedings shall examine the charge and certification. The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges.

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012, c.26 (C.18A:6-17) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

C. 18A:6-17.3 Evaluation process, determination of charges.

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

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

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency,

except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. 2012, c.26 (C. 18A:6-117, et al).

C. 18A:6-122 Annual submission of evaluation rubrics

16. a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals and vice-principals and all other teaching staff members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

b. Notwithstanding the provisions of subsection a. of this section, a school district may choose to use the model evaluation rubric established by the commissioner pursuant to subsection f. of section 117 of P.L. 2012, c.26 (C. 18A:6-123) to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members. In the case in which the district fails to submit a rubric for review and approval, the model rubric shall be used by the district to assess the effectiveness of its teachers, principals, assistant principals and vice-principals and all other teaching staff members.

C. 18A:6-123 Review, approval of evaluation rubrics.

17. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L. 2012, c.26 (C. 18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

POSITION OF THE PARTIES

For the District

The District argues that these amended tenure charges, *"alleging inefficiency were brought against the Respondent, Toni Lenz, based upon her deficient teaching performance, consistent lack of improvement and receipt of negative evaluations. For these reasons, the Petitioner filed amended tenure charges for inefficiency against the Respondent with the District, pursuant to N.J.S.A. 18A:6-10; N.J.S.A. 18A:6-11; N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1; N.J.S.A. 18A:6-17.3; and N.J.A.C. 6A:3.5.1(b) with the Commissioner of Education."* Furthermore, the Respondent argues that inefficiency charges can only be brought pursuant to Section 25, rather than Section 8 of Teach NJ and therefore, the Petitioner's charges must be dismissed. However, the Petitioner argues that that argument is wrong because it is either too early or too late. More importantly, that position overlooks *"the Commissioner's directive that these charges have been docketed as new charges and which are being processed with respect to Section 8, inefficiency charges only – were reviewed and deemed sufficient to either warrant dismissal or reduction in salary."*

The Petitioner contends that the Respondent's reliance on I/M/O Tenure Hearing of Leonard Yarborough and the State-Operated School District of the City of Newark, docket 69-3/15, I/M/O Tenure Charges of Jodi Thompson and the State-Operated School District of the City of Newark, docket 24-8/14 and I/M/O Tenure Charges Against Sandra Cheatham and the State-Operated School District of the City of Newark, docket 226-8/14 is seriously flawed because each one suffers from the same fundamental weaknesses: the arbitrator exceeded his or her statutory authority in the absence of

clear legal mandates from the Commissioner. The same is true in the instant matter, and this issue is currently pending before the Appellative Division.

The Petitioner argues that in the prior case, *"The Respondent's Motion to Dismiss was granted based upon the Arbitrator's determination that Section 25 tenure charges were premature, based upon a theory of collateral estoppel, without expressly addressing the tenure charges under Section 8 and without any hearings or findings of facts. The prior decision did not address the issue of Section 8 Tenure Charges. Following this holding, the Petitioner submitted the instant amended tenure charges adding an additional charge of inefficiency pursuant to Section 8 of Teach NJ."*

Furthermore, the Petitioner contends, *"The Amended Tenure Charges were initially served on the Respondent after being submitted to the State-District Superintendent on or about January 14, 2015. These charges were drafted in light of the then-building trend of arbitrators dismissing Section 25 tenure charges of inefficiency as premature and refusing to consider the alternate basis of Section 8 as un-plead. Because the Amended Tenure Charges address Section 8 charges, the Respondent was afforded the statutorily mandated time period of fifteen (15) days rather than the ten (10) day response prescribed for charges brought under Section 25."*

The Petitioner contends that the School District did determine that there was probable cause, and the State-appointed District Superintendent completed the Certificate of Determination on March 3, 2015, which was then filed with the Commissioner of Education on March 6, 2015. Therefore, the tenure charges were timely filed with the Commissioner on the 42nd day after the District's receipt of the Respondent's answer, which was within the 45 day time limitation to same.

The Petitioner contends that *"they are seeking its first bite at the apple to have the merits of this teacher's inefficiency charges heard by the fact-finders required by applicable law."* Furthermore, the motion for summary decision should be denied as there are significant disputed facts, and the matter should move forward toward a hearing on the merits of the Section 8 Tenure Charges.

Additionally, the Petitioner contends that the Arbitrator has jurisdiction to decide this matter for inefficiency under Section 8 of Teach NJ.

