STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

--X

In the Matter of Tenure Charges filed by
The School District of the Borough of
New Milford, Bergen County, New Jersey
Against Lawrence Henchey

--X

Agency Docket No. 322-11/14

SUMMARY DECISION &
CASE MANAGEMENT ORDER

Issued: January 3, 2015

ARBITRATOR
Joseph Licata, Esq.

APPEARANCES

FOR THE PETITIONER
Vittorio S. LaPira, Esq.
Fogarty & Hara

FOR THE RESPONDENT
Sheldon H. Pincus, Esq.
Bucceri & Pincus

NATURE OF DISPUTE

In accordance with N.J.S.A. 18A:6-10 et. seq. and N.J.A.C. 6A:3-5.1(b), on November 7, 2014, the New Milford Board of Education ("Board") filed with the New Jersey Department of Education, Bureau of Controversies & Disputes tenure charges against Lawrence Henchey ("Henchey") seeking to dismiss him from employment as a certificated Language Arts teacher based on five (5) Charges:

Charge No. 1 alleges that Henchey has consistently demonstrated inefficiencies and ineffectiveness in his teaching skills throughout the 2011-2012, 2012-2013 and 2013-14 school years and as a result of the significant negative impact that his poor teaching performance has upon the quality of education that his students receive, Henchey must be dismissed from his position.

Charge No. 2 alleges that Henchey has consistently demonstrated inefficiencies and ineffectiveness in his teaching skills throughout the 2011-2012, 2012-2013 and 2013-2014 school years despite intensive and comprehensive assistance that has been continuously offered to him by the District Administration and his colleagues, and through multiple corrective action plans designed to address and improve his teaching deficiencies, which demonstrates either an inability or an unwillingness to improve, and which inability or unwillingness to improve constitutes inefficiency warranting dismissal from his position.

Charge No. 3 alleges that as a result of Henchey's consistent failure to, among other things, implement District initiatives; implement a more interactive method of instruction; integrate core content in lesson plans and classroom instructional practices;

use effective teaching strategies; implement consistent grading practices; and meet the professional expectancies set forth in the New Jersey Professional Standards for Teachers, Board Policies and his job description, Henchey's increments were withheld by the Board for the 2013-2014 and 2014-2015 school years, and which ongoing inefficiencies and ineffectiveness warrant dismissal from his position.

Charge No. 4 alleges that in addition to Henchey's consistent failure to demonstrate effective and efficient teaching performance during the 2011-2012, 2012-2013 and 2013-2014 school years, Henchey has failed, since 2002, to remediate certain deficiencies and demonstrate improvement in areas of specific concern, including but not limited to, the use of varied instructional techniques/student-centered activities and the provision of adequate lesson closure, and which inability or unwillingness to improve, and the resulting impact on the education received by his students, constitutes inefficiency warranting dismissal.

Charge No. 5 alleges that, in addition to Henchey's consistent failure to implement effective and efficient teaching strategies, and in addition to his unwillingness or inability to improve upon the same, Henchey has also demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school years which has included a lack of respect for the Administration and a complete disregard for the high professional standards placed upon him, and which unprofessionalism constitutes incapacity and conduct warranting dismissal.

On November 21, 2014, within the applicable 15-day timeline (N.J.A.C. 6A:3-5.3(a)), Henchey filed with the New Jersey Department of Education, Bureau of

Controversies & Disputes, an Answer and Affirmative Defenses to the Tenure Charges. However, Henchey did not file a Motion to Dismiss in lieu of an Answer within the same applicable 15-day timeline. See, N.J.A.C. 6A:3-5.3(a)1.

On December 1, 2014, Kathleen Duncan, Director, Bureau of Controversies and Disputes notified the parties' respective representatives (1) that the Tenure Charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary and (2) that the dispute was referred to the undersigned Arbitrator for resolution in accordance with N.J.S.A. 18A:6-16. On December 8, 2014, during a telephone conference, Counsel for Mr. Henchey notified Board Counsel and the undersigned of his intent to file a "Motion to Dismiss" the tenure charges. Ground rules governing the motion and hearing dates were discussed and set. The undersigned memorialized the results of the telephone conference in writing on the same day:

> In addition, Mr. Pincus has notified Mr. LaPira and I of his intent to file a motion to dismiss the certified tenure charges. Since an Answer has been filed, I regard the motion as one for summary judgment and I agree, in an exercise of discretion only, to decide that portion of the motion that is not subject to a genuine dispute of material fact. The motion schedule is as follows: December 10 (motion papers due via email and in MS Word format); December 19 (opposition papers due via email and in MS Word format); and December 26, 2014 (reply papers, if any, due via email and in MS Word format). The motion will be decided in advance of the first day of hearing. I have set down five days of hearing as follows: January 8, 12, 13, 14 & 15, 2015. All hearing days shall begin at 9:30 a.m. and conclude by 5:00 p.m. The hearing will be held at the administrative offices of the New Milford Board of Education. Testimony should be very limited with respect to past incidents, events, etc. that are a matter of record and that were not contemporaneously contested. Finally, the hearing will be governed by the Labor Arbitration Rules of the American Arbitration Association pursuant to N.J.S.A. 18A:6-17.1c.

The parties' representatives complied with the briefing schedule. In addition, the undersigned asked the parties to address, by no later than January 2, 2015, Arbitrator Walt De Treaux's Opinion and Award in State Operated School District of the City of Camden and Leon Mashore, et. al. Agency Docket Nos. 303-10/14; 290-9/14; 300-10/14; and 291-9/14. The parties' representatives each submitted a written position statement in response.

THE POSITION OF LAWRENCE HENCHEY

Henchey first posits that Charges Nos. 1-4 must be dismissed due to non-compliance with Section 25 of the Act. Section 25 mandates the filing of an inefficiency charge by the Superintendent in instances where a teacher is "rated ineffective or partially ineffective in an annual summative evaluation" for at least two years. N.J.S.A. 18A:6-17.3(1) and (2). It is not disputed that the first two years of the TEACHNJ evaluation process under Section 25 encompass 2013-14 and 2014-15. Henchey observes that N.J.S.A. 18A:6-123(e) provides that "[b]eginning 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."

Henchey further submits that the State Board of Education adopted and made effective comprehensive evaluation regulations entitled "Components of Teacher Evaluation" effective October 7, 2013 (45 N.J.R. 2211 (a)). These regulations required

that teaching staff members be observed at least three times per school year but not less than once a semester; with at least one of the observations being announced, including a pre-observation conference; with the remaining two observations announced or unannounced. N.J.A.C. 6A:10-4.4. Moreover, teaching staff members with corrective action plans, like Henchey, must receive a fourth observation in addition to the observations required by N.J.A.C. 6A:10-4.4 (See, N.J.A.C. 6A:10-2.5(j)(1), as well as a mid-year evaluation by the School Improvement Panel, N.J.A.C. 6A:10-3.1).

According to Henchey, the Board did not comply with the 2013-14 legal requirements. More specifically, in the 2013-14 school year, the District completed three of the four observations required by the regulations then in effect, and it did not perform a mid-year evaluation required from and by the School Improvement Panel ("SIP") (Charge No. 1, ¶¶19, 21, 23). Only a year-end evaluation was afforded Henchey (Charge No. 1 ¶26). Henchey points out, in response to Interrogatory No. 24, the Board admits that it did not conduct and/or provide him with a mid-year evaluation in 2013-2014 (Certification of Sheldon H. Pincus ¶6). While the Board counters that the Building Principal met weekly with Henchey to address progress on his corrective action plan, Henchey retorts that the Building Principal does not constitute the SIP contemplated and required to perform the mid-year evaluation. Pursuant to N.J.A.C. 6A:10-3.1(a), the SIP consists not only of the Building Principal, but a Vice-Principal, and a teacher who is chosen in accordance with N.J.A.C. 6A:10-3.1(b) in consultation with the majority representative. Henchey maintains that because of these omissions, both legal and

procedural, it is clear that the Tenure Charges should be dismissed as a matter of law with respect to Henchey's 2013-2014 evaluations and observations.

Henchey further argues that the Charges must be dismissed with respect to the Board's reliance on Henchey's 2012-2013 (and prior) observations and summative evaluations. According to Henchey, because the full implementation of TEACHNJ did not go into effect until the beginning of the 2013-2014 school year, the Board's reliance on the evaluations that it conducted in 2012-2013 (and prior) are expressly prohibited and premature: "The regulations implementing TEACHNJ, N.J.A.C. 6A:10-1.1 et. seq.; the provisions governing the content of evaluation and components, N.J.A.C. 6A:10-4.1; the procedures and components on rubric approval by the Commissioner, N.J.A.C. 6A:5.1; the procedures concerning the timing, form, and nature of teacher evaluations, observations, and corrective action plans, N.J.A.C. 6A:10-4.4 and N.J.A.C. 6A:10-2.5; as well as other components of the subchapter sections demand the conclusion that neither the Legislature in enacting TEACHNJ in August 2012 nor the Commissioner in establishing the regulatory scheme adopted in October 2013 intended that the Act be implemented or that teachers become subject to evaluation before the commencement of the 2013-2014 school year." (Henchey's Brief, at page 10).

Further, Henchey acknowledges that TEACHNJ allowed for the adoption of evaluation rubrics by December 31, 2012, however, it is clear that those rubrics which the Board used that year were different from those used in 2013-2014 and had not been approved by the Commissioner of Education. Even if they were the same (which they were not), the utilization of any preliminary evaluation rubrics (by no later than January

31, 2013) were seen by Legislature to be no more than a "pilot program" to test and refine those rubrics. They were not to be used to fully implement the Act. Indeed that is why N.J.S.A. 18A:6-123(e) provides that the implementation does not occur until the 2013-2014 school year. It thus states that "[b]eginning 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."

Henchey further observes that the District did not have a SIP in place until the 2013-2014 school year:

> Conspicuously absent from the minutia filled 46 pages of tenure charges is any reference to the SIP being in place for 2012-2013. The undisputed fact is that the District did not have a SIP in place until September 2013 (Certification of Sheldon H. Pincus ¶8, Exhibit C). Inasmuch as both N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-3.1 both require that each school within a district establish a SIP that conducts evaluations and oversees the mentoring program, the establishment of the SIP sometime in 2013-2014 precludes it from being seen or determined to be functioning during 2012-2013.

According to Henchey, the clear intent of the newly enacted evaluation and observation statutory scheme was to afford teachers and administrators/evaluators to become familiar with and, through trial and error, practice the new system and its requirements during the 2012-2013 school year with formal implementation commencing the beginning of the 2013-2014 school year. The purpose was to train certified teaching staff members and evaluators on the evaluation instruments and procedures and for the Department of Education to prepare and finalize its regulation, which later became known as ACHIEVENJ and which did not become effective until October 2013.

