
In the Matter of the Tenure Hearing of

**Marie Ebert,
State-Operated School District
of the City of Newark
Essex County**

Agency Docket No. 267-9/14

Ruling on Respondent's Motion to Dismiss

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE PETITIONER:

Laura Miller, *Scarinci Hollenbeck*
Sean D. Dias, *Scarinci Hollenbeck*
Ramon E. Rivera, *Scarinci Hollenbeck*

FOR THE RESPONDENT:

Nancy Oxfeld, *Oxfeld Cohen*

BACKGROUND

This matter is before the Arbitrator for a decision on the motion to dismiss filed by Marie Ebert (Respondent) on November 18, 2014. The Respondent filed a letter memorandum in lieu of brief in support of the motion on November 18, 2014, and also filed a supplemental letter memorandum on November 25, 2014.

- On December 5, 2014, the State-Operated School District of the City of Newark, Essex County (Petitioner) filed a brief in opposition to the Respondent's motion to dismiss.
- On December 10, 2014, the Respondent filed a letter memorandum in response to the Petitioner's brief.

- On December 12, 2014, the Petitioner filed a letter brief as a sur-reply to the Respondent's December 10, 2014 letter memorandum.¹
- On December 22, 2014, the Respondent submitted an arbitration decision that was issued on December 20, 2014.
- On January 2, 2015, the Arbitrator requested an extension to February 19, 2015, from the Bureau of Controversies and Disputes which was granted.
- On January 3, 2015, the Respondent submitted an arbitration decision that was issued on December 29, 2014.

I. Statement of Facts

The Respondent is a teacher in the District. She received a rating of "partially effective" in her 2012-2013 annual summative evaluation and "ineffective" in her 2013-2014 annual summative evaluation.

On August 26, 2014, the District served the Respondent with a "Notice of Tenure Charges" for inefficiency and conduct unbecoming a public school teacher, along with a Statement of Evidence, pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1. The Statement of Evidence included 19 exhibits, consisting of evaluations from the 2012-2013 and 2013-2014 school years, as well as memoranda, e-mails and correspondence regarding the Respondent's performance as a tenured teacher. The State-District Superintendent certified the tenure charges on September 18, 2014, and filed the charges with the New Jersey Department of Education (DOE).

By letter dated October 2, 2014, the Respondent asked the District for complete copies of any files about her that it maintained. On the same day, the Respondent filed an answer to the tenure charges, requesting that they be dismissed and raising 14 defenses.

By letter dated October 10, 2014, the Director of the Bureau of Controversies and Disputes notified the parties as follows:

¹ The District objected to the submission of Respondent's supplemental brief on the ground that the Arbitrator had not granted permission for the brief. The Respondent's request to file a supplemental brief is hereby granted. Similarly, the District's request to file its sur-reply is also granted.

Please be advised that, following receipt of respondent's answer on October 3, 2014, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3c; upon review, the Commissioner [of Education] is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Tia Schneider Denenberg as required by statute.

In e-mail exchanges beginning on October 7, 2014, the Arbitrator and the parties agreed that three days of hearing would be scheduled for November 20, November 21 and November 25, 2014. In a conference call with the parties on October 17, 2014, the Arbitrator directed them to take careful note of statutory deadlines. The Arbitrator encouraged the parties during those exchanges "to work out the various filing dates."

On October 22, 2014, the Respondent asked the Petitioner for the information required by N.J.S.A. 18A:6-17.1b as soon as possible. Noting that the statutory provision requires the District to supply a list of witnesses "with a complete summary of their testimony," the Respondent "remind[ed]" the District

that 'a complete summary of their testimony' is not the same as a statement of the subject upon which the individual would testify. Thus, for example, it is not sufficient to state that an individual will testify as to:

Ms. Ebert's performance and Ms. Ebert's compliance with her CAP [Corrective Action Plan].

You must set forth the specific facts which will be testified to by the witness.

Also on October 22, 2014, the Respondent sent Petitioner 25 Interrogatories regarding the Petitioner's compliance with statutory procedural requirements, the Respondent's attendance record and requests for accommodation, and the allegations in the tenure charges of conduct unbecoming a teacher. On October 30, 2014, the Respondent sent revised Interrogatories; the sole revision corrected one erroneous reference to the Respondent.