The Petitioner references specific arbitration awards (see, I/M/O Tenure Hearing of Edward Newton and State-Operated School District of the City of Newark, docket 276-9/14), and I/M/O Marie Ebert and State-Operated School District of the City of Newark docket 49-3/15. In the Ebert matter, Arbitrator Tia Schneider Denenberg determined that, *"Although a charge involving 2012-2013 evaluations may not be brought under Section 25; no similar impediment prevents the District from seeking removal according to the requirements of Section 8."*

The District contends that they anticipated that the tenure charges in the prior proceeding would be dismissed and began proceeding to amend the tenure charge to cure the defect ultimately cited by the Arbitrator in dismissing the charges in the January 17, 2015 Opinion and Award. The amended tenure charge was perfected before the Department of Education adding the comprehensive and pre-existing charge of inefficiency to be assessed on a preponderance of the evidence standard rather than the more limited two annual evaluations of the Teach NJ Act. Furthermore, the Petitioner argues that, *"The contention that an inefficiency charge cannot proceed on any basis other than N.J.S.A. 18A:6-17.3, and that a charge cannot proceed on that*

basis either until all applicable requirements are met – essentially, that the legislature intended to hand poorly performing teachers a free pass for two years after the Act's defective date has been rejected by Teach NJ Arbitrators."

Additionally, in I/M/O Jodi Thompson State-Operated School District of the City of Newark docket 240-8/14 and 16-1/15, Arbitrator Daniel Brent stated, *"Nothing in the provision of the Teach NJ statute explicitly created a two-year, much less a four-year hiatus during which ineffective teachers were immune from evaluation of their performance resulting in discipline or discharge."* Moreover, arbitrators in several cases in which Section 25 charges have been dismissed have suggested that dismissal might not have been required if the charges had been plead, in the alternative, on the basis of Section 8, as well as Section 25. See, I/M/O Rinita Williams and State-Operated School District of the City of Newark and, docket 504-14, I/M/O Elena Brady and State-Operated School District of the City of Newark docket 478-14. These arbitrators have read Teach NJ to allow inefficiency charges to proceed on grounds other than Section 25, contrary to Respondent's contention here.

The District contends that in accordance with N.J.S.A. 18A:6-10, once a matter is transmitted to arbitration by the commissioner, the arbitrator must proceed to a hearing on the merits. Under N.J.S.A. 18A:6-16, the question before the Arbitrator is whether the evidence in the record presented supports the charge of inefficiency.

The District strongly argues that the evaluations of the Respondent for the 2012-2013 school year are valid as Section 25 of Teach NJ was in effect and in full force in the 2012-2013 school year and may be considered under a preponderance of the credible evidence standard. The question under Section 8, inefficiency charges, is

whether the District has met its burden under the long-established preponderance of credible evidence. In support of the preponderance of credible evidence standard, the District contends that inefficiency has been defined as a charge against an employee that he/she has failed to reasonably perform the duties of his/her title, an inability to maintain classroom decorum and discipline, an inability to teach a prescribed curriculum and a failure to submit required information on time, even after constant written reminders.

The Petitioner references the four standards in N.J.S.A. 18A:6-17.2 governing Section 25 charges. Those four standards are:

"(1) the employee's evaluation failed to adhere substantially to the evaluation process, including to, 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 federal and state law, or other conduct prohibited by state or federal laws; or

(4) the District's actions were arbitrary and capricious."

The Petitioner strenuously argues that the only issue for the Arbitrator is whether the record supports a finding that the charges are true. Without developing the record at a hearing and considering the District's evidence, which goes beyond the summary statement of evidence, it is impossible to make this determination.

In support of its position that the 2012-2013 evaluations are valid and may be considered under the preponderance of credible evidence standard, the Petitioner contends, "*The District piloted a new teacher evaluation system in the 2011-2012 school year, not 2012-2013 as asserted without support by Respondent. Thus, evaluations conducted in the 2011-2012 pilot year did not count for official purposes, but*

the experience of that pilot program informed the development of the teacher evaluation process adopted, approved and implemented in subsequent school year 2012-2013. It is indisputable that the legislature purposely adopted and approved Teach NJ August 6, 2012 in the 2012-2013 school year. As such, there is no question that the evaluations in the 2012-2013 school year were to be used toward determining if tenure charges are warranted, if not as the sole basis."

As stated by Arbitrator Brent in Thompson, supra, "*Nothing in the new Teach NJ statute precludes a school district that had been designated pilot district in 2011-2012 and successfully implemented a rubric approved by the Commissioner in 2012-2013 from evaluating its teachers under the approved Teacher Performance Assessment Criteria.*"

The doctrines of *res judicata* and double jeopardy do not apply to preclude the instant charges. The Respondent's argument that the instant charges must be dismissed because the parties are barred from re-litigating in a new case an issue already disposed of *"is misplaced and is a mischaracterization of the facts that exist in the instant matter."* Furthermore, a party asserting a defense of collateral estoppel has the burden of demonstrating that the issue is litigated in a prior proceeding. Nevertheless, the amended tenure charges were never adjudicated, and as such, that defense does not apply. I/M/O Leonard Yarborough and State-Operated School District of the City of Newark, docket 69-3/15 the Arbitrator Gerber did not reach the merits of the charge under Section 8, i.e., he never addressed whether the School District had met its burden of proving inefficiency. As such, the Section 8 charge was not adjudicated. Therefore, even if the School District is bound by the Arbitrator's decision

in the previous matter, it is not precluded by that decision from bringing the instant charge as the Arbitrator's decision does not address the charge not presented pursuant to Section 8.