In further support of Henchey's position, Henchey relies upon NJDOE regulatory guidance for tenure charge cases implicating the 2013-2014 school year (Certification of Sheldon H. Pincus ¶10, Exhibit E). Thus, on page 4 of that guidance, it was specifically asked:

> Q. Will summative ratings "count" this year (2012-2013) toward tenure decisions?
>
> A. No – the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-2013 school year will impact tenure decisions. 2013-2014 is the first year where the statewide system will be in place, and the first year when the summative rating "clock" (i.e. teachers needing to be rated at least effective for two of three years) will start.

Since Henchey's 2012-2013 annual summative evaluation (if not also those occurring in prior school years) is precluded from consideration by the Commissioner or an arbitrator, according to Henchey, the Board lacks the required two consecutive deficient performance evaluations necessary to bring tenure charges pursuant to N.J.S.A. 18A:6-17.3, as non-compliance bars consideration of the charges. Indeed, N.J.S.A. 18A:6-17.3(c) states:

> [n]otwithstanding 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. (Emphasis supplied).

Under the above-quoted language, either the Commissioner or the Arbitrator must dismiss tenure charges alleging inefficiency if it is determined that a school district did not comply with these uniform observation and evaluation procedures, guidelines and processes.

In support of Henchey's statutory and regulatory analysis, Henchey directs the Arbitrator's attention to analogous TEACHNJ arbitrations. In <u>IMO the Tenure Charge Hearing of Inefficiency of Sandra Cheatham and the School District of the City of Newark</u>, Docket No. 226-8/14, Arbitrator Stephen M. Bluth dismissed procedurally defective charges of inefficiency and ordered the respondent reinstated with full back pay and benefits. He held that "[s]imply put, the passage of TEACHNJ superseded any evaluation procedures that had been in place prior to its enactment. Thus, in my view, the "clock" began with the 2013-2014 school year." <u>See</u>, http://www.state.nj.us/education/ legal/teachnj/2014/oct/420-14.pdf (slip op at 11) (Certification of Sheldon H. Pincus ¶11, Exhibit F). Arbitrator Bluth further opined that the Department of Education's guides (cited above), make it clear that the no evaluation in the 2012-2013 school year would impact tenure decisions (slip op at 13). Finally, according to Henchey, Arbitrator Bluth rejected the contention that, if a teacher is exonerated under Section 25 of the Act, a district may advance a Section 8 claim of inefficiency by which a teacher may be dismissed under the conditions that are delineated under that section.

Mr. Henchey further relies upon In the Matter of the Tenure Charge of Inefficiency against Neil Thomas and the School District of Newark, (Agency Dkt. No. 244-9/14). Arbitrator Robert Simmelkjaer there held: (a) as designee of the Commissioner pursuant to N.J.A.C. 6A:3-5.1(c)(5), he could "examine the charge" to determine whether the procedural requirements necessary to file an inefficiency charge under Section 25 of the TEACHNJ Act had been met (slip op. at 33); (b) given that TEACHNJ and its implementing NJDOE regulations had not been enacted when the district conducted its pilot program, the district could not rely on its 2012-2013 evaluations to charge the teacher with inefficiency absent adherence to each of the substantive evaluation standards of TEACHNJ, N.J.S.A. 18A:6-17.3 (slip op. at 40); (c) having filed tenure charges pursuant to Section 25 of TEACHNJ, ostensibly based upon two consecutive years of "partially effective" ratings, the district was obligated to use only those evaluations conducted in accordance with a rubric adopted by the board and approved by the Commissioner pursuant to P.L. 2012, c. 26.(slip op at 44); and (d) that the district could not proceed under Section 8 of TEACHNJ (slip op at 46).

Based on the foregoing statutory and regulatory interpretations, Henchey asks the Arbitrator in this case to dismiss Charges Nos. 1-4 for the District's non-compliance with Section 25 and implementing regulations.

Lastly, Henchey seeks dismissal of Charge No. 5 based on principles of double jeopardy. Charge No. 5 alleges that in addition to being inefficient, Henchey has demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school year, which has included a complete lack of respect for the Administration

and a complete disregard for the high professional standards placed upon him. Incorporated by reference from Charges Nos. 1-4 are the facts that Henchey's salary and adjustment increments were withheld by the Board upon the recommendation of the Superintendent of Schools for the school years 2012-2013 and 2013-2014. (See, e.g., Charge No. 1 ¶¶ 16 and 28. See, Board Doc. No. 56 (h) – Letter and Board Resolution from Board Secretary Michael Sawicz to Henchey dated July 16, 2013; Board Doc. No.57 (p) – Letter from Superintendent Polizzi to Henchey dated June 5, 2014; and, Board Doc. No. 57 (r) – Letter and Board Resolution from Board Secretary Michael Sawicz to Henchey dated June 24, 2014).

According to Henchey, any reasonable and rational reading of those letters, the statement of reasons given in support of the withholdings, and these tenure charges make it evident that the allegations of Charge No. 5 are subsumed in, and made part of, the reasons underlying the withholdings. It is also clear that, in exercising its discretion to withhold the salary and adjustment increments, the Board at no time reserved any rights or gave any indication that tenure charges might follow for the same conduct. As such, the Board made a conscious and deliberate determination that that was the penalty it had elected to exact from Henchey for the conduct alleged. It gave no notice, required by its own policies, that the conduct might further give rise to the filing of tenure charges. (Certification of Sheldon H. Pincus ¶12, Exhibit G).

In support of this last argument, Henchey relies upon longstanding arbitral decisions in the private sector (citations omitted), the application of double jeopardy in public sector disciplinary proceedings and, moreover, the application the principle of

double jeopardy by TEACHNJ arbitrators, including the undersigned. See, e.g., In the Matter of Ricky Porter (MSB, decided March 16, 2007) (considering reprimand letter previously issued to be penalty and rejecting attempt to impose further punishment); In the Matter of Victor Onwuzuruike (MSB, decided August 9, 2006) (reversing the removal of an employee, finding he had previously been disciplined for the incidents at issue, via official written reprimands that were placed in his personnel file by his supervisor; the Board, thus, rejected appointing authority's attempt to impose double punishment for the same offense and its attempt to revive a stale charge to impose a greater penalty); and I/M/O Jill Buglovsky (Decided December 21, 2012).

Based on the foregoing, Henchey argues: "It necessarily follows that these double jeopardy principles find particular applicability to the facts of this case. The doctrine must be considered not only in determining whether the Board stated a cause of action on which charges could be predicated (See, Answer to Tenure Charges, First Affirmative Defense), but further in considering whether any increased penalty may be imposed should it be determined that the Board could have legitimately proceeded" (Henchey Brief at page 20).

THE BOARD'S OPPOSITION

The Board does not necessarily deny the foregoing Section 25 deficits. Rather, the Board notes that it could not have complied with Section 25 prior to the conclusion of the 2015-16 school year. The Board reasons that it filed tenure charges against Mr. Henchey pursuant to N.J.S.A. 18A:6-10-16 (Section 8) and that it complied with the procedural prerequisites to dismissing Henchey that apply to a Section 8 dismissal. The Board refers

to Section 25 as a "streamlined process", noting the comparatively more expeditious timeframes (up to 45 days in the aggregate) and the elimination of the need for a Board of Education to file a comprehensive Statement of Evidence (See, pages 5 and 6 of Board's Opposition Brief). The Board argues that Section 25 was never intended to negate (nor did it negate) the authority of a board of education to file tenure charges for, *inter alia*, inefficiency under Section 8.

In addition to the distinction of timelines for inefficiency charges filed under Section 25 and Section 8, the Board observes that the statutory language of TEACHNJ leaves no doubt that there are two distinct means by which tenure charges alleging inefficiency may be filed:

- N.J.S.A. 18A:6-17.2 set forth considerations for the arbitrator when considering inefficiency charges pursuant to N.J.S.A. 18A:6-17.3 and addresses whether the matter "...before the arbitrator pursuant to Section 22 of this act is employee inefficiency pursuant to Section 25 of this act..." (emphasis added). This language leaves no doubt that Section 25 is one way of pursuing inefficiency charges, otherwise there would be no reason to include the qualifying phrase "pursuant to Section 25 of this act."

- N.J.S.A. 18A:6-17.3(a) states, "Notwithstanding the provisions of N.J.S.A. 18A:6-11 or any other section of law..." (emphasis added). Clearly, N.J.S.A. 18A:6-17.3 contemplates inefficiency charges brought under N.J.S.A. 18A:6-10 et. seq.; if it did not, those quoted provisions would have no meaning.

- N.J.S.A. 18A:6-17.3(c) also recognizes the provisions of filing inefficiency charges under N.J.S.A. 18A:6-16 in its phrase, "[n]otwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law..."

- N.J.S.A. 18A:6-17.3(d) states that only rubric evaluations may be used to determine inefficiency charges "for purposes of this Section." If rubric evaluations were the only means by which inefficiency charges could

go forth, there would have been no Legislative purpose in stating, "for purposes of this Section."

- Finally, N.J.A.C. 6A:3-5.1(b) sets forth the timelines for filing charges "for reasons of inefficiency pursuant to N.J.S.A. 18A:6-17.3." By specifying that this section applies only to inefficiency charges filed under Section 25, the Commissioner is acknowledging that inefficiency charges may indeed be filed through alternate statutory provisions.

According to the Board, all of the phrases cited above would be meaningless if boards of education could only file tenure charges that included claims of inefficiency under Section 25. The Board relies upon the well-recognized rule of statutory construction that an interpretation that would render any part of a statute inoperative, superfluous or meaningless is to be avoided. See, e.g., Hoffman v. Hock, 8. N.J. 397, 406-07 (1952). As such, there is no basis for Henchey's claim that tenure charges for inefficiency can only be brought pursuant to Section 25. The Board submits that Henchey's position must be rejected as contrary to the intent of the legislature: the concept that inefficiency tenure charges can only be brought at the conclusion of the 2014-15 school year, meaning that a district would have to suffer through at least a third year of inefficiency for any teacher deemed inefficient in the prior two years, is an absurd result that could not have been intended by the Legislature. See, Schwartz v. Dover Public Schools, 180 N.J. Super. 210, 226-27 (App. Div. 1981)("Reason is said to be the 'soul of the law' and the sense of a statute should control over its literal terms. Interpretations which lead to absurd or unreasonable results should be avoided").

The Board, most notably, asserts that it did not plead Section 25 as the basis for the tenure charges. Cf. State Operated School District for the City of Newark [Brady,

Thomas and Cheatham cases]. Accordingly, the Board contends that the core rationale for dismissal of the tenure charges in the aforementioned Newark line of cases does not support Henchey's position. On the contrary, the arbitrators in the Newark matters did not ring Section 8's death knell, but rather, acknowledged the existence of Section 8 as a means of filing tenure charges for inefficiency that was unfortunately bypassed in the District's pleadings. The Board insists that there is not one shred of evidence that the instant charges were filed under Section 25 (as alleged by Henchey). Although the Board acknowledges that Henchey did not have two years' worth of ineffective or partially effective evaluations under an approved rubric when it filed the charges in October 2014, which is why the charges were filed under Section 8, nonetheless, the grounds for dismissing Henchey pursuant to Section 8 are abundant in nature.[1]

The Board further observes that other arbitrators have upheld tenure dismissals under Section 8 in closely analogous circumstances. The Board refers to In the Matter of the Tenure Hearing of Jose Martinez and the School District of the Township of Mahwah, Bergen County, Agency Dkt. No. 167-7/14 (De Treux)(reviewing observations commencing with the 2007-08 school year and continuing through 2013-14, including the withholding of salary increments for the latter three consecutive years of Martinez's career); In the Matter of the Tenure Hearing of Dr. Audrey Cuff and Cumberland

[1] The Board notes that Henchey has accumulated *at least* two years' worth of poor evaluations, as evidenced by not only his 2012-13 and 2013-14 evaluations, but also the Corrective Action Plans in place for 2012-13 and 2013-14 (each pertaining to concerns about to his teaching performance for the prior school year), and the withholding of his employment and adjustment salary increments, for reasons relating to his teaching performance, for the 2013-14 school year. Moreover, the Board asks the Arbitrator to observe that the McRel evaluation rubric, which the Board adopted on December 17, 2012, has been specifically approved by the Department of Education as complying with the law's requirements. *See* http://www.state.nj.us/education/AchieveNJ/teacher/approvedlist.pdf.

Regional School District Board of Education, Agency Dkt. No. 71-3/14 (Gerber)(sustaining charges of, among other things, inefficiency based on charges filed in March of 2014, notwithstanding non-compliance with Section 25); In the Matter of the Tenure Hearing of Edgar Chavez, State Operated School District of the City of Newark, Essex County, Agency Dkt. No. 269-9/12 (Brown)(dismissal of Chavez upheld on inefficiency grounds pursuant to Section 8); and In the Matter of the Tenure Hearing of Felicia Pugliese, State Operated School District of the City of Newark, Essex County, Agency Dkt. No. 272-9/12 (Brent)(dismissal of Pugliese on inefficiency grounds after two years of unacceptable ratings and argument that tenure charges were premature was rejected – no compelling evidence to support Henchey's arguments that TEACHNJ's passage created a state-wide hiatus of at least two years in preferring tenure charges for inefficiency).

The Board further asserts that it would have been impossible to file Section 25 tenure charges under the existing set of facts, as the tenure charges also allege unbecoming conduct as well as Henchey's inability or unwillingness to improve his teaching performance (i.e., incapacity or insubordination constituting other just cause). Here, reasons the Board, the tenure charges against Henchey are factually quite similar to those in Martinez and Cuff, where the arbitrators found that those teachers' inefficient teaching continued regardless of the assistance offered by the school districts. According to the Board, those are essentially tenure charges for gross incompetency, or incapacity, reasons that have led to dismissal of teachers in the past. In the present matter, the Board specifically charged that Henchey has either an "...*inability* or an unwillingness to

improve…" his teaching in various places,[2] and that theme is consistent throughout the tenure charges (emphasis added). The Board maintains that Henchey is not charged with inefficiency alone, but with incompetency and incapacity: "There can be no question, then, that the Charges 1 through 4 are not limited *solely* to inefficiency, but include incompetency as well. For that reason, the Board submits that it properly proceeded under Section 8 (Boards' Opposition Brief at page 18). The Board emphatically states that the legislature could not have intended to require a school district to file two separate tenure charge proceedings – one for inefficiency pursuant to the streamlined Section 25 process and one for all other grounds pursuant to the ordinary Section 8 procedures.

Based on the foregoing, the Board urges the Arbitrator to reject Henchey's Motion for Summary Decision regarding Charge Nos. 1-4.

Lastly, the Board insists that the concept of double jeopardy does not properly apply to a tenure dismissal proceeding or, alternatively, even if it does, the Board's action of salary increment withholding followed by the certification of tenure dismissal charges does not constitute double punishment. The Board first reasons that double jeopardy is a doctrine applicable solely in the context of a criminal proceeding. See, e.g., In the Matter of the Tenure Hearing of Richard Graffanino, Agency Dkt. No. 223-9/13 (January 31, 2014); In the Matter of the Tenure Hearing of Desly Getty, OAL Dkt. No. EDU-08750-08 (June 4, 2009)(Comm. Ed. July 17, 2009); see also Martinez, *supra* (school district withheld Martinez's increment and successfully pursued tenure charges resulting in his

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[2] *See, e.g.*, Charge 2, Heading, ¶¶ 20, 21, 29 and 33; Charge 4, Heading, ¶¶ 2 and 28; Charge 5, Heading and generally throughout the charge.

dismissal). In Getty, a tenured teacher alleged that since she had already been reprimanded for the conduct that was the subject of the tenure charges, double jeopardy should attach and the charges should be dismissed. Id. The ALJ rejected the argument, stating that "tenure hearings are not quasi-criminal in nature and are not primarily directed at imposing punishment upon teachers, but are instead vehicles to determine a teacher's fitness to teach and to set examples for impressionable students." Id., citing In the Matter of the Tenure Hearing of R. Scott McIntyre, 96 *N.J.A.R.*2d (EDU) 726 (App. Div. 1996).

Similarly, in McIntyre, a teacher that was arrested for possession of marijuana and had the complaint subsequently dismissed due to an illegal search unsuccessfully sought to have his dismissal from his teaching position, based on that conduct, overturned under the theory of double jeopardy. 96 *N.J.A.R.*2d at 726-27. The Appellate Division declined to overturn the tenure dismissal, since tenure charges are not instituted with the purpose of punishing a teacher. Id. at 727. Rather, tenure charges embrace a teacher's "fitness for school teaching and example setting for impressionable students who are entrusted by society to the teaching profession." Id.

Finally, in Graffanino,[3] the arbitrator directly and succinctly disposed of the very same arguments being made here:

> Although the District's tactic in withholding the salary increment and filing tenure charges is uncommon, I find that it does not constitute "double

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[3] The Board notes that Henchey's failure to cite to the Graffanino decision unfortunately reflects a lack of candor towards this tribunal, as the arbitrator there specifically rejected the *very same arguments* made here, and Henchey cannot claim ignorance of this matter, because his attorney was the same attorney who represented Graffanino, made the very same argument, and lost. This matter should be treated no differently.

jeopardy." Double jeopardy, of course, **applies only in criminal cases**; but Respondent is arguing duplicative punishments, two separate disciplinary actions for the same offenses. The District's approach was not an attempt to duplicate punishment; but rather, it was an attempt to fill a gap caused by the timing of the tenure charges. In the interval before tenure charges were filed and again before an arbitration decision would issue, **the District wanted to ensure that Graffanino's salary was not increased.** It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on Respondent.
[*Id.* at 26 (emphasis added).]

According to the Board, this matter is distinguishable from In the Matter of the Certified Tenure Charges Between the Randolph Board of Education and Jill S. Buglovsky, Docket No. 265-9/12 (December 21, 2012), where this arbitrator found that Randolph "cannot now retry Ms. Buglovsky based on conduct transpiring *over three years ago*, which *did not involve harm* or realistic potential harm to students, and was resolved at that time by an official reprimand." Buglovsky, Slip Op. at 54 (emphasis added).[4] In other words, it was an attempt to mete out duplicative punishment for the same conduct. The Board reasons that in this case, it was necessary to withhold Henchey's increment due to the timing of the tenure charges. Even more compelling than Graffanino, where the gap in time was relatively brief, the Board argues that the Superintendent did not serve the tenure charges until October 2014,[5] and the Board did not consider them until November 2014. The Board reasons that if it declined to certify the tenure charges, that would have meant that Henchey would effectively have received

[4] Also, in *Buglovsky*, reasons the Board, the teacher there was generally lauded as a good teacher with favorable evaluations, which mitigated the penalty of dismissal to a suspension and increment withholding. That is a stark difference from the facts in the instant matter, where Henchey has multiple years of poor evaluations, and no basis to conclude that the latest increment withholding will do anything to change his behavior, since he failed to fulfill his prior two corrective action plans (one of which came after his increments were withheld).

[5] Henchey was suspended before the beginning of the school year, and when the parties were unable to amicably resolve their issues, the Superintendent filed the instant tenure charges.

a raise—*and thus no consequences*—despite his substandard teaching performance in the 2013-14 school year. In sum, the Board maintains that it was acting prudently to ensure that Henchey did not receive a pay raise for his performance and conduct while the tenure charges were being finalized, and pending a decision on the tenure charges the Board, and ultimately, by an arbitrator. That is wholly permissible, and supported by the applicable case law and arbitration decisions (Board Opposition Brief at page 19).

For all these reasons, the Board asks the Arbitrator to reject dismissal of the Charges based on Henchey's double jeopardy argument.

HENCHEY'S REPLY

Here, Henchey maintains that Section 8, as amended, does not mention or include the term "inefficiency." According to Henchey, even more telling, N.J.S.A. 18A:16-11, as amended, deleted all reference to inefficiency charges and eliminated the 90-day notice and opportunity to correct allegations of inefficiency, which was a prerequisite to the certification of charges of inefficiency that had existed under the old legislation.

Henchey buttresses his contention with Arbitrator Simmelkjaer's conclusion in Thomas, To Wit: "In the absence of statutory language permitting the alternate and/or simultaneous filing of inefficiency charges under Section 8 and Section 25, the District, given the deficiencies found in its Section 25 filing, can file either Section 25 commencing with the 2013-2014 school year or Section 8 inefficiency charges based on one year." Henchey reasons that Arbitrator Simmelkjaer was referring to the 2011-2012 school year only.

In light of the foregoing, Henchey insists that Section 8's scope or useful lifespan is limited to those performance evaluations predating the 2013-14 school year. That is, Section 8, as a vehicle for facilitating tenure charges based on inefficiency, came to an end after the conclusion of the last group of inefficiency cases pending before the passage of TEACHNJ on August 6, 2012; citing, State Operated School District of the City of Newark and Darrin Hawthorne, Agency Docket No. 266-9/12 (charges filed in July of 2012); State Operated School District of the City of Newark and Edgar Chavez, Agency Docket No. 269-9/12 (charges filed March 26, 2012); and State Operated School District of the City of Newark and Felicia Pugliese, Agency Docket No. 272-9/12 (filing of charges preceded the 2012-13 school year).

Henchey specifically observes that, in Chavez, Arbitrator Brown reasoned – based on a March 26, 2012 filing date – that Section 18 of the Act afforded him jurisdiction to determine the case under the law "as read prior to the effective date of" the Act. Most importantly, Henchey points out that Arbitrator Brown further reasoned: "Importantly, the legislative did not similarly provide for such application of the old law for post-enactment charges of inefficiency that do not meet the prerequisite for consideration under Section 23" (Henchey Reply at page 3).

In application to the present matter, Henchey reasons that the Charges were filed on October 17, 2014 (over two years after August 6, 2012). As such, reasons Henchey, the "Board does not have the ability or the option to rely on Section 8 and the Arbitrator does not have jurisdiction to determine charges of inefficiency except under Section 25 of the Act" (Henchey Reply at page 4). Henchey characterizes the Board's Section 8

position as running "against the entire intent of the legislation... The legislative plan was designed to establish only one system for filing and deciding inefficiency cases, the Section 25 proceedings... No employer would proceed under Section 25 if it could avoid its requirements and still proceed with inefficiency cases" (Henchey Reply at pages 5-6).