On October 31, 2014, the Petitioner forwarded to the Arbitrator a letter of clarification from the DOE Assistant Commissioner, dated October 24, 2014. The letter responded to a request by the District for clarification of the DOE's intent in the "Guide to the TEACHNJ Act,"² as well as the status of the District's evaluation rubric during the 2012-2013 school year. The Assistant Commissioner's letter stated in relevant part:

[S]ince August 2012, the Department has published many resources meant to support school districts in the implementation of the Act. One such document was a response to questions regarding

² TEACHNJ is the acronym of the "Teacher Effectiveness and Accountability for the Children of New Jersey" Act, which was approved on August 6, 2012.

TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three years of employment . . . [Many non-tenured teachers requested] the District to clarify how the law applied to their tenure acquisition and the Department responded accordingly:

No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where [sic] the statewide system will be in place, and the first year when the summative rating "clock" . . . will start.

[S]uch clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher . . . In fact, the Department issued multiple publications notifying pilot school districts that any personnel consequences connected with evaluations were a matter of local decision and applicable State law . . . The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACHNJ Act.

On November 10, 2014, the Petitioner delivered to the Respondent 1,690 pages of documents, with no directory or index, which "the District intends to rely on at the hearing." On November 13, 2014, the Petitioner gave the Respondent a list of ten potential witnesses. According to the Respondent, the list lacks the statutorily required "complete summary of [the witnesses'] testimony." Rather, it merely identifies the subjects covered by the testimony.

On November 18, 2014, the Respondent requested adjournment of the hearings that were scheduled to begin on November 20, because she would be filing a motion to dismiss the charges. The District joined in the request. On November 20 the hearing was opened during a conference call with the Arbitrator. The hearings scheduled for November 21 and November 25 were adjourned.

In a letter memorandum in support of her November 18, 2014, motion to dismiss, the Respondent asserted, among other things, that as

we have not received any of the files requested (unless they are somehow jumbled into the 1,690 pages of documents, but we have not received any indication as to whether they are or are not), we have not received complete summaries of the testimony of witnesses and we have not received a response to Interrogatories.

On December 5, 2014, the District answered the Respondent's interrogatories, which had been sent on October 22 and revised on October 30. The District also gave the Respondent that day an index to the 1,690 documents which had been provided on November 10.

II. Positions of the Parties

The parties' arguments address two distinct issues: (A) a threshold issue as to whether the Arbitrator has authority to consider the Respondent's motion to dismiss; and (B) if the Arbitrator has such authority, whether the motion to dismiss should be granted. The parties' arguments with respect to the issues are set forth and addressed below.

A. Threshold Issue: Arbitrator's Authority to Consider Motion to Dismiss

1. The District's Position

The District argues that the Arbitrator lacks the statutory authority to consider the Respondent's motion to dismiss because: (1) pursuant to N.J.S.A. 18A:6-17.3, the Commissioner of Education has the sole authority to determine if the District properly followed the evaluation process, and in this case the Commissioner determined that the District did follow the evaluation process; and (2) once a tenure case is referred, the arbitrator may make only factual determinations on matters confined by statute that are based on a full evidentiary hearing.

As to its first contention, the District notes that N.J.S.A. 18A:6-17.3c provides the following:

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. 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.

According to the District, this provision empowers the Commissioner alone to determine whether the evaluation process was followed. In other words, that authority resides exclusively with the Commissioner and not with an arbitrator.

The District contends that its view is supported by the statute's legislative history. The Senate and Assembly Statements associated with the TEACHNJ Act describe the Commissioner's role as follows:

If the charge is forwarded to the commissioner, the individual against whom the charges are filed will have 10 days to submit a written response to the charges to the commissioner, and the commissioner, unless he determines that the evaluation process has not been followed, is required to forward the case to the arbitrator within five business days following the period provided for the response to the charges.

The description makes clear, the District believes, that the Legislature intended the Commissioner to be the sole decision-maker in the initial phase of the process.

The statute mandates, the District asserts, that a challenge to the evaluation process be brought to the Commissioner, given that the discretion to make a determination lies solely with him. Thus, a dispositive motion by a teacher alleging failure of a district to follow the evaluation process may be made only to the Commissioner prior to the referral of the charges to an arbitrator. The Commissioner's determination cannot be "punted" to an arbitrator, which is evident from the strict limitation of the scope of an arbitrator's review in N.J.S.A. 18A:6-17.2.