The Petitioner contends that the Respondent cannot meet the burden of demonstrating that the issue was litigated in a prior proceeding. The decision dismissing the previous charge was based on statutory grounds and applicable to the instant charge, specifically the requirements of N.J.S.A. 18A:6-123(d), which are applicable only to charges brought pursuant to Section 25. Accordingly, this is not a second bite at the apple as the Respondent asserts; this matter must proceed to hearing for a determination on the merits of the inefficiency charge under Section 8.

The entire controversy doctrine is not a bar to the tenure charges in the instant matter. The three-fold objectives behind the doctrine are (1) to encourage the comprehensiveness and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court, as well as respective parties; and (3) to promote traditional economy and efficiency by avoiding fragmented, multiple and duplicative litigation.

The Respondent's argument that the District is re-litigating the tenure charges against her because these charges have already been brought before an arbitrator in a District loss is not the fact pattern in the matter at bar. In the prior decision, the determination was not based upon the Respondent's evaluation or the merits of the District's argument. Arbitrator Restaino dismissed the previous charges against the Respondent based upon the theory of collateral estoppel. This, respectfully, is not a conclusive determination of the legal controversy presented for the parties.

Furthermore, a dismissal of the instant charges would not achieve an equitable result because the District would essentially be unable to bring tenure charges against any teacher based upon their poor evaluations in the 2012-2013 school year. Lastly, the instant tenure charges do not constitute a duplicative litigation because the merits of the charges have yet to be heard. Therefore, the issue regarding the substance of the District's underlying charges was never litigated, and no legal determination was made in this regard.

Should this matter proceed to a hearing and be heard on the merits, it will be the first time the parties have had an opportunity to argue their positions with regard to the substance of the allegations against the Respondent. This issue has yet to be argued – let alone re-litigated. This is not a case with a District loss on the merits of the previous tenure charges and now wishes to refile.

Accordingly, in recognition of the underlying principles of the enforcement of the entire controversy doctrine, the District's tenure charges against Respondent should proceed to hearing on determination of the merits.

The tenure charges were timely filed pursuant to N.J.S.A. 18A:6-13 and N.J.A.C. 6A:3-5.1. The District argues that the fact-pattern in evidence establishes without reservation that the amended charges were filed in accordance with the statute and were done so within 45 days as required by the statute.

For all of the foregoing reasons, the State-Operated School District for the City of Newark respectfully requests that Respondent's Motion for Summary Judgment be denied in its entirety and the matter proceed to a hearing on the merits.

For the Respondent

Preliminarily, the Respondent argues inefficiency charges can only be brought under Section 25 of Teach NJ. Additionally, the entire controversy doctrine gives credence and support to the Respondent's position that the instant charges should be dismissed. This is the second time that the Petitioner has brought the same tenure charges against the Respondent based on the same statement of evidence of Principal Lynn Irby-Jackson dated August 27, 2014. The Respondent argues that she is being subjected to double jeopardy. Furthermore, *"an employer, whether in a disciplinary arbitration governed by a collective bargaining agreement or a disciplinary arbitration pursuant to a statute, does not have the option of continually filing charges against an individual based on the same facts in the hopes that the Employer will, if it tries hard enough, succeeding in imposing discipline on the individual."*

The Respondent argues, *"Three arbitrators have now ruled that the Petitioner in this matter cannot do what it is doing herein, refile under Section 8 of the tenure laws a charge based on the same underlying factual allegations on which charges have previously been dismissed by an arbitrator pursuant to Section 25, i.e. Yarborough, supra; Thompson,"* Additionally, I/MO/ Sandra Cheatham and State-Operated School District of the City of Newark, docket 69-3/15 Arbitrator Bluth reached the same conclusion.

In Yarborough, supra, Arbitrator Gerber found that, *"The District was obligated, pursuant to the entire controversy doctrine, to bring all possible claims based on the same set of facts in one proceeding."* In Cheatham, supra, Arbitrator Bluth found, *"The doctrine of res judicata prevented the District from refiling charges based on the same set of facts under different legal theory."* In Thompson, supra, Arbitrator Brent

determined, *"There is no valid basis in the statute to afford the District two separate, sequential opportunities to litigate identical charges arising from the same set of facts by citing two different sections of the statute in two separate tenure hearings."* The three Arbitrators all arrived at the same conclusion that the employer cannot rewrap the identical factual charges against an employee which have been dismissed in a new wrapping and be allowed to proceed.