Finally, Henchey asks the Arbitrator to note additional support for its double jeopardy argument and for dismissal of Charge 5 by way of reference to In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren).[6]

DISCUSSION AND OPINION

Jurisdiction

Initially, I have decided to address the motion in an exercise of discretion under TEACHNJ, N.J.S.A. 18A:6-117, et. seq., effective August 6, 2012 (P.L.2012, Ch. 26). The instant motion is treated as one for summary decision because an Answer, as opposed to a Motion to Dismiss, was filed by Henchey and because evidence has been introduced in the form of the Certification of Sheldon H. Pincus with attached Exhibits. Compare, N.J.A.C. 6A:3-5.3(a) and 5.3(a)1. Additionally, N.J.S.A. 18A:6-16 allows for a motion for summary decision – filed with the Commissioner -- to be transmitted to an arbitrator or to be decided by the Commissioner. In this matter, Henchey did not meet the prerequisite filing with the Commissioner, but instead filed the motion after

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[6] In addition, the undersigned asked the parties to address, by no later than January 2, 2015, Arbitrator Walt De Treaux's Opinion and Award in State Operated School District of the City of Camden and Leon Mashore, et. al. Agency Docket Nos. 303-10/14; 290-9/14; 300-10/14; and 291-9/14. The parties' representatives each submitted a written position statement in response. I have carefully considered the Mashore position statements and incorporate both into my decision.

transmittal of the case to the undersigned. Thus, the Labor Arbitration Rules of the American Arbitration Association, which otherwise governs this dispute, do not provide a party to an arbitration with the right to file a dispositive motion. Lastly, in light of the relatively stringent restrictions imposed on arbitrators under N.J.S.A. 18A:6-17.1 b., it is evident that an arbitrator must cautiously exercise discretion in deciding whether to address any motion filed after transmittal of the case from the Commissioner of Education to the arbitrator. In this case, I have elected to exercise discretion in favor of deciding the motion given the importance and relative novelty of the legal principles involved.

Summary Decision Standard

Summary decision may be granted if the pleadings, discovery and affidavits show "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.S.A. 1:1-12.5. Contini v. Bd. of Educ., 286 N.J. Super. 106 (App. Div. 1995). In ruling on summary-decision motions, administrative agencies follow substantially the same standard as the standard governing motions for summary judgment in civil litigation. The essence of the inquiry is whether the evidence presents a sufficient disagreement to require submission to the trier-of-fact or whether it is so one-sided that one party must prevail. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995). I have carefully considered Henchey's moving papers, the opposition filed by the Board, Henchey's reply letter brief and both parties' position statements in response to my request following Arbitrator Walt De Treux's

decision in Mashore. Because the parties' respective positions do not raise a genuine issue of material fact, I am satisfied that summary decision is appropriate.

Synopsis

The failure of the District to comply with the uniform evaluation rules in place under TEACHNJ for 2013-2014 must be deemed fatal to the sufficiency of Tenure Charges Nos. 1-4 (and 5, in part) with respect to the 2013-2014 school year. I am not convinced, however, that there was a moratorium on filing a Section 8 tenure charge alleging inefficiency insofar as the 2012-2013 school year is concerned. However, since the Board has clearly addressed Henchey's 2012-2013 shortcomings by way of an increment withholding action under N.J.S.A. 18A:29-14 unrelated to the filing of tenure charges shortly thereafter, I must dismiss the Board's Charges with respect to Henchey's teaching performance during the 2012-2013 school year based on the principles elaborated upon in IMO Randolph Board of Education and Jill S. Buglovsky, Docket No. 265-9/12 (December 21, 2012), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury)[7]; see, also, In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren). With respect to Henchey's 2011-2012 performance, this record contains no indicia that the Board sought to contemporaneously discipline Henchey for his teaching performance during that year. To the contrary, Henchey received an acceptable year end evaluation and was placed on a

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[7] A copy of the Order and Opinion confirming the undersigned's Opinion and Award in Buglovsky is attached hereto and made a part hereof.

non-disciplinary Corrective Action Plan. Thus, I will dismiss the Board's tenure charges with respect to Henchey's teaching performance during the 2011-2012 school year. Finally, this matter will proceed to a hearing based solely on Charge No. 5, on a limited basis, as more fully discussed herein.

Dismissal of Charges Nos. 1-4 (2011-12, 12-13 and 13-14 School Years)

In its most basic sense, the TEACHNJ Act represents the byproduct of two years of bipartisanship legislative efforts. The interests of school boards and teachers in bringing about meaningful tenure reform leaps from the pages of the legislation and legislative history. In the recent case of IMO State Operated School District for the City of Newark and Elena Brady, Agency Docket No. 270-9/14, Arbitrator Joyce Klein cogently described the legislative covenant that was embodied by the final legislation on August 6, 2012:

> TEACHNJ adopted new performance requirements for teaching staff and streamlined the process for revoking tenure from those teachers who do not meet the new performance requirements. In exchange for these requirements, the legislature adopted requirements for teachers receiving ineffective and partially effective summative ratings including required corrective action plans pursuant to N.J.S.A. 18A:6-128(b) and School Improvement Panels pursuant to N.J.S.A. 18A:6-120 (slip op. at 19-20).

Arbitrator Klein's analysis is firmly grounded in the Legislature's declaration of purpose at N.J.S.A. 18A:6-118:

> The Legislature finds and declares that:
>
> a. The goal of this legislation is to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions;

> b. The New Jersey Supreme Court has found that a multitude of factors play a vital role in the quality of a child's education, including effectiveness in teaching methods and evaluations. Changing the current evaluation system to focus on improved student outcomes, including objective measures of student growth, is critical to improving teacher effectiveness, raising student achievement, and meeting the objectives of the federal "No Child Left Behind Act of 2001".

In State Operated School District of the City of Camden And Leon Mashore, et. al. Agency Docket Nos. 303-10/14; 290-9/14; 300-10/14; and 291-9/14, Arbitrator Walt De Treaux recently stated that TEACHNJ "dramatically revised teacher evaluations in a way that the new criteria allowed for more effective removal of ineffective teachers." The trade off, of course, is that a school district must afford teachers with the tools necessary to improve upon their performance, commencing with the 2013-2014 school year and that teachers will not be dismissed for inefficiency if they meet the new standards.

As to the substantive law that must be applied in a tenure revocation case, N.J.S.A. 18A:6-17.5, entitled, "Governing law for tenure charge determination" provides:

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

The instant charges were filed on November 7, 2014 – well after the passage of the Act on August 6, 2012. The applicable statutory provisions serving as vehicles for processing tenure charges post August 6, 2012 include N.J.S.A. 18A:6-16 (Section 8) and N.J.S.A. 18A:6-17.3 (Section 25).

Importantly, N.J.S.A. 18A:6-10 remained unaffected by the TEACHNJ Act. The recognized causes of action for bringing tenure charges against a certificated teacher continue to be inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:6-11, encompassed by Section 8, states:

> 18A:6-11. Written charges; written statement of evidence; filing; statement of position by employee; certification of determination; notice
>
> 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 statements 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 finds 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.

Of note, the following language was removed from N.J.S.A. 18A:6-11 by way of the new legislation: **[Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and**

allow at least 90 days in which to correct and overcome the inefficiency].[8]

N.J.S.A. 18A:6-16 "Proceedings before commissioner; hearing" (Section 8) was amended to make relatively minor changes in the preexisting timelines and, most significantly, to supplant the Office of Administrative Law with a panel of arbitrators:

> Upon receipt of such a charge and certification (referring to N.J.S.A. 18A:6-11), or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's behalf in the proceedings shall examine the charges 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:6-17.1) 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.

In contrast to the removal of the old inefficiency language from Section 8, Section 25 specifically addresses the subject of inefficiency charges under the new law. Section 25 mandates the filing of an inefficiency charge by the Superintendent in instances where a teacher is "rated ineffective or partially ineffective in an annual summative evaluation"

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[8] N.J.S.A. 18A:6-13 was similarly modified (pertaining to the dismissal of a tenure charge in the case where a board of education does not act on the submission of a tenure charge by school administration).

for at least two years. N.J.S.A. 18A:6-17.3(1) and (2). N.J.S.A. 18A:17.3 (Section 25) provides in full:

> 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.).

As noted in Henchey's moving papers, the substantive evaluation standards are set forth under N.J.S.A. 18A:6-117, et. seq. and under the regulations implementing the new law, N.J.A.C. 6A:10-2.1, et. seq.

In response to the foregoing, I observe that both parties made reasonable arguments in support of their competing positions. Henchey reads the above language as reflecting a legislative shift in the processing of all charges of inefficiency from Section 8 to Section 25 and imposing, by implication, a moratorium on discipline for inefficiency until after the completion of the 2014-15 school year and then only pursuant to Section 25. The Board, on the other hand, reasonably argues that no such moratorium was expressed and Section 8 remains a viable procedure with its own requirements for prosecuting a charge of inefficiency:

- N.J.S.A. 18A:6-17.2 set forth considerations for the arbitrator when considering inefficiency charges pursuant to N.J.S.A. 18A:6-17.3 and addresses whether the matter "...before the arbitrator pursuant to Section 22 of this act is employee inefficiency pursuant to Section 25 of this act..." (emphasis added). This language leaves no doubt that Section 25 is one way of pursuing inefficiency charges, otherwise there would be no reason to include the qualifying phrase "pursuant to Section 25 of this act."

- N.J.S.A. 18A:6-17.3(a) states, "Notwithstanding the provisions of N.J.S.A. 18A:6-11 or any other section of law..." (emphasis added). Clearly, N.J.S.A. 18A:6-17.3 contemplates inefficiency charges brought under N.J.S.A. 18A:6-10 et. seq.; if it did not, those quoted provisions would have no meaning.

- N.J.S.A. 18A:6-17.3(c) also recognizes the provisions of filing inefficiency charges under N.J.S.A. 18A:6-16 in its phrase, "[n]otwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law..."

- N.J.S.A. 18A:6-17.3(d) states that only rubric evaluations may be used to determine inefficiency charges "for purposes of this Section." If

rubric evaluations were the only means by which inefficiency charges could go forth, there would have been no Legislative purpose in stating, "for purposes of this Section."

- Finally, N.J.A.C. 6A:3-5.1(b) sets forth the timelines for filing charges "for reasons of inefficiency pursuant to N.J.S.A. 18A:6-17.3." By specifying that this section applies only to inefficiency charges filed under Section 25, the Commissioner is acknowledging that inefficiency charges may indeed be filed through alternate statutory provisions.

Since the plain language of TEACHNJ can be reasonably debated with respect to the viability of a Section 8 tenure proceeding for inefficiency, I did evaluate the legislative history as contained in the New Jersey State Law Library with an eye toward ascertaining the intent of the legislation. I can conclude with confidence that the legislature obviously sought to overhaul evaluation criteria, to train teachers on the new criteria and to make it easier to remove teachers who, despite the required training, cannot meet the expected standards in two consecutive years. It also can be detected that the legislature was disturbed by the inordinate time and costs associated with bringing all tenure charges to conclusion under Section 8, and that they were particularly disturbed by the ninety (90) day window of correction that a school district was obligated to provide to a teacher charged with inefficiency before tenure charges could be firmly prosecuted.[9] Having said this, however, since both Sections 8 and 25 matters are now both relatively expedited and less costly as compared to the *status quo ante,* I am not convinced either

[9] See, e.g., IMO State Operated School District and Wesley Gilmer, 2011 WL 5868027 (noting under footnote 1 a 138-day improvement period and under footnote 2 that 23 days of hearing took place).

that the legislature would be shocked if an inefficiency case was prosecuted pursuant to Section 8 where Section 25 was not applicable.[10]

More importantly, even if Section 8 has some life left in it for processing a tenure charge based on inefficiency, I am convinced that Section 25 was intended to supersede Section 8 in the case of a conflict. For example, if a teacher meets the TEACHNJ evaluation criteria and, thus, cannot be removed from his or her position under Section 25, it would seem anomalous to conclude that he or she may be removed from employment pursuant to Section 8. By the same token, if a teacher fails to meet the new substantive evaluation criteria, then he or she may, or shall be, brought up on tenure charges for inefficiency under Section 25 and, in that scenario, Section 8 is of no import. Elevating substance over procedure, I find that all teachers were entitled to the 2013-2014 and 2014-2015 school years to see if they could pass muster under Section 25. As such, I agree with Henchey's analysis that allowing a Section 8 proceeding for inefficiency to encompass 2013-2014 would defeat the purpose underlying Section 25. Thus, because I believe that a Section 8 tenure proceeding for inefficiency cannot interfere with the more specific tenets of Section 25 concerning TEACHNJ evaluations commencing with the 2013-14 school year, I conclude that any Section 8 proceeding necessarily must be limited to school years 2012-2013 and prior.

In light of the foregoing, I find that, to the extent that Section 8 remains a potential procedural vehicle to bring tenure charges alleging inefficiency after August 6, 2012, it

[10] The preference for arbitrators in lieu of administrative law judges came about in a Senate Committee Substitute for Senate No. 1455 on June 18, 2012 (more than four (4) months after introduction by Senator Ruiz and less than two (2) months before Governor Christie's signing of the Bill).

does so only for the 2012-2013 school year. Here, I agree with Arbitrator Simmelkjaer's conclusion in Thomas: "In the absence of statutory language permitting the alternate and/or simultaneous filing of inefficiency charges under Section 8 and Section 25, the District, given the deficiencies found in its current Section 25 filing, can file either Section 25 commencing with the 2013-14 school year or Section 8 inefficiency charges based on one year" (referring to 2012-2013) (slip op at 47). Thus, whereas Section 8 may be available for tenure charges predicated on evaluations not encompassed by TEACHNJ (or where both efficiency and conduct charges are alleged after the 2014-15 school year), most importantly, Section 8 is not available as a means to address evaluation deficiencies encompassing the 2013-2014 school year. At the very least, even if Section 8 is still intact, certainly, a Section 8 proceeding cannot be based on a legally flawed 2013-2014 school year evaluation.

In further support of this conclusion, I observe that the DOE adopted and made effective comprehensive evaluation regulations entitled: "Components of Teacher Evaluation" effective October 7, 2013 (45 N.J.R. 2211 (a)). These regulations required that teaching staff members be observed at least three times per school year but not less than once a semester; with at least one of the observations being announced, including a pre-observation conference; with the remaining two observations announced or unannounced. N.J.A.C. 6A:10-4.4. Moreover, teaching staff members with corrective action plans, like Henchey, must receive a fourth observation in addition to the observations required by N.J.A.C. 6A:10-4.4 (See, N.J.A.C. 6A:10-2.5(j)(1), as well as a

mid-year evaluation by the School Improvement Panel, N.J.A.C. 6A:10-3.1). All of these requirements were effective during the 2013-14 school year.

In review of the record before me, I agree with Henchey that the Board did not comply with the 2013-2014 legal requirements and, thus, cannot use Section 8 as a basis to bring tenure charges. More specifically, in the 2013-2014 school year, the District completed three of the four observations required by the regulations then in effect, and it did not perform a mid-year evaluation required from and by the School Improvement Panel ("SIP") (Charge No. 1, ¶¶19, 21, 23). Only a year-end evaluation was afforded Henchey (Charge No. 1 ¶26). Henchey points out, in response to Interrogatory No. 24, the Board admits that it did not conduct and/or provide him with a mid-year evaluation in 2013-2014 (Certification of Sheldon H. Pincus ¶6). While the Board counters that the Building Principal met weekly with Henchey to address progress on his corrective action plan, I credit Henchey's retort that the Building Principal does not constitute the SIP contemplated and required to perform the mid-year evaluation. Pursuant to N.J.A.C. 6A:10-3.1(a), the SIP consists not only of the Building Principal, but a Vice-Principal, and a teacher who is chosen in accordance with N.J.A.C. 6A:10-3.1(b) in consultation with the majority representative. Although I recognize that a Section 25 proceeding was not yet ripe, once again, the substantive law governing mandatory evaluation criteria was in effect and the Board was obliged to follow it with respect to all of its teaching personnel, Section 8 notwithstanding.

Indeed, as of July 1, 2013, it was illegal for a school board and education association to agree upon an evaluation system that differed from the Act. See, N.J.S.A.

18A:6-126. By the same token, a school board would have no license to unilaterally implement an evaluation system than did not meet the letter of the substantive evaluation requirements of the new law. Therefore, the Board, in my opinion, cannot seek dismissal of Henchey for inefficiency during the 2013-2014 school year because the Board itself has failed to adhere to the mandatory evaluation procedures that were uniformly in place under TEACHNJ for that year.[11]

Based on the foregoing, I find that the Board cannot rely upon Henchey's 2013-2014 summative evaluation/teaching performance as a basis for Charges Nos. 1-4 (and Charge No. 5, to the extent the Board seeks a finding of incapacity or conduct unbecoming based solely on Henchey's teaching performance during the 2013-2014 school year).

Next, while I also dismiss Charges Nos. 1-4 with respect to the 2012-13 and 2011-12 school years, I do so for different reasons. On the one hand, I agree with the notion that 2012-2013 was a pilot year for the purpose of Section 25. School administrators were charged with implementing a rubric approved by the Commissioner of Education by December 31, 2012, to "test and refine the evaluation rubric" by January 31, 2013, N.J.S.A. 18A:6-123(d), to train teachers and administrators on the approved rubric, to set up a SIP, to comply with the requisite observations and evaluations, to establish corrective action plans, etc. IMO State Operated School District for the City of Newark

[11] Perhaps recognizing its flaw, the Board may have invoked Section 8 in order to avoid resetting the two year clock under Section 25 to the 2014-2015 and 2015-2016 school years. While the Board's growing dissatisfaction with Henchey's performance after the passage of TEACHNJ may be understandable, the Board could have removed Henchey from employment after the 2014-2015 school year under Section 25 if it had simply complied with TEACHNJ's mandatory evaluation criteria during the 2013-14 school year.

and Elena Brady, Agency Docket No. 270-9/14(Klein)("Thus, both the statute and rules suggest that the 2012-2013 school year, which was the first year that TEACHNJ was in effect, was to be a developmental year for preparing to fully implement the newly adopted requirements for evaluation rubrics to be used for both the acquisition of tenure and the revocation of tenure for inefficiency beginning in the 2013-2014 school year", slip op at 13); and, see also, N.J.S.A. 18A:6-123(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.").

Having said this, however, TEACHNJ evaluation criteria were not in place during 2012-13. In addition, the legislation does not reflect an express recognition that teaching personnel were immunized from disciplinary consequences flowing from poor teaching performance or misconduct pending the first year of TEACHNJ evaluations. cf. N.J.S.A. 18A:7A-45(c)("notwithstanding any other provision of "law and contract" while the State district superintendent could file tenure charges against a principal or vice principal for incapacity or unbecoming conduct at any time after the state takeover, he or she could not do so for inefficiency reasons or other just cause until "after the completion of an assessment cycle of not less than 12 months"). Consistent with Arbitrator Simmelkjaer's finding in SOSD City of Newark and Neil Thomas, and in light of my dismissal of the 2013-14 Charges, I am satisfied that the Board could otherwise proceed under Section 8 with respect to Henchey's evaluation relative to the 2012-2013 school year. Having said this, however, I must ultimately dismiss, *sua sponte*, Charges Nos. 1-4 with respect to the

2012-13 school year based on the doctrine of double jeopardy or double punishment.

Here, I fully incorporate by reference my rationale set forth in IMO Randolph Board of Education and Jill S. Buglovsky, Docket No. 265-9/12 (December 21, 2012), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury); see, also, In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren). In rejecting the rationale opposing the doctrine's applicability to the education context, I direct the parties to both my Opinion in Buglovsky and the Opinion of Judge Hansbury confirming that Award. I add that arbitrators addressing whether there is just cause for discipline or discharge have for years incorporated constitutional-like protections into the analysis -- fully aware that they were not proceeding over a "criminal case" -- for example, "disparate treatment" (or equal protection under the law); double jeopardy (borrowed from the Fifth Amendment); the right to cross-examination (borrowed from the confrontation clause of the Sixth Amendment); and the right of the grievant not to testify in a disciplinary hearing (borrowed from the Fifth Amendment), etc. See, *Elkouri and Elkouri*, How Arbitration Works, 6th Edition, Chapter 15, Section F ("Factors in Evaluating Disciplinary Penalties"), pages 964-1000. Thus, no mistake has been made concerning the applicability of the concept of double jeopardy to the arbitration context.

Additionally, as an arbitrator empowered to exclusively determine tenured teacher dismissal cases under Section 22 of the Act, I note that we may accept or reject prior decisions in the education context just as we may accept or reject the decisions and

rationales of other arbitrators. Here, I find no reason to depart from the traditional arbitral approach to determining just cause, notwithstanding the ALJ's rationale in Getty that was fully addressed and reconciled appropriately by Judge Hansbury in confirming Buglovsky. Suffice it to say that the provisions of Title 18A addressing reprimands, increment withholdings and tenure dismissal are disciplinary actions, with the exception of those increment withholdings not deemed levied predominantly for disciplinary purposes. See, N.J.S.A. 34:13A-26; Randolph Tp. Bd. of Educ. v. Randolph Educ. Ass'n, 306 N.J. Super. 207 (App. Div. 1997), certif. den. 153 N.J. 214 (1998). As such, since N.J.S.A. 18A:6-10 expressly refers to the "just cause" standard in all tenure dismissal cases seeking a reduction in compensation or dismissal, I see no reason to depart from the traditional arbitration approach in deciding the instant dismissal case under a just cause standard.

In the present case, since the Board has clearly addressed Henchey's 2012-2013 shortcomings by way of an increment withholding for 2013-14 -- not leading to the filing of tenure charges shortly thereafter (See, Statement of Evidence, Tab 56 (g)), I will dismiss the Board's tenure charges with respect to Henchey's teaching performance during the 2012-2013 school year. With respect to 2011-2012, this record contains no indicia that the Board sought to contemporaneously discipline Henchey for his teaching performance during that year. To the contrary, Henchey received an acceptable year end evaluation and was placed on a non-disciplinary, Corrective Action Plan. Thus, I will dismiss the Charges with respect to Henchey's teaching performance during the 2011-2012 school year as well.

Based on the foregoing, I grant Henchey's motion for summary decision with respect to Charges Nos. 1-4 in their entirety.

Limitations of Charge No. 5 (Incapacity and Conduct Unbecoming)

Charge No. 5 alleges that, in addition to Henchey's consistent failure to implement effective and efficient teaching strategies, and in addition to his unwillingness or inability to improve upon the same, Henchey has also demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school years which has included a lack of respect for the Administration and a complete disregard for the high professional standards placed upon him, and which unprofessionalism constitutes incapacity and conduct warranting dismissal.

Here, although I do not see a significant difference between "double jeopardy" as that terminology has been commonly understood by arbitrators in discharge and discipline cases under a just cause analysis for more than a century and "double punishment", I concur with the underscored portion of Arbitrator De Treaux's rationale in IMO River Dell Regional School District and Richard Graffanino, Agency Dkt. No. 223-9/13, distinguishing the doctrine based on the timing of events in the case of an increment withholding followed by the issuance of tenure charges:

> Although the District's tactic in withholding the salary increment and filing tenure charges is uncommon, I find that it does not constitute "double jeopardy." Double jeopardy, of course, applies only in criminal cases; but Respondent is arguing duplicative punishments, two separate disciplinary actions for the same offenses. **The District's approach was not an attempt to duplicate punishment; but rather, it was an attempt to fill a gap caused by the timing of the tenure charges. In the interval before tenure charges were filed and again before an arbitration decision would issue, the District wanted to ensure that Graffanino's salary was**

> **not increased.** It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on Respondent. [Id. at 26 (emphasis added).][12]

As such, the Board may present evidence demonstrating Henchey's alleged continued "incapacity" and "conduct unbecoming" during the 2013-14 school year while all prior years must be deemed satisfied or *res judicata* by virtue of the Board's July 16, 2013 increment withholding and any other prior discipline that exists in the record. Thus, this means that Mr. Henchey enters the hearing process with a major disciplinary record in the form of an increment withholding under Title 18A for incapacity and related conduct unbecoming. The allegations set forth under Charge No. 5 that antecede the 2013-14 school year will not be re-litigated or recycled. Instead, the focus of the hearing will now shift to whether Henchey should be dismissed from his teaching position based on his alleged continued incapacity and related conduct unbecoming, as specifically set forth by Charge No. 5, pars. 12-19.[13]

Case Management Order

Lastly, in order to expeditiously manage this matter scheduled to commence on January 8, 2015, I direct the parties as follows.

1. The hearing is now limited to the following issue: Did the Board have just cause to dismiss Lawrence Henchey from his teaching position based

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[12] Indeed, the failure to withhold an increment may be cited by a teacher as evidence that the ensuing tenure charges were not justified based on the implicit recognition that increments are not withheld in the case of satisfactory teaching performance in a given school year.

[13] As to the distinction between inefficiency and incapacity and related misconduct, the latter offenses involve, among other things, a teacher's chronic failure to meet professional expectations, and unprofessional and hostile reactions to supervision by district personnel. See, IMO School District of the Borough of Butler, Morris County, 2010 WL 5624390; Board of Education of the Township of Parsippany-Troy Hills v. Greg Molinaro, 96 N.J.A.R. (EDU) 268, 1995 WL 863033 (1995); Bd. of Ed. Lawrence Twp. v. Lester Helmus, 2 N.J.A.R. 334 (1980).

on his alleged continued incapacity and related conduct unbecoming as specifically set forth by Charge No. 5, pars. 12-19?;

2. All documents relevant to the charges of incapacity and conduct unbecoming (including rebuttal letters, if any) prior to the 2013-2014 school year shall be admitted without testimony;

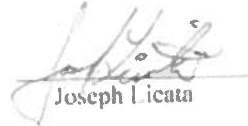
3. The parties may simply refer to the Statement of Evidence identifying markers without the need to separately introduce the same documents as exhibits; documents obtained in discovery that are not contained in the Statement of Evidence must be introduced in exhibit format; and

4. Testimony shall be limited to the events of the 2013-14 school year, although the "decision-maker" may testify in summary fashion as to how, if at all, he or she factored in Henchey's overall work record (as reflected in the Statement of Evidence) in connection with the charges of incapacity and conduct unbecoming and the recommendation for dismissal. Mr. Henchey, of course, may refer to those portions of his prior work record that he deems supportive of his continued employment in the District.

CONCLUSION

For the reasons more fully set forth herein, I grant Mr. Henchey's Motion for Summary Decision with respect to Charges Nos. 1-4 of the November 7, 2014 Tenure Charges. I deny the motion with respect to Charge No. 5, pars. 12-19. Lastly, I direct the parties to observe the case management order set forth on pages 40 and 41.

Respectfully submitted,



Joseph Licata

Dated: January 3, 2015

FILED

JUL 16 2013

STEPHAN C. HANSBURY
PRESIDING JUDGE
CHANCERY DIVISION

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Plaintiff

JULL S. BUGLOVSKY, Plaintiff, -v- THE RANDOLPH TOWNSHIP BOARD OF EDUCATION, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: MORRIS COUNTY Docket No.: C13-13 Civil Action **ORDER OF JUDGMENT**

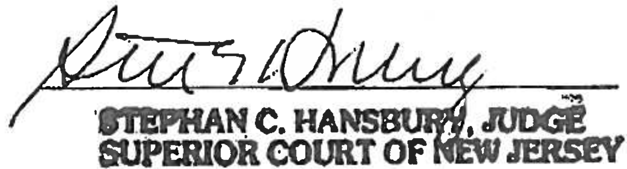
This matter being opened to the Court by Order to Show Cause, by Sanford R. Oxfeld, Oxfeld Cohen, P.C., attorney for Plaintiff, Jill S. Buglvosky, for an Order of Judgment confirming and enforcing the Arbitrator's Opinion and Award in State of New Jersey Department of Education Docket No.: 265-9/12, and the Court having heard and considered the submissions and the arguments of counsel, and for good cause shown;

IT IS on this 16th day of July, 2013;

ORDERED that the Opinion and Award of Arbitrator Joseph Licata, Esq., issued on December 21, 2012 in State of New Jersey, Department of Education Docket No.: 265-9/12, be and is hereby confirmed and enforced; including the immediate

reinstatement of Ms. Buglovsky to her teaching position, with full back-pay and benefits retroactive to the date she should have been reinstated; and

IT IS FURTHER ORDERED, that a copy of this Order of Judgment be served on Defendant within 7 days hereof, through Lawyers Service.



STEPHAN C. HANSBURY, JUDGE
SUPERIOR COURT OF NEW JERSEY

See attached statement of reasons

BUGLOVSKY v. THE RANDOLPH TOWNSHIP BOARD OF EDUCATION c/w RANDOLPH TOWNSHIP BOARD OF EDUCATION v. BUGLOVSKY
Docket No. MRS-C-13-13

STATEMENT OF REASONS

Plaintiff, Jill S. Buglovsky ("Ms. Buglovsky"), applied for an order to show cause as to why the Court should not confirm the arbitration award issued by Arbitrator Joseph Licata ("Mr. Licata"). Defendant, the Randolph Township Board of Education (the "Board") subsequently applied for an order to show cause as to why the Court should not vacate the same award. This Court ordered consolidation of the Board's case into Ms. Buglovsky's case on May 6, 2013.

Ms. Buglovsky has been a Health and Physical Education Teacher for grades K-5 in Randolph Township since 2002 and has consistently received positive performance evaluations. However, during the 2008-2009 school year, Ms. Buglovsky used her school email account[1] to correspond with another person known as "J.C." Many of the roughly 2,000 e-mail messages between Ms. Buglovsky and J.C. contained graphic sexual language, and at least one thread of correspondence discussed drug use.[2] One e-mail reads as though Ms. Buglovsky invited J.C. to her office for a sexual liaison.[3] In April 2009, the Board reprimanded Ms. Buglovksy and warned her that she would be dismissed if she did not cease this conduct. After this, Ms. Buglovsky continued to correspond with J.C. via e-mail on the school network, but used her personal e-mail accounts and communicated using discrete language. The Board alleges, however, that Ms. Buglovsky attempted to thwart the Board's monitoring of her conduct by sending these subsequent communications from a colleague's computer and by using her own personal e-mail accounts rather than her school account. During the 2011-2012 school year Ms. Buglovsky evidently continued to use the District computer network for personal use[4] during the school day, including during times when she was scheduled to be teaching.

Ultimately, the Board, under new administration, filed tenure charges against Ms. Buglovsky and sought to remove her from her teaching position. Pursuant to N.J.S.A. 18A:6-16, the Commission of Education reviewed the charges and concluded that, if proven, the charges would be sufficient to warrant dismissal or reduction of salary. Pursuant to N.J.S.A. 18A:6-17.1, Joseph Licata was chosen as the arbitrator from the list maintained by the Commissioner. Mr. Licata reviewed the charges, as well as evidence submitted on behalf of both parties, and issued a 69-page decision wherein he sustained several of the charges, but opined that termination was an excessive remedy. Mr. Licata disposed of the charges as follows:

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[1] Mr. Licata found that a number of these e-mails were sent from Ms. Buglovsky's home computer while she was on maternity leave.
[2] Ms. Buglovsky alleges that there is no evidence that she actually used drugs during her employment as a teacher, and that she cannot drink or use drugs due to her bipolar disorder.
[3] A subsequent investigation revealed that J.C. was in Virginia when the e-mail was sent and that Ms. Buglovsky was aware of his location. Accordingly, the e-mail can be read to have been based in fantasy.
[4] This alleged personal use was not of a sexual nature.

- Charge One, pertaining to the sexually explicit e-mails, was dismissed as attenuated due to the passage of time, and because Ms. Buglovsky had already been formally reprimanded for the conduct and had subsequently ceased to engage in the conduct;

- Charge Two, pertaining to more discrete e-mails sent in 2009-2010 was sustained with respect to a few implicitly sexual communications, but was dismissed as to non-sexual personal e-mails because Ms. Buglovsky was not disciplined previously for that type of e-mail and received a positive performance evaluation for the year;

- Charge Three, alleging that Ms. Buglovsky used a co-worker's computer and log-in as an "alias" to communicate with J.C. via personal e-mail between September 2009 and November 2009 was sustained in part and dismissed in part. The dismissal resulted from Mr. Licata's finding that the charge was attenuated due to the passage of time and Ms. Buglovsky's subsequent similar communications using her own identity;

- Charge Four, alleging non-sexual use of personal e-mail on the school network during the 2010-2011 school year, was dismissed because Ms. Buglovsky was not disciplined previously for that type of e-mail and received a positive performance evaluation for the year;

- Charge Five, alleging one personal, non-sexual communication with J.C. during the 2011-2012 school year was dismissed for the reasons stated with respect to charges Two and Four, and because it exemplified her significantly improved behavior;

- Charge Six, alleging Internet browsing during instructional time was sustained;

- Charge Seven was dismissed as setting forth no new or additional factual allegations;

- Charge Eight regarded a picture of Ms. Buglovsky using her iPod, allegedly during instructional time, which was sent via e-mail from another individual to Ms. Buglovsky with a caption stating "My Baby at Work." Ms. Buglovsky apparently replied to the e-mail and said, "I was drawing you at that time!" This was apparently the incident that influenced the Board to file the tenure charges, but the Board withdrew the charge at the arbitration hearing;

- Charge Nine, alleging a pattern of misconduct, was dismissed because no disciplinary action was taken for the same behavior following the 2009-2010 and 2010-2011 school years, and as a result of Ms. Buglovsky's history of improving her behavior after being reprimanded.

Instead, Mr. Licata determined that a 120-day unpaid suspension and loss of a salary increment were an appropriate consequence for Ms. Buglovsky's conduct. Pursuant to Mr. Licata's decision, the Board was supposed to reinstate Ms. Buglovsky following the end of the December holiday break. However, the Board did not and has not yet reinstated Ms. Buglovsky. The instant orders to show cause address Ms. Buglovsky's application to confirm Mr. Licata's award and the Board's application to vacate same.

This Court grants Ms. Buglovsky's application to confirm the arbitration award and denies the Board's application to vacate the award.

Pursuant to N.J.S.A. § 18A:6-16, when tenure charges are filed with the Commissioner of Education ("Commissioner"), and the Commissioner determines that the charges warrant either dismissal or a reduction in salary, the Commissioner must refer the dispute to an arbitrator pursuant to N.J.S.A. § 18A:6-17.1. See N.J.S.A. § 18A:6-16. As set forth in N.J.S.A. § 18A:17.1(e), "the arbitrator's determination shall be final and binding . . . [and] the determination shall be subject to judicial review and enforcement as provided pursuant to [N.J.S.A. §] 2A:24-7 through [N.J.S.A. §] 2A:24-10." N.J.S.A. § 18A:17.1(e). N.J.S.A. § 2A:24-8 provides that the Court "shall vacate an arbitration award in any of the following cases:

> a. Where the award was procured by corruption, fraud or undue means; b. Where there was either evident partiality or corruption in the arbitrators, or any thereof; c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party; d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

[N.J.S.A. § 2A:24-8.] The New Jersey Supreme Court has interpreted "undue means" (a) to encompass decisions that are contrary to applicable law or public policy. See Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 230-31 (1979).

In interpreting N.J.S.A. § 2A:24-8 and the rest of the Arbitration Act, New Jersey Courts have afforded a presumption of validity to decisions issued by arbitrators. See Township of Wyckoff v. PBA Local 261, 409 N.J. Super. 344, 354 (App. Div. 2009). This reflects the underlying policy of promoting a sense of finality. See Linden Bd. of Ed. v. Linden Ed. Ass'n. ex rel Mizichko, 202 N.J. 268, 266 (2010). In keeping with this policy, courts must confirm an arbitrator's award "so long as it is reasonably debatable" and "a reviewing court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's interpretation." Id. at 276-277 (internal citations omitted). Accordingly, it is the burden of the party challenging the award to rebut the presumption of validity and establish that the award must be vacated.

I. Whether Mr. Licata's Decision Misapplied or Is Contrary to the Law

New Jersey's Tenure Employees Hearing Law mandates that no tenured public employee shall be dismissed from his or her position, or shall be subject to a reduction in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause . . ." following a hearing by the commissioner or a person appointed by the commissioner. See N.J.S.A. § 18A:6-10. Where parties do not define "just cause" for termination in an agreement between them, the Appellate Division has upheld an arbitrator's endeavor to define "just cause" based on the

totality of the circumstances. See Linden Bd. of Ed., supra, at 277-278; see also In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). In Linden Bd. of Ed., the Court also upheld the arbitrator's consideration of "progressive/corrective discipline" as part of the "just cause" concept, and recognized the arbitrator's authority to fashion an appropriate remedy where the arbitrator found that there was not "just cause" to support terminating the employee. Id. at 277.[5]

The New Jersey Courts' definition of "unbecoming conduct" originated in the context of law enforcement, but was cited in the education context in In re Donahue, No. A-1636-06T1, 2008 N.J. Super. Unpub. LEXIS 1429 (App. Div. Mar. 3, 2008). There, the Court noted, "the phrase 'unbecoming conduct' has been described as 'elastic' and 'defined as any conduct which adversely affects the morale or efficiency' of the public entity or 'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" Id. at *21. (internal quotations omitted). "[A] finding of misconduct need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'" Id. at *22 (internal citations omitted). "Unfitness to remain as a teacher may be demonstrated by a single incident if it is sufficiently flagrant, although in less serious matters progressive disciplinary measures may be more appropriate." In the Matter of the Tenure Hearing of Desly Getty, OAL 08750-08S, 2009 N.J. Agen. LEXIS 319 (June 4, 2009) (citing In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967)). "The determination of what constitutes conduct unbecoming a public employee is primarily a question of law." Donahue, supra at *21 (internal citation omitted).

a. Double Jeopardy

The Office of Administrative Law (OAL) has stated that the Constitutional protection of "double jeopardy" which generally protects criminal or quasi-criminal defendants from being punished more than once for the same crime, does not apply in the context of a tenure hearing. See Getty, supra, at 34-35. This is because tenure hearings "are not primarily directed at imposing punishment upon teachers, but are instead vehicles to determine a teacher's fitness to teach and to set examples for impressionable students." Id. However, in Getty, the OAL ultimately recognized that "reason and fairness must play a role in determining the sanction to which one who fails in one instance should be exposed" and reached the conclusion that "while Ms. Getty's actions do warrant some additional response, neither the students nor the general public will be best served by removing Ms. Getty's tenure." Id.

In the instant case, it is clear that Mr. Licata looked to the totality of the circumstances to evaluate whether Ms. Buglovsky had engaged in conduct unbecoming a teacher, and whether the Board had "just cause" to terminate her from her teaching position. In so doing, Mr. Licata recognized that Ms. Buglovsky had been disciplined for sending the sexually explicit e-mails in April 2009, and that she generally ceased that conduct, but for a few discrete and far less offensive exceptions, following the April 2009 discipline. Accordingly, Mr. Licata decided that the sexually explicit e-mails could not support a finding of "just cause" to terminate Ms. Buglovsky. The Court finds that this was not an impermissible application of the constitutional

[5] Although Linden Bd. of Ed. involved a janitor, rather than a teacher, the case is relevant to the extent it addressed an arbitrator's evaluation of "just cause" where the phrase was not otherwise defined.

protection of "double jeopardy" which is afforded only in criminal, or quasi-criminal proceedings, but a proper application of the principles of reason and fairness that the OAL applied in Getty, or a proper consideration of progressive/corrective discipline that the Appellate Division held to be within the authority of the arbitrator in Linden Bd. of Ed, supra. She was disciplined at that time in the manner the Board felt was appropriate and corrected her behavior.

Although these principles may borrow from the "double jeopardy" protection, Mr. Licata never acted as though he was bound to apply such a protection. To the contrary, he recognized that the protection itself did not apply, but that its underlying principles were relevant. See Opinion & Award at pg. 54. Accordingly, this Court finds that Mr. Licata's dismissal of Charge One, reflecting a finding that Ms. Buglovsky had already been adequately disciplined for sending the sexually explicit e-mails and had corrected her behavior, was not a misapplication of the Constitutional protection of double jeopardy, but a determination as to reasonableness and fairness and a consideration of progressive or corrective discipline, made properly, within Mr. Licata's discretion as an arbitrator and based on the totality of the circumstances before him. See Opinion & Award at pg. 57.[6]

b. Laches

"Laches is 'an equitable defense that may be interposed in the absence of the statute of limitations,' and has been defined as an 'inexcusable delay in asserting a right.'" Northwest Covenant Med. Ctr. V. Fishman, 167 N.J. 123, 140 (2001) (internal citations omitted). "'[L]aches involves more than mere delay, mere lapse of time. There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party.'" Id. (internal citations omitted). "Factors considered in determining whether to apply laches include '[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay.'" Id. (internal citations omitted).

The Board asserts that the doctrine of laches cannot apply in the context of a tenure hearing, but the precedent the Board cites on this issue does not stand for the proposition asserted. Specifically, the ALJ in I/M/O Tenure Hearing of David Clark did not decline to apply the doctrine of laches. See I/M/O Tenure Hearing of David Clark, 95 N.J.A.R. 2d (EDU) 164, *133-134 (N.J. Admin. 1995). Rather, the ALJ noted that it was unnecessary to reach the issue of whether laches barred the charges because it was appropriate to dismiss the charges on the merits.[7] Similarly, in I/M/O Tenure Hearing of Morton, the ALJ declined to apply laches to bar charges, based on a finding that the two year delay in filing the charges did not prejudice the employee. See I/M/O Tenure Hearing of Morton, 96 N.J.A.R. 2d (EDU) 236, *32 (N.J. Admin. 1995). This reflects an understanding that laches may apply in the context of a tenure hearing under appropriate circumstances, rather than a precedent that laches is inapplicable to tenure

[6] Notably, Mr. Licata properly qualified the dismissal of Charge One by stating that the reprimand issued in 2009 could still be used as "prior discipline" for purposes of determining a disciplinary penalty and to evaluate the credibility of Ms. Buglovsky's stated understanding that she was verbally warned not to use the district network to access her private e-mail to read or send sexually explicit messages. See Opinion & Award at pg. 58.

[7] There is significant discussion in I/M/O Tenure Hearing of David Clark of whether the doctrine of laches applies in the context of a tenure hearing, but this discussion appears in the section of the opinion that simply summarizes the position of the parties. It is clear from a full reading of the opinion that the ALJ did not decide this issue.

hearings as a matter of law. It should be noted that laches might actually be an appropriate doctrine to apply in this context, as there is no statute of limitations. See Fishman, supra.

In the instant case, Mr. Licata did not expressly apply the doctrine of laches, but did dismiss certain allegations as "stale" due to the passage of time and to Ms. Buglovsky's subsequent good behavior. See Opinion & Award at pg. 61. The Board presents no law to suggest that this decision exceeded Mr. Licata's authority.

c. Application of Civil Service Precedent and Failure to Apply Prior Education Law Decisions

The Board alleges that Mr. Licata reached an impermissible conclusion by applying cases regarding civil service employees as opposed to cases regarding educators. However, the Board fails to articulate a distinction between civil service law and education law that is sufficient to demonstrate that reliance on civil service precedent led to an improper conclusion. Notably, decisions in the context of tenured educators have borrowed from civil service decisions in defining "unbecoming conduct" and otherwise. See Donahue, supra.