Here, the Commissioner exercised his authority pursuant to N.J.S.A. 18A:6-17.3.c when he issued the October 10, 2014, correspondence to the parties. This correspondence constituted a final administrative decision. As such, the proper mechanism to contest it is a judicial appeal lodged in accordance with N.J.S.A. 18A:6-9.1. Since the Respondent did not file her motion to dismiss with the Commissioner prior to referral to the Arbitrator, her motion must be denied.³

As its second point, the District argues that once a tenure case is referred, the arbitrator may only make factual determinations, on matters restricted by statute, that are based on a full evidentiary hearing.

Under TEACHNJ, once a tenure charge is transmitted to an arbitrator pursuant to N.J.S.A. 18A:6-17.1, based on an allegation that the employee was inefficient pursuant to N.J.S.A. 18A:6-17.3, the arbitrator's decision is confined to determining whether:

- (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
- (2) there is a mistake of fact in the evaluation;
- (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
- (4) the district's actions were arbitrary and capricious.

³ The District asserts that its view is supported by two arbitration decisions. In its sur-reply, the District acknowledges that a third arbitration decision supports the Respondent's argument, but the district insists that the decision is incorrect.

According to the District, the language of subsection (1) predicates an arbitrator's determination of the adequacy of an individual teacher's evaluation on a previous finding of the soundness of the evaluation process itself. In other words, in order to dismiss a tenure charge on the basis of a flawed "evaluation process," the arbitrator would be required to determine that the error "materially affected the outcome of the evaluation" in the relevant school year. N.J.S.A. 18A:6-17.2b. That determination cannot be made without considering all evidence presented at the hearing, including the results of observations and the testimony of witnesses about the inefficiency of the teacher.

2. The Respondent's Position

The Respondent disputes the District's claim that the Commissioner determined that the tenure charges in this matter meet all statutory procedural requirements, and also disputes its contention that the Arbitrator lacks authority to decide a claim that the charges do not meet statutory procedural requirements.

The Respondent relies on a growing list of arbitrators' decisions in support of her position that an arbitrator has the authority to determine whether tenure charges brought by a school district comply with all statutory procedural requirements. According to the Respondent, these decisions support her position that the arbitrator has the authority to decide this motion, and that the Commissioner did not render a decision that all procedural requirements for the tenure charges to proceed to hearing have been met.

3. Holding: Arbitrator's Authority

Consideration of the relevant statutory provisions leads to the conclusion that the Respondent's motion to dismiss is properly before the Arbitrator.⁴

It is clear from the provisions of TEACHNJ, and is undisputed by the parties, that a chief purpose of the legislation was to expedite the processing of teacher tenure cases. To this end, N.J.S.A. 18A:6-17.3 states that upon receipt of a charge of teacher inefficiency, the Commissioner shall examine the charge, and the teacher shall have 10 days to submit a

⁴ In addressing the parties' arguments on the issues in this matter, due consideration has been given to the arbitration awards they have cited. The awards are informative, but the controlling consideration is the Legislature's intent, as evidenced in the statutory provisions. Since the TEACHNJ Act established a permanent panel of 25 arbitrators to hear tenure charges, it is to be expected that awards may reach contradictory interpretations of the legislation. The awards are subject to judicial review, which may ultimately resolve conflicts among them. Until then, the awards ought not be regarded as final for purposes of collateral estoppel.

written response. Within five days from the deadline for a written response, the Commissioner must refer the case to an arbitrator, unless he or she determines that the evaluation process has not been followed. Thus, the Commissioner's determination must be made within a brief period.

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

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

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

Thus, the Legislature created distinctive roles for both the Commissioner and an arbitrator in reviewing the evaluation process. The Legislature clearly intended the Commissioner to decide within five days whether a District had taken the requisite steps for completing an evaluation,⁵ whereas the arbitrator was asked to determine whether those steps were carried out correctly and in accordance with the prescribed standards. This construction of the legislation gives meaningful purpose and effect to both its language and intent.

The Respondent's motion to dismiss presents several arguments challenging the way her evaluation was conducted, which is the domain of the arbitrator. Other arguments presented by the motion call into question the production of evidence and the discovery process. Since this occurred after the charges were referred to the Arbitrator, it cannot have been a matter for the Commissioner. Consequently, both categories of arguments submitted in the motion are properly before the Arbitrator and will be addressed to the extent necessary.

⁵ The Commissioner's determination that the steps leading to the teacher's evaluation were taken is an administrative decision that can be challenged only in a judicial forum.