The Respondent further argues, *"The fact pattern in evidence further shows that this is the second time the Petitioner has brought tenure charges based on the same factual allegations against the Respondent. A careful review of the two charges shows that they are essentially identical. The first charge (Oxfeld Certification, Exh. A) and the second charge (Oxfeld Certification, Exh. D), contain one charge of inefficiency. There are only two differences in the two sets of charges against the Respondent. The first difference is that the initial charge, the charge from August 2014, includes one tenure charge of inefficiency with subparts A-U (Oxfeld Certification, Exh. A), while the second tenure charge contains one tenure charge of inefficiency, with subparts A-T."* The difference between the two charges is that there has been a typographical correction. The first tenure charge had an identical allegation in subparagraph G and subparagraph H, where it stated the Respondent has failed to establish a culture of learning. The second tenure charge only has that allegation once so there is one less specification. The only other difference is that in paragraph 2 of the first charge, Principal Irby-Jackson indicates that tenure charges have been brought pursuant to <u>N.J.S.A.</u> 18A:6-10; <u>N.J.S.A.</u> 18A:6-11; <u>N.J.S.A.</u> 18A:6-17.3 and <u>N.J.A.C.</u> 6A:3-5.1. In the amended

notice of inefficiency charges, Ms. Irby-Jackson adds N.J.S.A. 18A:16-6 and N.J.S.A. 18A:6-17.1.

The statements of evidence relied upon by Principal Irby-Jackson are identical, wherein in the first tenure charges she states, *"The above charge is supported by the attached statement of evidence under oath by Lynn Irby-Jackson annexed hereto (Oxfeld Certification, Exh. A, to which is annexed Ms. Irby-Jackson's August 27, 2014, statement of evidence; Oxfeld Certification, Exh. B)."* The date of the amended notice of inefficiency charges signed by Principal Irby-Jackson is August 27, 2014, and is the identical date of the first charges under Section 25 of the statute. The Petitioner did not even re-date the statement of evidence (Oxfeld Certification, Exh. B and Oxfeld Certification, Exh. F).

The Respondent again argues that an inefficient tenure charge can only be brought under Section 25 of Teach NJ and, therefore, the District's charge must be dismissed. The Respondent argues, *"A brief review of the history underlying the passage of Teach NJ and its implementing regulations, the statutory and regulatory language itself, as well as arbitrable precedent makes clear that charges of inefficiency are now defined by and required to proceed pursuant to Section 25 and only pursuant to Section 25 of the Teach NJ·Act."*

Moreover, by eliminating the 90 day notice of inefficiency required prior to Teach NJ and replacing it with a new procedure, with all its specific requirements, *"The legislature clearly meant to allow only one method of pursuing tenure charges of inefficiency against a tenured teacher. Had the legislature intended to simultaneously*

allow the pursuit of tenure charges of inefficiency with no procedure required of the District, the legislature would have so stated."

The Respondent also argues, *"The applicable law and its implementing regulations were a part of a larger quid pro quo of which the new Section 25 of Teach NJ lies at its very heart. The radically transformed system of teacher evaluation and accountability provides that teachers are more readily subject to removal based only on two years of inadequate performance, subject to a speedy and formidable limited review and defenses available under prior law. (See N.J.S.A. 18A:6-17.2). That was the quid, but the quo in exchange for that stream-lined discharge procedure was well-defined, transparent, and uniform observation and evaluation guidelines, processes and procedures and the transparent and uniform tenure removal procedure for claims of inefficiency outlined in Section 25 of the Teach NJ Act."*

Additionally, the legislature, for the first time created a specific and inclusive definition of teacher inefficiency. In doing so, *"they substantially revised existing statutes, principally Section 8, while creating a new Section 25 governing inefficiency charges. Gone from the law was the prior requirement that teachers receive notice of the 90 day improvement period prior to the commencement of inefficiency charges. In its place the legislature crafted Section 25 (N.J.S.A. 18A:6-17-3) entitled, Filing with the Secretary of the Board of Education Notice of a Charge of Inefficiency Procedural Requirement."*

It should also not be overlooked, *"that in enacting the new Section 25 of Teach NJ and specifically defining inefficiency, as well as revamping the entire teacher evaluation process, the legislature substantially curtailed the defenses available to*

educators subject to tenure charges. Thus, the legislature concurrently enacted Section 23, which applies to inefficiency charges brought pursuant to Section 25 and substantially limits the scope of review of employee evaluations and defenses which may be raised by the teacher."

The limited scope of review of teacher evaluations and the limitation on defenses set forth in Section 23 of Teach NJ (N.J.S.A. 18A:6-17.2) directly flow from the concurrent overhaul of the evaluation process and procedures. Teachers may no longer challenge an evaluator's determination - but, only so long as the determination is based on evaluations which comply with applicable procedures.

The Respondent contends that the District is, *"Effectively saying that both N.J.S.A. 18A:6-17.2 and 17.3 are simply optional and that it may comply with statutory and regulatory procedures, or not. The District apparently believes that if it fails to comply with applicable procedures necessary to bring charges under Section 25 – as was previously determined in this case – it may simply ignore Section 25 altogether. In that case, the limitations on review of evaluations were predicated on compliance with statutory evaluation requirements and procedures. Under this bizarre theory, the efforts of the legislature to streamline tenure proceedings are rendered a complete nullity. That simply was not the intent of the legislature in revamping the State's tenure laws."*

The Respondent continues to argue that, *"The terms of the applicable statute and regulatory provisions all confirm that the exclusive means to which to bring inefficiency charges against a teacher is through Section 25 and only Section 25."*

In support of its argument that inefficiency charges can only be brought under Section 25 of Teach NJ, the Respondent refers to I/M/O Ursula Whitehuirst and State-

Operated School District of the City of Newark, docket 282-9/14, where Arbitrator Simmelkjaer addressed this issue once again against the same Petitioner, concluding that inefficiency charges could not be brought under Section 8. He stated, *"The Arbitrator is not convinced that having dismissed the inefficiency charge against Ms. Whitehurst based on the District's non-compliance with N.J.S.A. 18A:6-17.3, through its utilization of the Respondent's annual summative evaluation for the 2012-2013 school year it can now proceed to a hearing under N.J.S.A. 18A:6-16."* Furthermore, Arbitrator Simmelkjaer stated, *"Since the charge of inefficiency filed with the Commissioner alleged that over a two year period from September 22 to the present, the teacher was determined to be either ineffective or partially effective in her annual summative ratings under Section 25 and the statement of evidence reinforces the charge, the District is bound by the procedural requirements of Section 25."*

Additionally, the Respondent contends that the Williams, supra; Whitehurst, supra; and Thompson, supra arbitration determinations flatly rejected the District's pursuit of charges of inefficiency under Section 8.

The Respondent argues, *"The District has not provided, and cannot provide, any reason to deviate from these consistent and persuasive arbitration opinions and awards. They are firmly grounded in not only the legislative of the Teach NJ Act, but also the language of the statute itself, its regulations and authoritative guidance issued by the Department of Education."*

The Respondent contends, *"In what appears to be a desperate bid to rehabilitate its previously dismissed charges against the Respondent, the District has pressed forward with its already discredited effort to pursue charges of inefficiency pursuant to*

Section 8 of Teach NJ. For purposes of pursuing charges of inefficiency, Section 8 now stands as little more than a legal relic supplanted by Section 25."

The Respondent contends that the Petitioner apparently believes that through Section 8 it does not need two school years, beginning with the 2013-2014 school year of ineffective or partially effective ratings to bring a charge of inefficiency. The Respondent continually argues, *"If the legislature had intended for deficient Section 25 inefficiency charges to proceed to arbitration via Section 8, they would have so stated."*

Moreover, if a district could *"simply file an inefficiency tenure charge under the other charges section of Section 8, it would render the entire legislative overhaul of the tenure system, as set forth in Teach NJ and the creation of Section 25 framework and procedure for inefficiency charges, meaningless and unnecessary."*

Section 25 imposed an obligation upon the District to comply with the new evaluation system. Absent from Section 25 or any other authority is any language that the legislature intended for a deficient Section 25 inefficiency charge to proceed to arbitration via Section 8 as a fall back or alternate means through which to pursue inefficiency charges.

The Respondent argues that the Petitioner's charge is barred by the entire controversy doctrine, which is equitable in nature and is fundamentally predicated upon judicial fairness and will be invoked in that spirit. In this case, the Petitioner had the opportunity to raise all legal bases for its tenure charge of inefficiency against the Respondent based upon her evaluation and conduct for the 2012-2013 and 2013-2014 school years when it filed charges in August 2014. It could have chosen to bring those

charges simultaneously under Section 8 based upon the same facts or series of transactions or occurrences. It did not do so and it cannot now re-litigate the case.

The action of the District clearly violates the entire controversy doctrine, as well as the principle of judicial finality and efficiency. No less importantly, it violates the Respondent's due process rights to not be subject to the same charges repeatedly and indefinitely by the Petitioner. This matter has been litigated, and it has, concluded.

The Respondent continues to rely upon prior arbitration decisions in Yarborough, supra, Cheatham, supra, and Thompson, supra. In Yarborough Arbitrator Gerber stated, *"The entire controversy doctrine embodies a principle that the adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings. There was nothing to prevent the District from alternatively pleading a count of inefficiency under Section 8 in its initial papers."* In Thompson, Arbitrator Brent stated, *"The second tenure charge did not amend the first charge by the introduction of new facts, nor was a second theory raised in a timely manner. The second set of tenure charges simply alleged a second cause of action under a different statutory standard in order to prove that the Respondent's teaching was legally unacceptable to the extent that her tenure should be rescinded."* In Cheatham, Arbitrator Bluth stated, *"Moreover, I find that the doctrine of res judicata is relevant in this matter. This is so because I have examined both the first and second set of charges and observed the charges for January 2015 were virtually identical to the charges I had previously dismissed. Further, I reject the District's claim that the matter raised in the second set of charges are not the same matter and, thus, do not fall under*

res judicata. In my opinion this is pure nonsense: just because the charges were filed under a different section of the law does not render the matter indifferent."

In conclusion, the Respondent asks that the tenure charges against Toni Lenz be dismissed with prejudice and she be returned to work with full salary and benefits.

DISCUSSION AND ANALYSIS

The unique facts of each case can and do control how a particular disputed action by a school district might be adjudicated if a claim is submitted to arbitration pursuant to c.26, P.L. 2012. I have included extensive positions of both parties concerning whether and not N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 is controlling in the instant matter.

The Department of Education, by way of a letter dated June 17, 2015, sent to counsel for both parties indicating that the above-captioned tenure charges – which have been docketed as new charges (see Agency docket number 97-4/15) and are being processed with respect to Section 8, inefficiency charges only were reviewed and deemed sufficient if true to warrant dismissal or reduction in salary. *"The Arbitrator shall review those charges which are not dismissed as a result of a motion under the preponderance of evidence standard."*

Counsel for the Petitioner submitted a motion to the Commissioner of Education for emergent relief dated June 19, 2015, and indicating that *"The District had demonstrated irreparable harm if the application for emergent relief is not granted."*

On July 17, 2015, the Commissioner of Education denied the application because he stated he *"lacks jurisdiction to hear and decide the Petitioner's Motion for*

Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the Arbitrator pursuant to N.J.A.C. *6A:3-5.5(b)."*

Due to the fact that the Department of Education has required me to make a determination in the instant matter using a preponderance of evidence standard, it is appropriate to quote the preponderance of evidence standard into the record. Black's Law Dictionary , 9th edition, defines preponderance of the evidence as, *"the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force, superior evidentiary weight, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."*

Additionally, other legal terms have been utilized in various arbitration hearings dealing with tenure charges against teachers and in particular, with the State-Operated School District, City of Newark. The following legal terms will be utilized in my Award:

Res *judicata*: an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue; (2) a final judgment on the merits; and (3) involvement of the same party or parties in privity with the original parties.

Collateral Estoppel: a doctrine barring a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.

The Entire Controversy Doctrine: this doctrine embodies the principle that adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings.

Additionally, in support of its arguments to sustain the tenure charges, the District, *"has filed a Notice of Appeal with the Appellate Division on the following issues: (1) the Commissioner of Education transferred the Tenure Hearing to the same arbitrator who heard the parties' previous Tenure Charges in violation of N.J.S.A. 18A:6-17.1, and (2) the Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the Tenure Charges in violation of N.J.S.A. 18A:6-16."*

Moreover, Exh. A of the Petitioner's Motion to the Commissioner of Education for emergent relief, is a Notice of Appeal to the Superior Court/Appellate Division and on that form the NJ Department of Education is referenced as well as Agency Number 97-4/15, which is the Agency number assigned to the amended Tenure Charges. The first decision I rendered on January 17, 2015, docket number 289-9/14 was not appealed by the District.

One of the defenses raised by the Petitioner is that the amended charge of inefficiency was not timely filed. N.J.A.C. 6A:3-5.1 establishes the procedure for implementing the 45 day limitation set forth in N.J.S.A. 18A:6-13. The Respondent filed a written response to the amended tenure charges dated January 23, 2015, and the District had 45 days from that date to make a determination as to the probable cause and the amended tenure charges pursuant to N.J.A.C. 6A:3-5.1(b)(4). The Petitioner

did determine there was probable cause to the amended charges and the State-appointed District Superintendent completed the Certification on the 42nd day, March 6, 2015, which was well within the 45 day limitation. I find the argument raised by the Respondent in this area to be absurd to say the least. The charges were accepted by the Department of Education, and on April 30, 2015, the undersigned was appointed arbitrator in the instant matter.

The Respondent's argument that the amended charge had to be effective August 27, 2014, is unrealistic. That is the date that the first set of charges were filed. Below is my rationale for my determination in the instant matter, but suffice it to say, the charges were timely filed.

The Petitioner argues, *"The evaluation of Respondent for the 2012-2013 school year are valid as Section 25 of Teach NJ were in effect and in full force in the 2012-2013 school year and may be considered under a preponderance of the credible evidence standard."* Section 25 or N.J.S.A. 18A:6-17.3 is the evaluation process, and determination of the charges. N.J.S.A. 18A:6-17.2 is the considerations for arbitrators when rendering a decision and there are four areas an arbitrator is required to review to determine if the charges filed by any board of education are to be sustained or dismissed. Section B of that statute states, *"If the arbitrator determines that the four factors 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."*

N.J.S.A. 18A:6-16, also known as Section 8, is the section of the statute utilized by the Department of Education in referring this matter to me. All provisions of a statute must be read harmoniously. N.J.S.A. 18A:6-123, 17.e. states, *"Beginning with the*

2013-2014 school year, a board of education shall ensure implementation of the improved, adopted evaluation rubric for all educators in all elementary, middle and high schools in the District. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the Commissioners as requested on a regular basis." The Petitioner's argument that the evaluations of the Respondent for the 2012-2013 school year is misplaced because of N.J.S.A. 18A:6-123, 17.e.

The standards for an arbitrator to review inefficiency charges are found in N.J.S.A. 18A:6-17.3. It is not found in N.J.S.A. 18A:6-16. In fact, N.J.S.A. 18A:6-17.3 c. specifically states, *"Notwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the Commissioner shall examine the charge."* There is nothing in Section 25 that would allow a charge of inefficiency to be heard under N.J.S.A. 18A:6-16. However, it is important to review the application of N.J.S.A. 18A:6-16. That section, commonly referred to as Section 8, refers to conduct unbecoming such as, but not limited to, excessive absenteeism, insubordination, misuse of school equipment/property, egregious conduct, open and notorious disrespect for management authority, physical altercation with other staff member(s), corporate punishment, theft, etc. This is not an exhaustive list, but a list of the type of charges that could be addressed with this section. Nothing can be found in Section 8 that would grant a board of education the right to process inefficiency charges.

In contract construction or construction in creating a statute, the Latin phrase *expressio unius est exclusio alterius* is controlling in the instant matter. That Latin

phrase simply means that to express or include one thing implies the exclusion of the other or of the alternative. Here, the legislature clearly established that Section 25, N.J.S.A. 18A:6-17.2 and 17.3 are to be utilized. They specifically reference inefficiency. They did not reference conduct unbecoming such as those enumerated above. Therefore, to attempt to extend Section 8 to inefficiency charges was never contemplated by the legislature and that action by the Employer must be rejected.

It is a subterfuge for Petitioner to argue that even if Section 25 inefficiency charges are determined to be without merit, those charges can be re-cast and proceed to arbitration under Section 8.

Most importantly, nothing can be found in Section 25, or any other provision of Chapter 26 of the Legislative intent to allow for amended tenure charges of inefficiency to be brought against the Respondent.

The arbitration decisions in Yarborough, Thompson, Cheatham, Williams and Whitehurst clearly establish without reservation that the Board is attempting to get two bites at the apple, which is not allowed under these proceedings. The Arbitrators in those cases determined that Section 25 was the applicable section for inefficiency cases and not Section 8 and, therefore, denied the State-Operated School District, City of Newark's position to sustain the tenure charges. The Board presented tenure charges in all of those cases and when they came back for a second bite at the apple, they were rebuffed and rejected by the Arbitrators.

The Board references the Felicia Pugliese and the State-Operated School District of the City of Newark docket 272-9/12 and I/M/O/ Edgard Chaves and the State-Operated School District of the City of Newark, docket 269-9/12 cases as support for its

argument that I have jurisdiction to decide the instant matter under Section 8 of TEACHNJ. In those two cases, both teachers appealed the determinations of the Arbitrators Brent and Brown respectively, because they believed the Arbitrators' decisions to sustain the tenure charges didn't address the fact pattern in evidence. Those matters were argued before the Appellate Division of Superior Court on March 17, 2015, and a decision was rendered on May 19, 2015. The panel consisting of Judges Koblitz, Has and Higbee stated in an opinion delivered by J.A.D. Koblitz as follows: *"Thus, we remand both matters to the Department of Education to determine the validity of those legal defenses raised by each teacher deemed appropriate by the Agency for resolution by the Agency, so that a uniformed educational policy will be promulgated. The Agency should determine the appropriate standards to be used by arbitrators when adjudicating tenure hearings, thus determining a consistent procedure for teachers in a position similar to Chavez and Pugliese who have received tenure charges after the effective date of Teach NJ alleging poor performance that occurred prior to the implementation of the statutes new standards."* Those two cases do not offer any support for the Board's position in the instant matter.

The Certifications of Nancy Oxfeld, counsel for the Respondent, dated July 10, 2015, are both informative and illuminating. Exh. A are the 21 components of the inefficiency charge signed by Arts High School Principal, Lynn Irby-Jackson on August 27, 2014. Additionally, the statement of evidence has 51 separate components and is also signed on August 27, 2014. It should be noted for the record that subsections G and H, which are part of the inefficiency charge are the same. Apparently, it appears to be a typographical error. Therefore, there are only 20 charges. Exhibit D is the

amended notice of inefficiency charges signed by Principal Lynn Irby-Jackson. There are 20 parts of the inefficiency charge and the interesting fact is that there is a paragraph that states, "*The above charge is supported by the statement of evidence previously submitted under oath by Lynn Irby-Jackson dated August 27, 2014, and filed with the Commissioner of Education on or about September 29, 2014.*" That has a notation of December ___, 2014, with the Principal's signature. Accordingly, I do not know if it was actually signed in December. However, it was notarized on January 14, 2015. The statement of evidence (see Exh. E) has the exact same 51 components and is signed August 27, 2014, which is exactly the one which was filed for the first tenure charges of inefficiency against the Respondent. Those charges were adjudicated by the undersigned on January 17, 2015.

The Petitioner did not even change the dates of the charges of inefficiency with all of the subcomponents or the statement of evidence. They are all dated August 27, 2014. That in itself is outrageous to say the least. To advance such an document and expect the Arbitrator to accept it expands the boundaries of believability to beyond any recognizable limit.

The charges are exactly the same, the dates are critical and that is why I use the word illuminating, because they illuminate that the District did not do anything different. The charges are identical. I determined that the amended petition was timely filed, but that amended petition is the same petition that was filed for the first set of charges. Accordingly, the District has not added any new charges; there are no amended charges. If there are, I didn't find them.

The District's action in the instant matter in filing the amended tenure charges is violative of *res judicata* and collateral estoppel. It also violates the entire Controversy standard when the District had the opportunity to include N.J.S.A. 18A:6-16 as the basis for the tenure charges. In fact, the Petitioner stated, *"Even if the Arbitrator here concludes, notwithstanding the facts and arguments presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charges against Respondent should not be dismissed. Instead, the charges must be evaluated under N.J.S.A. 18A:6-16 and the case should proceed to hearing."* Unfortunately for the District the utilization for evaluations for the 2012-2013 school year were violative of Chapter 26 and, therefore, could not be included. Even though the District established a pilot program with the Commissioner of Education, that pilot program could not set aside N.J.S.A. 18A:6-123, 17.e. No matter how this matter is reviewed, the evaluations for the 2012-2013 school year are inappropriate to be utilized for inefficiency charges based on the above-referenced section of the statute.

The District has not met its burden to have a hearing in the instant matter. The District's appeal to the Appellate Court was based upon the following:

"1. The Commissioner of Education transferred the Tenure Hearing to the same Arbitrator who heard the parties' previous tenure charges, Gerard Restaino, in violation of N.J.S.A. 18A:6-17.1; and

2. The Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the tenure charges in violation of N.J.S.A. 18A:6-16."

Moreover, Exh. A attached to the Petitioner's Motion for Emergent Relief references only DOE docket 97-4/15. It does not reference DOE 289-9/14, my award in the first case. Therefore, DOE 289-9/14 is final and binding on the parties, which unequivocally establishes that res judicata and collateral estoppel are alive and

controlling in the instant matter. When the Entire Controversy Doctrine is factored into this award enhancing res judicata and collateral estoppel, it exposes the Petitioner's arguments and establishes that the District has not met its burden of having a hearing in the matter at bar.

Utilizing the preponderance of evidence standard, it is clear and without reservation that the District's actions in the instant matter violated the statute and, accordingly, must be dismissed.

AWARD

In accordance with the preponderance of credible evidence standard, the Respondent's Motion for Summary Judgment to dismiss the tenure charges against Toni Lenz is hereby granted. The Petitioner's motion to compel a hearing in this matter is denied.

The Respondent, Toni Lenz, shall be returned to work with full back pay, benefits, and seniority. The Petitioner shall also reimburse the Respondent for any documented medical expenses she incurred while she was under suspension.

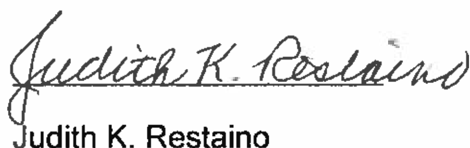
Dated: August 24, 2015

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 24th day of August, 2015, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.



Judith K. Restaino

Notary Public

Lake Twp., Wayne County

My Commission expires on November 10, 2017