Moreover, the primary education law cases cited by the Board wherein dismissal was held to be an appropriate remedy are factually distinct from the instant case. For example, in In re Voza, the educator referenced students in his explicit e-mails. See In re the Revocation of Richard Voza, 2011 N.J. Agen. LEXIS 545 (N.J. Admin. 2011). Ms. Buglovsky's e-mails are completely devoid of references to students. In In re Howarth and In re Donahue, the educators used school equipment to search and view pornography. See In re Revocation of Certificates of Dean Howarth, 2009 N.J. Agen. LEXIS 506 (N.J. Admin. 2010); see also In re Revocation of Certificates of Darlene Donahue, 2006 N.J. Agen. LEXIS 658 (N.J. Admin. 2006). The conduct of viewing and searching for pornography on a school computer goes a step further than sending explicit e-mail communications to one individual, and presents a greater risk that students might see the explicit materials.

It is clear from Mr. Licata's decision that he looked to the totality of the circumstances in evaluating whether students would be better served by the retention or removal of Ms. Buglovsky. In so doing, he considered not only her inappropriate conduct, but her response to prior discipline, the decreasingly offensive nature of the alleged conduct, her display of remorse and participation in therapy, and her consistently positive performance evaluations. It follows that this Court finds that Mr. Licata's decision not to order dismissal was reasonable and not inconsistent with established education law.

II. Whether Mr. Licata's Decision Is Contrary to Public Policy

Under rare circumstances, a court may vacate an arbitration award that violates public policy, but the policy must be a "clear mandate" and must be embodied in "statute, regulation, or legal precedent." See New Jersey Turnpike Authority v. Local 196, 190 N.J. 283, 287-288 (2006). Importantly, the inquiry is whether the award itself, as opposed to the conduct giving rise to the award, violated the policy. Id.

In the instant case, the Board cites precedent to establish a public policy that teachers are held to a higher moral standard. However, such precedent is insufficiently "clear" to establish that suspending rather than dismissing a teacher who engages in unbecoming conduct contravenes this policy. The Board cites no other relevant precedent, statute, or regulation on this issue. Accordingly, this Court finds that Mr. Licata's decision did not contradict public policy and cannot, therefore, be vacated on that ground.

III. Whether Mr. Licata Gave Sufficient Weight to the Evidence Presented

In advocating for the vacation of Mr. Licata's award, the Board also asserts that Mr. Licata failed to give appropriate weight to certain evidence including a USB drive containing explicit communications, Ms. Buglovky's use of a colleague's online log-in information to access Ms. Buglovsky's personal e-mail, and Ms. Buglovsky's browsing of the Internet during instructional time.

The Board alleges that since Mr. Licata did not explicitly mention the USB drive containing 22,000 screen shots of Ms. Buglovsky's Internet communications (Ex. J4), he must not have properly considered that evidence. However, it is clear from Mr. Licata's decision that he adequately considered both the content and volume of Ms. Buglovsky's inappropriate Internet activities and reached a reasonable decision that suspension was an appropriate consequence. Considering the totality of the circumstances and Mr. Licata's ultimate conclusion, there is nothing in the record to suggest that Mr. Licata failed to give sufficient weight to this evidence.

The Board also raises the issue that from September 2009 through November 2009, Ms. Buglovsky sometimes used a colleague's computer, under this colleague's log-in in violation of Board policy, to access her own personal e-mail. The Board asserts that this evidence suggests that Ms. Buglovsky intentionally attempted to evade monitoring by using her own school-issued computer and log-in to send work-related communications via school e-mail, but switching immediately thereafter to her colleague's computer and log-in to access her personal e-mail for personal reasons. It is undisputed that the e-mails sent during this time period were not explicitly sexual in nature. Mr. Licata reviewed this evidence and found that "to the extent there is any attempt to 'cover her tracks,' I find that such activity is limited to the period September through November of 2009, almost three years prior to the filing of tenure charges." See Opinion & Award, at pg. 42. Mr. Licata further found that Ms. Buglovsky used her own log-in to access her personal e-mail for the remainder of the 2009-2010 school year, and made no sexually explicit communications during that time. Accordingly, Mr. Licata found, "the record does not sufficiently evidence intent on the part of Ms. Buglovsky to evade review of her e-mail communications after December of 2009." See Opinion & Award, at pg. 43.

Mr. Licata cited several reasons in support of his decision that Ms. Buglovsky's 2009-2010 computer usage did not warrant dismissal. First, Mr. Licata credited Ms. Buglovsky's testimony that accessing of personal e-mail is prevalent among staff members during non-instructional time and that she genuinely believed that she was not prohibited from sending non-sexual personal e-mails. See id. at pg. 43-44. Mr. Licata further found that "Ms. Buglovsky's network usage was under individualized scrutiny" as a result of the explicitly sexual Spring 2009 communications. Id. at pg. 44. Importantly, Mr. Licata noted that no disciplinary action was

taken against Ms. Buglovsky and that Ms. Buglovsky received a positive evaluation for the 2009-2010 school year. Id. at pg. 44. Mr. Licata ultimately noted that the only improper conduct in 2009-2010 was Ms. Buglovsky's use of Mr. Patrick's log-in, but that this violation, which ceased in November 2009 and was never addressed by the Board, was attenuated due to the passage of time.

With respect to the 2010-2011 school year, Mr. Licata found that Ms. Buglovsky only exchanged a handful of e-mails with J.C. See id. at pg. 44-45. However, Mr. Licata also found that within a seven-week period, Ms. Buglovsky accessed the Internet for personal reasons on five occasions when she was supposed to be teaching. See id. at pg. 49. Ultimately, Mr. Licata found that this was "conduct unbecoming a teacher," warranting disciplinary action but not dismissal. In support of his finding that suspension and an increment loss were more appropriate remedies than dismissal, Mr. Licata cited the fact that at least one of the incidents occurred on "Take Your Child to Work Day" and the access of a "My Little Pony" website during instructional time indicated that it was Ms. Buglovsky's daughter who had been using the computer while Ms. Buglovsky was teaching. See Opinion & Award, at pg. 50. Additionally, Mr. Licata found that, again, Ms. Buglovsky had not been disciplined and had received a positive evaluation for the 2010-2011 school year. See id. at pg. 58. Mr. Licata inferred that Ms. Buglovsky's improved behavior following her 2009 reprimand indicated that Ms. Buglovsky would likely have ceased sending personal e-mails and using the Internet during instructional time if the violations were brought to her attention. Mr. Licata therefore concluded that it would be "fundamentally unfair" to dismiss Ms. Buglovsky for this conduct. Id. Mr. Licata also declined to find that the web-browsing was part of a pattern of unbecoming conduct, as a consequence of the prior improvements in Ms. Buglovsky's behavior. Id. at pg. 64.

It follows that this Court finds that Mr. Licata gave sufficient weight to all of the evidence presented. Mr. Licata's divergence with the Board's position can be attributed to his decision to give substantial weight to Ms. Buglovsky's improved behavior and positive performance evaluations. The Court finds that Mr. Licata acted within his discretion in considering the totality of the circumstances and weighing the evidence as he did.

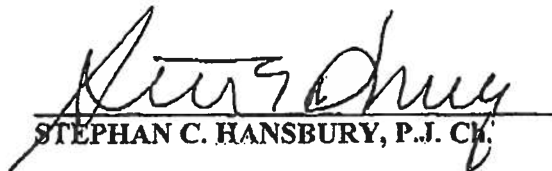
Whether Mr. Licata Properly Interpreted the Board's Policies

Mr. Licata's Arbitration Opinion and Award outlines the bases for his conclusions with respect to the charges asserted by the Board against Ms. Buglovsky. Mr. Licata based his decision on the assertion that a lesser punishment would address Ms. Buglovsky's conduct more effectively than dismissal would, given the circumstances surrounding her initial punishment, her subsequent interactions with the Board including positive performance evaluations, her improved conduct, and her understanding of what was expected of her thereafter.

Although the Board's policies prohibit certain behavior in which Ms. Buglovsky undisputedly engaged, the Board's policies do not mandate dismissal as a consequence. Additionally, the Court finds that Mr. Licata properly credited Ms. Buglovsky's testimony that she did not understand the Board's policy to mean that she was prohibited from sending personal e-mails of an appropriate nature, and that she understood that other teachers frequently used the computers for personal reasons during non-instructional time. In considering whether Ms.

Buglovsky had proper notice regarding the impropriety of her conduct, Mr. Licata also found that the Board's policy was worded in a manner that incorporates both legal and non-legal jargon, making it "unduly complex." Mr. Licata also referenced the April 2009 letter of reprimand, which referenced e-mails of a sexual nature.

This Court finds that this was not an attempt on the part of Mr. Licata to "re-write" the Board's policy. Instead, this Court finds that Mr. Licata properly interpreted Ms. Buglovsky's understanding of the Board's computer usage policy in the context of other communications and circumstances that may have influenced Ms. Buglovksy's perception of the Board's expectations for her conduct. Thus, this Court finds that Mr. Licata did not misinterpret or fail to give sufficient weight to the Board's policy. It should also be noted that the Policy does not carry the weight of a collective bargaining agreement, so reference to public service precedent that binds an arbitrator to give deference to a collective bargaining agreement does not apply here.



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STEPHAN C. HANSBURY
PRESIDING JUDGE
CHANCERY DIVISION

RANDOLPH TOWNSHIP BOARD OF EDUCATION, Morris County, Plaintiff, v. JILL BUGLOVSKY, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: MORRIS COUNTY DOCKET NO: C/16-13 CIVIL ACTION **ORDER**

THIS MATTER having opened to the court by Schenck, Price, Smith & King, L.L.P., attorneys for the Randolph Township Board of Education (hereinafter "Plaintiff"), upon the filing of a Verified Complaint and Order to Show Cause against Defendant, Jill Buglovsky ("Defendant"), to vacate the decision of Arbitrator Joseph Licata in the matter docketed as Commissioner of Education Agency Docket No. 265-9/12, and the Court having reviewed the papers and for good cause shown:

IT IS on this 16th day of July, 20__

ORDERED as follows:

1. The December 21, 2012 award of Arbitrator Joseph Licata in the arbitration entitled In the Matter of the Arbitration of Certified Tenure Charges Between the Randolph Township Board of Education and Jill S. Buglovsky, docketed as Agency Docket No. 265-9/12, is hereby vacated; and
2. Ms. Jill Buglovsky is hereby ordered dismissed from her tenured position as a teacher in the Randolph Township School District; and

Denied

{01281516.DOCX.1}

2. Defendant shall pay to Plaintiff ~~reasonable attorney's fees and costs of suit in an amount to be determined~~; and Denied

3. Counsel for Plaintiff shall serve a copy of this order upon all interested parties and attorneys of record within seven (7) days from the receipt hereof.

P.J.Ch.
STEPHAN C. HANSBURY, JUDGE
SUPERIOR COURT OF NEW JERSEY

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