B. Merits of the Motion to Dismiss

1. Contentions of the Respondent

The Respondent first addresses the tenure charge process, and then the reasons that the charges should be dismissed.

a. The tenure charge process

N.J.S.A. 18A:6-17.1 removed tenure charge hearings from the Office of Administrative Law and the Commission of Education. It substituted hearings before a permanent panel of arbitrators, in part to make the hearing process simpler and speedier. To that end, the scope of arbitral review was limited to the four matters set forth in N.J.S.A. 18A:6-17.2a, and the arbitrator was specifically prohibited from reviewing the evaluator's judgment about the quality of an employee's classroom performance. N.J.S.A. 18A:6-17.2c. Discovery, too, was streamlined. Upon referral of the charges to arbitration, the district was required to

provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses and a list of witnesses with a complete summary of their testimony to the employee or the employee's representative. N.J.S.A. 18A:6.17.1b3.

A district was precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. *Id.*

A prudent district would not file the charges until it was ready to proceed with discovery, since the respondent had to be given all discovery documents and a complete summary of each potential witness' testimony as soon as the case is referred to the arbitrator. Thus, the district should be thoroughly prepared before the tenure charge is filed.

Tenure litigation does not assure equity in the matter of access to information. In challenging a termination for inefficiency, the employee is limited to a maximum of 25 interrogatories. Depositions are not taken. Given the rapidity of the process, the window for acquiring information to prepare a case is open only briefly.

Offsetting the disadvantages attributable to the speed of the process and the limited discovery is the teacher's entitlement to timely receipt of all evidence that might be used against her and a complete summary of witness testimony. The entitlement helps balance the equities, since a district decides when to "pull the trigger" by filing the charge. The

teacher is in a reactive posture. For that reason, the burden is properly on the district to prepare the charge and the supporting material adequately before filing. In this instance, the district did not meet that burden.

b. The tenure charges must be dismissed as premature

The Respondent contends that under N.J.S.A. 18A:6-123e, the 2013-2014 school year is the first year in which an individual can be evaluated under the comprehensive scheme that requires termination if an individual is rated "ineffective" and/or "partially effective" for two straight years. The central issue is whether charges of inefficiency pursuant to TEACHNJ can be brought after the conclusion of 2013-2014 school year (using evaluations for the 2012-2013 and 2013-2014 school years), as argued by the District, or only after the conclusion of the 2014-2015 school year (using evaluations for the 2013-2014 and 2014-2015 school years), as argued by the Respondent. The issue has already been decided in favor of the teacher by several arbitrators. Their decisions support the Respondent's position that the charges must be dismissed when they are based on evaluations for the 2012-2013 and 2013-2014 school years. The doctrine of collateral estoppel precludes raising again an issue that was already decided in another arbitration case to which the District was a party. If the District believes that an arbitrator's interpretation of the statute is wrong, it can seek to have that decision vacated by a court. Until then, the District is bound by the decision. For that reason, the tenure charges against the Respondent must be dismissed as having been filed prematurely, in violation of TEACHNJ.

c. The tenure charges must be dismissed because the District failed to disclose all evidence to the Respondent when the charges were referred to arbitration

N.J.S.A. 18A:6-17.1b3 could not be more clear:

Upon referral of the case for arbitration, the employing board of education shall provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

When the Legislature enacted TEACHNJ, it sought to achieve speed without sacrificing fairness. In requiring teachers who are charged and suspended without pay to be returned to the payroll within 120 days (N.J.S.A. 18A:6-11), the Legislature allowed little time for discovery. It therefore required that a district, which chooses the time of filing, prepare its case in advance, disclosing to the teacher all pertinent documentation as well

as a complete summary of possible testimony. The completeness of the disclosure compensates for the relatively short time that the teacher has to respond to the charges. When a district fails to furnish full discovery at the time of the referral, as required by the Legislature, it cannot present any evidence at the hearing "except for purposes of impeachment of witnesses." N.J.S.A. 18A:16-171b3.

In the instant matter the District produced no evidence, no list of witnesses, and no complete summary of testimony until one week prior to the scheduled hearing. Production was late, despite prompting by the teacher's counsel. The District's tardiness violates TEACHNJ by hampering the teacher's ability to prepare a response. Consequently, the charges must be dismissed, since there is no evidence that the District can legally present at the hearing.

d. The charges must be dismissed, since the witness list provided by the District does not contain a complete summary of the witnesses' testimony

The law requires not merely a list of witnesses but "a list of witnesses with a complete summary of their testimony." The list of witnesses that the Petitioner submitted one week before the scheduled start of the hearing lacks a detailed account of the facts to which the individuals will testify. It contains only a general description of the matters that would be covered. Accordingly, even if it had been produced at the time the charges were assigned to the Arbitrator, the statement would have been insufficient.

The Respondent was entitled to learn the substance of the testimony, that is, the facts that would be adduced, not just a list of the topics that would be covered. The law makes it clear that while the process must move briskly, the Respondent should not be left to guess about the information that will emerge at the hearing. The Respondent was denied her right to be informed about any documentary or testimonial evidence that could be presented at the hearing.

In short, the Respondent did not receive a list of witnesses with "a complete summary of their testimony," either when the matter was transferred to the Arbitrator, two months before the scheduled hearing, or when the list of witnesses was given to the Respondent a scant week prior to the scheduled hearing. Therefore, the tenure charges must be dismissed.

e. The tenure charges must be dismissed, since the Petitioner has not replied to the Respondent's discovery requests

The Respondent submitted interrogatories as well as a request for a copy of any files concerning her that are maintained by the District. As of November 18, 2014, she had received no answers to the interrogatories, unless they are buried somewhere among the 1,690 pages of non-indexed documents that were delivered.

Without a complete response, the Respondent is denied the opportunity to pursue her statutory defenses: that procedural requirements of TEACHNJ were not met with regard to her entire evaluation process, that the District refused to accommodate her illness, that she was retaliated against for requesting accommodation, and that the District demanded her return to work from sick leave.

The District does not have the right to deny information to the Respondent that she needs to present a defense. The District cannot just deliver 1,690 pages of unorganized documents and a generalized witness list to a respondent the week before the hearing and expect the tactic to be considered compliance with the law. The statute calls for full discovery in ample time to prepare the litigation. The charges must be dismissed, because absent full discovery, the respondent could not effectively defend herself.

f. The Arbitrator does not have jurisdiction to decide a charge of inefficiency on an alternate statutory basis

The District argues that there is an independent statutory basis for pursuing charges of inefficiency, N.J.S.A. 18A:6-16. However, given that this argument has been rejected in another case, the Arbitrator here should reject the claim as well.

2. Contentions of the Petitioner

- a. The evaluations of the Respondent for the 2012-2013 school year are valid as TEACHNJ was in full force and effect in the 2012-2013 school year and the collateral estoppel doctrine does not bar the Arbitrator from considering the District's arguments in this regard**

i. Prematurity

The Respondent argues that inefficiency charges are premature and cannot be brought against her until after the conclusion of the 2014-2015 school year, pursuant to TEACHNJ.

The Respondent's argument that the 2012-2013 evaluations cannot be used as part of the two-year evaluation period under TEACHNJ is contrary to the plain text of the act. The legislation was passed on August 6, 2012, and went into effect before the beginning of the 2012-2013 school year. See N.J.S.A. 18A:6-117 to 129 and N.J.S.A. 18A:6-16 through 17.5., N.J.S.A. 18A:6-117.

In light of the statutory language, there is no question that evaluations in the 2012-2013 school year were to be used to determine whether tenure charges were warranted. That was the conclusion of the DOE on October 24, 2014. Although the Respondent terms the DOE's conclusion a "personal opinion" of the Assistant Commissioner, that characterization cannot detract from the import of the analysis of the act's effective date by the agency specifically tasked with implementing it.

ii. Collateral Estoppel

The Respondent's contention that collateral estoppel bars the filing of the charges rests principally on the allegedly binding effect of recent arbitration decisions. Those decisions found that the effective date of the act is the school year 2013-2014, so that an evaluation in the 2012-2013 school year could not be used as a reason to file charges. However, the Respondent failed to cite any statutory basis for finding that the effective date for taking action against a teacher was 2013-2014. The Respondent's reliance on a source other than the TEACHNJ statute should be given no weight.

Moreover, two of the conditions needed to invoke the collateral estoppel doctrine—a final judgment on the merits and no possibility of review—are not present here. The District still could seek vacation of the award relied upon by the teacher. Thus, there has been no final determination of the disputed legal issue.

Additionally, there is no judicial decision with respect to the general issue of the effective date of the act. Given that it was passed as recently as August, 2012, conflicting arbitration awards on legal issues related to the act's implementation are natural. Such conflicts will ultimately be resolved by New Jersey courts. Applying the doctrine of collateral estoppel during the act's infancy would be unjustified. Until the issue of the Act's effective date is resolved in a judicial forum, arbitrators are likely to render decisions that reflect their personal opinions.

b. The Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3.

Relying on two arbitration awards, the District contends that the Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-16 or N.J.S.A.

18A:6-17.3. Importantly, in the instant case, this matter was initially pleaded under both sections. While N.J.S.A. 18A:6-17.3 mandates charges for two consecutive annual ratings of "ineffective" or "partially effective," N.J.S.A. 18A:6-16 allows dismissal on the basis of inefficiency or other grounds specified in the statute, including conduct unbecoming a teacher. See N.J.S.A. 18A:6-10. Even if the Arbitrator concludes that the requirements for inefficiency charges under N.J.S.A. 18A:6-17.3 have not been met, the charge must be evaluated under N.J.S.A. 18A:6-16. Therefore, the case should proceed to hearing.

c. The District has complied with its discovery obligations and, in any event, there is no statutory authority to dismiss this matter on the basis of a board of education's failure to provide discovery

N.J.S.A. 18A6-17.1b3 instructs a board of education to provide its evidence and witness summaries "upon referral of the case for arbitration." There is no specific deadline by which this must be done. There are no reported cases that have analyzed the term "upon referral," but one arbitrator has rejected the Respondent's definition that "upon referral" means simultaneously with the referral.

The Respondent complains that the Petitioner did not provide its document production or witness summaries until one week before the scheduled hearing on November 20, 2014 and asserts that pursuant to N.J.S.A. 18A6-17.1b3, the tenure charges against the Respondent must be dismissed. However, during the first conference call between the parties on October 17, 2014, the Arbitrator directed them to work out discovery and motion deadlines. This fact alone removes the discovery process in this case from the strictures in N.J.S.A. 18A6-17.1b3. A comprehensive discovery schedule was not completed, as neither party contacted the other in order to create one.

On November 7, 2014, the District advised the Respondent that its evidentiary documents and witness list would be supplied on November 10, 2014 and November 12, 2014, respectively. Since the Respondent did not object to these deadlines, either to Petitioner or to the Arbitrator, the Petitioner's discovery was produced accordingly. Indeed, the first time the Respondent has sought a remedy from the Arbitrator with respect to discovery was the instant motion to dismiss. The Respondent also failed to provide any discovery or witness lists of her own. Applying a standard of reasonableness to these circumstances requires denial of the Respondent's motion to dismiss.

Additionally, this is not, as the Respondent implies, a case where a party is forced to prepare a defense based upon a naked pleading and would be prejudiced by last minute, voluminous discovery. The Statement of Evidence furnished to Respondent with the filing of the charges on August 26, 2014, included 19 exhibits and fully explained the basis for the charges. In any event, the Petitioner's evidence was in fact provided to the Respondent 10 days before the scheduled hearing.

As the Respondent points out, a tenure proceeding should ensure a speedy resolution. Indeed, while N.J.S.A. 18A6-17.1b3 does not set a precise deadline for a district to furnish its evidence, it does specify a deadline for the responding teacher to furnish his or her evidence, namely ten days before the hearing. The statute thus assumes that ten days is a sufficient period of time for counsel to have evidence in hand in order to prepare for a hearing.

While the Respondent complains of 1,690 documents "dumped" on her ten days before the hearing, most of those documents consist of Respondent's personnel file, which was requested by the Respondent. Much of the Respondent's personnel file is duplicative of Petitioner's Statement of Evidence and/or is irrelevant to the charges, a conclusion which can be reached by the Respondent's quick perusal of the dates of the documents themselves. The charges filed against the Respondent state that the underlying conduct began on October 19, 2012 (inefficiency) and June 7, 2013 (conduct unbecoming). In other words, the volume of the documentation does not correlate with the time needed to review it.

The Respondent points to no legal authority in support of the extraordinary remedy she seeks. Nothing in N.J.S.A. 18A6-17.1b3 supports dismissal of tenure charges for a district's failure to provide discovery beyond that provided in its statement of evidence. The Legislature could have allowed such a remedy if it so elected, as it in fact did in N.J.S.A. 18A:6-13, which provides for dismissal of tenure charges when a district fails to make a probable cause determination within 45 days after receipt of the written charge.

Moreover, the remedy in N.J.S.A. 18A6-17.1b3 for failing to produce witness summaries is not a dismissal of the charges but merely the preclusion of any evidence or witnesses not produced, except for impeachment purposes. The argument Respondent advances for dismissal is that "there is no evidence which [Petitioner] can legally present at the hearing". (See Page 8 of Respondent's initial brief). This is not true. The Petitioner has filed a Statement of Evidence, and the Respondent has filed an answer. The exhibits attached to the Statement of Evidence are admissible. The Respondent would not be prejudiced if a hearing were to go forward on the Statement of Evidence alone.

Additionally, N.J.S.A. 18A6-17.1f reads:

Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

At no point before the motion to dismiss did the Respondent advise the Commissioner or the Arbitrator that the District had not adhered to the discovery deadlines. The Respondent is therefore not in compliance with the statute she cites and cannot avail herself of its remedies.

III. Discussion

TEACHNJ established a new structure for processing teacher tenure charges. A keystone of the structure is referral of charges to arbitration proceedings that are intended to be expeditious yet guarantee the teacher due process. In order to accomplish these objectives, the Legislature limited the arbitrator's substantive review of teacher evaluations and mandated prompt disclosure of relevant evidence to the teacher. Specifically, N.J.S.A. 18A:6-17.1b3 states:

Upon referral of the case for arbitration, the employing board of education shall provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

Thus, the Legislature made it clear that the teacher was to receive "all evidence," including the items listed in the statute, "upon referral" of a case to arbitration. This requirement serves two important interests: (1) ensuring that the teacher gains access to the district's evidence early enough to mount an effective defense; and (2) ensuring that the proceeding begins swiftly and operates under strict time constraints.

In the instant case, the Commissioner informed the parties that the tenure matter was being referred to the Arbitrator on October 10, 2014. According to the plain language of the statute, the District was required to disclose all evidence to the Respondent on that date. The Legislature could not have more lucidly articulated the District's obligation. That body might have instructed the District to send the evidence within a reasonable period after referral or within a specified number of days of referral. But it did not. Rather, consistent with its goal of assuring both rapid hearing of a charge and due process, the Legislature expressly required the District to turn over all evidence precisely when the matter was referred to arbitration. No delay was contemplated.

To read the statute as allowing the District to wait until a later time would be inconsistent with the purposes of the legislation, inasmuch as it would hinder the teacher's ability to defend herself, denying her due process. As the party that initiated the process, determined when charges would be filed, and possessed the evidence that underpinned them, the District should have been prepared to comply in a timely fashion with its statutory disclosure obligation. If the obligation is not enforced in this instance, the structure envisioned by the Legislature may collapse when the volume of cases swells.

It is readily apparent that the District did not provide the Respondent with all evidence on October 10, 2014, the date on which the matter was referred to the Arbitrator. Indeed, the District does not argue otherwise. According to the record, the District supplied the Petitioner with the following material on the dates specified:

- (1) On November 10, 2014, one month after the date the matter was referred to the Arbitrator, the Petitioner delivered to the Respondent 1,690 pages of documents, with no index, that the District intends to rely on at the hearing.
- (2) On November 13, 2014, the Petitioner provided the Respondent with a list of ten potential witnesses.
- (3) On December 5, 2014, the Petitioner gave the Respondent an index of the 1,690 documents sent on November 10, 2014.
- (4) On December 5, 2014, the Petitioner submitted answers to the Respondent's interrogatories, which were sent on October 22, 2014, and revised on October 30, 2014.

The timing of these submissions establishes that the Petitioner did not comply with its statutory obligation to provide all evidence to the Respondent upon referral of the charge to the Arbitrator.⁶

The Respondent argues that the District's failure to comply with its statutory obligation mandates the dismissal of the tenure charge. The District, on the other hand, maintains that dismissal is unwarranted because: (1) there is no statutory provision permitting dismissal for failure to provide full discovery; (2) the remedy in N.J.S.A. 18A6-17.1b3 is not a dismissal but merely preclusion of any omitted evidence or witnesses, except for impeachment purposes; (3) a hearing can go forward on the Petitioner's Statement of Evidence and Exhibits, which was attached to the charges and which the

⁶ The District notes that when it advised the Respondent on November 7, 2014, that it would supply its evidentiary documents and witness list on November 10, 2014, and November 12, 2014, respectively, the Respondent did not object to these dates. The District also asserts that the first time the Respondent sought a remedy from the Arbitrator with respect to discovery issues is with the instant motion to dismiss, and further contends that the Respondent has failed to provide any discovery or witness lists of her own. The short answer to these contentions is that: (1) the District's November 7, 2014, statement could not, and did not, cure its failure to provide the documents and witness list when the tenure charge was transferred to the Arbitrator almost one month earlier; (2) the Respondent was under no obligation to object to the District's November 7, 2014, statement at that time and appropriately objected in her motion to dismiss; and (3) any alleged failure by the Respondent to provide discovery or witness lists does not excuse the District's failure to comply with its statutory obligation. In any event, the Petitioner has not at any point objected to the Respondent's alleged failure.

