

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

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

Agency Docket No. 322-11/14

**SUMMARY DECISION &
CASE MANAGEMENT ORDER**
(On Reconsideration)

Issued: January 6, 2015

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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

On January 3, 2015, I filed with the New Jersey Department of Education, Bureau of Controversies and Disputes Summary Decision and Case Management Order. In summation, I granted Mr. Henchey's Motion for Summary Decision with respect to Charges Nos. 1-4 of the November 7, 2014 Tenure Charges. I denied the motion with respect to Charge No. 5, pars. 12-19. Lastly, I directed the parties to observe the following case management order set forth on pages 40 and 41 in anticipation of the hearing set to commence on Thursday, January 8, 2015:

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 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.

On Sunday, January 4, 2015, the Board filed a letter brief/motion for reconsideration. The Board takes issue with that portion of my Summary Decision

holding that the Board failed to comply with the mandatory evaluation procedures of TEACHNJ for the 2013-14 school year, because it did not conduct a mid-year evaluation of Mr. Henchey. Perhaps correctly, the Board observes that the new law does not require a mid-year evaluation unless a teacher has been rated partially effective in his most recent annual summative evaluation – which could not take place under Section 25 until after the 2013-14 school year. The Board requests that it be permitted to utilize the 2013-14 evaluation in the instant tenure charge proceedings to demonstrate inefficiency, incapacity, and conduct unbecoming.

On January 5, 2014, Mr. Henchey filed a letter in opposition to the Board's request for reconsideration. Henchey accuses the Board of backpedaling from its previous admission that it did not comply with Section 25. Apart from the mid-year evaluation issue, Henchey observes that the Board failed to submit in discovery any proof that its evaluation rubric (McRel) was submitted to or approved by the Commissioner. Mr. Henchey opines: "In this case the Board shot its gun prematurely and the lack of a mid-year evaluation is but one of the errors it committed in seeking to bring inefficiency charges against Henchey." Mr. Henchey urges the Arbitrator to decline reconsideration for trial reasons as well: "To allow the Board to use those observations to demonstrate inefficiency, incapacity and conduct unbecoming would simply open a Pandora's box, because inevitably each party would then feel compelled to refer to prior observations/evaluation to refute and/or allow for consideration of the totality of the circumstances."

After reviewing the Board's motion, I must deny same. The undersigned's twofold rationale for rejecting the Board's Section 8 position with respect to the 2013-2014 school year was articulated in the alternative. The primary thrust of the rationale, as set forth at pages 32 to 33, is that the legislature intended teachers to have the 2013-2014 and 2014-2015 school years to see "if they could pass muster under Section 25." Thus, I agreed with Henchey's argument that a Section 8 proceeding for inefficiency cannot be advanced with respect to the 2013-14 school year. As such, I concluded "that any Section 8 proceeding necessarily must be limited to school years 2012-2013 and prior." In the alternative, I reasoned: "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." I then analyzed the Board's evaluation of Henchey during the 2013-2014 school year under Section 25 and held that the Board failed to comply with the new law by omitting a mid-year evaluation performed by the School Improvement Panel (pages 33-35).

In considering the Board's argument on reconsideration, I must reaffirm my grant of Summary Decision with respect to Charges Nos. 1-4 regarding the 2013-14 school year based on the first of two alternative rationales set forth above, i.e., the inapplicability of Section 8 to interfere with the first two operative years of Section 25 (2013-14 and 2014-15). While I realize that Arbitrator De Treux allowed such Section 8 evidence of inefficiency in Martinez, as Henchey aptly notes, the issue was not raised by Mr. Martinez who, for some reason, represented himself and, thus, "had a fool for a client." To the extent that Arbitrator Gerber reached a contrary conclusion in Audrey Cuff, I note

the support for the undersigned's conclusion based on the several arbitration decisions noted by Henchey in his reply brief dated December 23, 2014.