The District also notes that during a conference call with the parties on October 17, 2014, the Arbitrator directed the parties to work out discovery and motion deadlines. The District asserts that this fact removes the discovery process in this case from the strictures in N.J.S.A. 18A6-17.1b3. However, nothing stated in that conference call in any way modified or contravened the applicability of relevant statutory provisions and, as such, does not serve to nullify their relevance here.

Respondent has answered; and (4) the Respondent is not in compliance with N.J.S.A. 18A6-17.1f because, at no point before the motion to dismiss, did the Respondent advise the Commissioner or the Arbitrator that discovery deadlines had been ignored.

The absence of a statutory provision specifying a remedy for failure to provide discovery—beyond the Statement of Evidence—implies that the Legislature left to the Arbitrator the determination of an appropriate remedy under all the relevant circumstances. The District's reliance on N.J.S.A. 18A:6-17.1b3 is also unavailing. That provision does not prescribe remedies for failure to provide all evidence upon referral of the case for arbitration. Rather, it precludes a board of education from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. Nowhere does the provision assert that preclusion is the only possible consequence of noncompliance, nor does it explicitly limit the scope of an arbitral remedy for a district's failure to effect timely discovery.

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

Any appropriate remedy must further the statute's purposes—ensuring both due process and timeliness in the resolution of tenure charges. To permit a hearing to be held solely on the basis of the District's Statement of Evidence and Exhibits and the Petitioner's answer, as suggested by the District, would be incompatible with due process and would, in effect, reward the District for failure to comply with its statutory obligation in a full and timely manner. Such an approach allows a district to impede preparation of a teacher's defense, compromising the fairness of the process, without even explaining the cause of the delay.

Finally, the District's reliance on N.J.S.A. 18A6-17.1f is misplaced. That provision requires an arbitrator or any other involved party to inform the Commissioner of a failure to adhere to a time limit. The Respondent effectively informed the Commissioner, through service of filings on the District, that timeliness was an issue. Additionally, through this ruling on the motion to dismiss, a copy of which is being served on the Commissioner, the Arbitrator will have informed the Commissioner of her determination that the District has not conformed to a statutory timeline. Further, even assuming lack of compliance with N.J.S.A. 18A6-17.1f, nothing therein suggests that it was intended to affect in any way the appropriateness of a remedy for the District's failure to comply with a different provision—N.J.S.A. 18A:6-17.1b3. As such, N.J.S.A. 18A6-17.1f imposes no bar to granting the motion to dismiss.

IV. Conclusion

For the reasons set forth above, the Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to comply with the timeliness mandate in N.J.S.A. 18A:6-17.1b3. In light of this decision, there is no need to address the Respondent's remaining arguments for dismissal, primarily regarding whether filing of the inefficiency charge was premature and whether the charge of conduct unbecoming a teacher is properly before the Arbitrator. This ruling is premised squarely on the breach of statutory time limits. Finally, the dismissal is without prejudice to the District's right to file charges again in a manner that fully comports with applicable statutory provisions.


Tia Schneider Denenberg
Arbitrator

DATED: January 30, 2015


In the Matter of the Tenure Hearing of
Marie Ebert,
State-Operated School District
of the City of Newark
Essex County

Agency Docket No. 267-9/14

Ruling of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L. 2012, c. 26, to hear and decide the above-captioned matter, rules as follows:

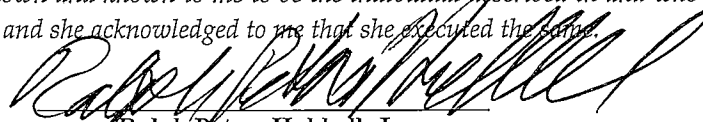
The Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to meet the timeliness mandate in N.J.S.A. 18A:6-17.1b(3). Marie Ebert shall be reinstated as a teacher with full back pay and benefits. The dismissal is without prejudice to the District's right to file charges again.


Tia Schneider Denenberg
Arbitrator

Dated: January 30, 2015

State of New York
County of Columbia

On this 30th day of January, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.


Ralph Peters Hubbell, Jr.
Notary Public State of New York
No. 4793303
Qualified in Dutchess County
Commission Expires October 31, 2015