I add that what is clear is that the future of tenure disputes involving efficiency was intended to lie within Section 25 and not Section 8; the first year the Section 25 clock began running was 2013-14; and all teachers, as part of the comprehensive legislative covenant reached, were provided with an opportunity to prove their efficiency during the 2013-14 and 2014-15 school year based on a rubric approved by the Commissioner of Education. While this may have resulted in some teachers avoiding "justice" for their poor performance in years leading up to the 2013-14 school year, I observe, boards of education still had the ability to take action prior to the commencement of the 2013-14 school year for inefficiency under Section 8 and Section 25 did not preempt Section 8 cases involving incapacity, conduct unbecoming and other just cause. I leave off with the thought that the new legislation – which addressed a plethora of tenure-related matters – understandably may not have been perfectly drawn with respect to each and every contingency subsequently arising. Thus, for all these reasons, even if I retract my alternative rationale for granting Summary Decision, i.e., the Board's failure to conduct a mid-year evaluation, such action would not change the outcome of my January 3, 2015 Summary Decision, but only eliminate the second of two alternative rationales in support of my ultimate finding and order. In so concluding, I comment that, unless this matter is remanded, I need not address Mr. Henchey's point that the Board failed to comply with other aspects of TEACHNJ, e.g., failure to demonstrate that it timely secured the approval of the McRel rubric by the Commissioner

of Education and, thus, could not rely on the 2013-14 evaluation, even if the lack of a mid-year evaluation in 2013-14 was appropriate.

In light of the foregoing, and for the reasons contained in my January 3, 2015 Summary Decision, I reiterate, the heart of the dispute remaining is whether the Board had just cause to dismiss Mr. Henchey for continued incapacity and conduct unbecoming based on the 2013-14 allegations set forth at Charge No. 5, pars. 12-19. As to the distinction between inefficiency and incapacity, 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). The Board may introduce any and all evidence originating during the 2013-14 school year in support of Charge No. 5, pars. 12-19 to prove Henchey's alleged incapacity and conduct unbecoming. Such evidence may include evidence of the assistance and/or constructive criticism provided to (or reiterated to) Mr. Henchey during the 2013-14 school year, no matter what the form – not to demonstrate inefficiency – but to serve as a predicate for the allegation that Henchey's incapacity and conduct unbecoming continued as demonstrated by the manner of his responses, or lack thereof, to such assistance and/or constructive criticisms.

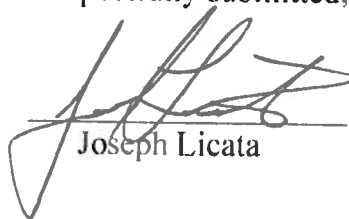
Finally, both parties may refer to Mr. Henchey's overall work record (as contained in the Statement of Evidence) culminating with the 2012-2013 school year increment

withholding in support of their respective positions concerning the appropriate disciplinary penalty, if proof of continuing incapacity and conduct unbecoming is demonstrated based on Henchey's actions and/or or inactions during the 2013-14 school year.

CONCLUSION

Based on the foregoing, I must deny the Board's request for reconsideration, but I issue this decision for clarification and guidance given the fast-approaching commencement of the hearing. The parties are referred to the Case Management Order set forth above and within my original Decision.

Respectfully submitted,



Joseph Licata

Dated: January 6, 2015

State of New Jersey
Government Records Request
Receipt

Requestor Information

David Foster
The Trentonian
600 Perry Street
Trenton, NJ 08618

dfoster@trentonian.com
609-349-7437

Request Date: January 5, 2015
Maximum Authorized Cost: \$100.00
Email

Request Number: W93149
Request Status: In Progress
Ready Date:

Custodian Contact Information
Chief of Staff
Records Custodian
100 Riverview Plaza
P.O. Box 500
Trenton, NJ 08625-0500
OPRA.CUSTODIAN@doe.state.nj.us
609-943-4599

By _____

Status of Your Request

Your request for government records (# W93149) from the Chief of Staff has been reviewed and is In Progress. Detailed information as to the availability of the documents you requested appear below and on following pages as necessary.

The cost and any balance due for this request is shown to the right. Any balance due must be paid in full prior to the release / mailing of the documents.

If you have any questions related to the disposition of this request please contact the Custodian of Records for the Chief of Staff. The contact information is in the column to the right. Please reference your request number in any contact or correspondence.

Cost Information

Total Cost:	\$0.00
Deposit:	\$0.00
Total Amount Paid:	\$0.00
Balance Due:	\$0.00

Document Detail

Div	Doc #	Doc Name	Redaction Req	Pages	Legal Size	Electronic Media	Other Cost
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----- No Document Detail -----

1/5/2015: Received.

Your request for government records (# W93149) is as follows: