

**Pursuant to Referral By the Commissioner of Education  
State of New Jersey  
Before Timothy J. Brown, Esquire**

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**In the matter of:**

**The Tenure Hearing of  
Edward Newton**

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

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: **Agency Docket No. 276-9/14**  
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**Decision and Award**

**Appearances:**

**On behalf of the State Operated School District of the  
City of Newark, Essex County:**

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**On behalf of Edward Newton:**

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## **Introduction**

This matter arises from tenure charges submitted on or about September 24, 2014 by the State Operated School District of the City of Newark (the School District or the District) based upon inefficiency pursuant to N.J.S.A. 18A:6-10. N.J.S.A.18A:6-11, N.J.S.A. 18A6-17.3 and N.J.S.A. 6A:3-5.1 against Edward Newton (Respondent) and an December 22, 2014 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to N.J.S.A. 18A:6-17.3c. The hearing in the matter was conducted on February 10, 17 and 24, 2015 in Newark, New Jersey. At the hearing all parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Newton was present for the entire hearing and testified on his own behalf. At the close of the hearing on February 24, 2015 the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on March 13, 2015 the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

## **Issues**

The issues presented in this matter may be accurately stated as follows:

Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if not, what is the appropriate remedy?

## **The Tenure Charge**

The tenure charge in this matter are based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.S.A. 6A:3-5.1 and states:

### CHARGE ONE: INEFFICIENCY

During the period from September 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:

- a. The Respondent has failed to implement curricular goals and objective(s).
- b. The Respondent has failed to design coherent instruction.
- c. The Respondent has failed to assess student learning.
- d. The Respondent has failed to create an environment of respect and rapport.
- e. The Respondent has failed to manage student behavior.
- f. The Respondent has failed to manage classroom procedures.
- g. The Respondent has failed to establish a culture of learning.
- h. The Respondent has failed to communicate clearly and accurately.
- i. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
- j. The Respondent has failed to engage students in learning.
- k. The Respondent has failed to provide feedback to students.
- l. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.
- m. The Respondent has failed to reflect on teaching.
- n. The Respondent has failed to contribute to the School and District.
- o. The Respondent has failed to grow and develop professionally.
- p. The Respondent has failed to demonstrate promptness and attendance.

## **Respondent**

Respondent has a New Jersey middle school math certification and obtained tenure in or about 2010. He has taught math and science at the elementary and middle school level in the District since 2006 and taught at Lincoln Elementary school from 2008 until the instant tenure charges. At Lincoln, Respondent taught as a classroom teacher in math and science for three years, and more recently as a math problem solving teacher and classroom math teacher. Prior to the 2012-2013 school year Respondent received annual evaluations of satisfactory or proficient. Respondent received Annual Summative Evaluation ratings of “Partially Effective” for the 2012-2013 and 2013-2014 school years. As a result of his receiving ratings of Partially Effective for two consecutive years, the District filed the instant inefficiency tenure charge.

## **Testimony**

### **Lincoln School Principal Debora R. Weaver**

Principal of Lincoln School Debora R. Weaver testified that during the 2012-2013 school year Respondent was evaluated pursuant to the District’s 2012-2013 “Framework For Effective Teaching.” The Framework includes five “competencies” for which teachers are evaluated: (1) Lesson Design and Focus; (2) Rigor and Inclusiveness; (3) Culture of Achievement; (4) Student Progress Toward Mastery and (5) Commitment to Personal and Collective Excellence. The Framework contemplates that teachers will be evaluated through evidence; evidence of three general types; (a) what can be observed, (b) what can be seen in artifacts and (c) what can be seen in quantitative data. Teachers

may receive ratings at four levels in each competency: Highly Effective, Effective, Partially Effective and Ineffective. Both administrators and teachers received significant and continuing training on the evaluation tool, according to Weaver.

The 2012-2013 Framework provided the following “main components” of the teacher evaluation process under the Framework:

1. Goal-setting meeting and IPDP creation – recommended
2. Partial Period Observation(s) – recommended
3. Pre-Observation Conference(s) – recommended
4. Formal observation(s) – required
5. Post-Observation Conference(s) – required
6. Mid-Year Review – strongly recommended
7. Annual Evaluation – required

The 2012-2013 Framework also provided that tenured teachers “must have a minimum of one (1) formal observation, though the district recommends that all teachers be observed at least 3 times, whether formally or informally,” and that a post observation conference “must be held within ten (10) calendar days following the formal observation.” The Framework further provides that the time frame for the post-observation conference “may be extended due to the absence of either the observer or the teacher.”

Weaver explained that the District’s 2013-2014 “Framework” contained some modifications from the previous year. The 2013-2014 Framework continued to have the same five competencies and four ratings. However, the Framework modified the number of observations required for a tenured teachers so that all tenured teachers were required to have three observations and that teachers on a Corrective Action Plan (CAP) were required to have at least one additional observation and that at least one of the observations of a teacher subject to a CAP must have been performed by someone other

than the individual who performed the other observations of the teacher. Under the 2013-2014 Framework, teachers with a CAP were required to have at least two short observations and at least two long observations. All observations must be followed up by a post-observation conference within ten working days of the observation and at least one observation must have a pre-observation conference. Finally, midyear conferences were required for teachers on a CAP and all teachers were to receive an annual evaluation.

The 2013-2014 Framework also provided that any teacher who received an annual summative evaluation rating of Partially Effective or Ineffective in the 2012-2013 school year must have a CAP in the 2013-2014 school year. The Framework specifies that a CAP should be developed in the beginning of a school year through a collaborative process between the teacher and supervisor.

Weaver testified that during the 2012-2013 school year she performed observations in her school from grade three down and that grade four and up were performed by her Vice Principal Kishanda Montes. As a result, Weaver did not perform any observations of Respondent during the 2012-2013 school year. But, she testified, she reviewed and approved the observations performed by Montes, including the vice principal's observations of Respondent.

In school year 2013-2014 Weaver performed one short observation of Respondent on April 9, 2014 and held a post observation conference with the teacher. She testified that she rated Respondent as Effective with a score of 11 for the observation. Weaver also testified that she recommended the instant tenure charges against Respondent. Weaver testified that she made the recommendation because:

This is the second year of him being rated partially effective.  
And we provide a lot of support in our building, and he only

had one effective observation in that two-year period. And he just wasn't having the positive impact on the students. The lessons - - the areas of his CAP had not really demonstrated growth over some time for someone whose CAP had been basically the same for - - that time. And his competency areas that were - that were weak were the ones that really are the catalyst of a classroom, classroom management and effective planning. And those are like the backbone of a good lesson over time. And we provided, I believe, as - an abundance of support, and it was not consistently being implemented or evident in the classroom.

In terms of the support provide Respondent, Weaver explained, Respondent attended numerous collaborative meetings of teacher teams, the school did a year-round professional development book study on "Teach Like a Champion," the school used "The Skillful Teacher," gave Respondent specific references to pursue in his CAP and asked him to do the follow-ups to demonstrate such. Despite such efforts, Weaver testified, Respondent did not show improvement over the two years at issue and in her opinion there was no more the District could have provided Respondent within reason that could have helped him improve his performance.

### **Vice Principal Kishanda Montes**

Kishanda Montes was Vice Principal of Lincoln School during the 2012-2013 and 2013-2014 school years at issue here and testified that she performed observations and evaluations of Respondent in both school years. In the 2012-2013 school year Montes performed two observations of Respondent a mid-year evaluation and an end-of-year (Annual) evaluation. She testified that Respondent was offered and received a significant amount of professional development during both school years on a group basis as well as from her on an individual basis.

Montes identified professional development attended by Respondent on September 4, 5, 18, 2012. She conducted a partial period (or short) observation of Respondent on October 24, 2012 and testified that the lesson did not go well as the “do now” portion of the lesson intended as a first-five-minutes warm up became the entire lesson. According to Montes many of the students were not paying attention and were carrying on their own conversations throughout the lesson. Montes testified that it is her practice to hold a post observation conference after every teacher observation and that she did so in this case with Respondent. Montes gave Respondent a “Partially Effective” rating for the observation.

Respondent attended “collaborative meetings” with groups of teachers involving ANET data analysis on October 24 and November 7, 8 and 15, 2012. Montes testified that she invited Respondent to an individual December 4, 2012 conference with the Vice Principal to share her observations and support targeted to Respondent’s needs; in this case primarily lesson planning and class management.

On December 19, 2012 Montes conducted a formal announced observation of Respondent. The related “Formal Observation Form” reflects that a pre-observation conference was held with Respondent on December 17, 2012 and that the December 19, 2012 observation was an hour and twenty minutes in length. Montes gave Respondent an “Ineffective” rating for the observation. The form also reflects that the post-observation conference was held on January 17, 2013.

Respondent attended another collaborative meeting relating to data on February 7, 2013. Montes also testified that Respondent received quarterly Data Artifacts-Feedback addressing his particularly needs and directing that he analyze why a lesson had not been

effective, develop an instruction plan to re-teach the lesson and thereafter submit a reassessment analysis reflecting whether students learned as a result of the re-teaching. According to Montes, Respondent did not submit a reassessment.

Respondent attended February 12 and 26, 2013 collaborative meetings on how to write lesson plans, particularly focused upon writing plan objectives.

Respondent received a mid-year evaluation from Vice Principal Montes on March 8, 2013 in which he received an overall rating of Partially Effective. Montes noted that in competency 1, Lesson Design and Focus, Respondent had submitted only 10% of the required lesson plans for cycles 1 and 2. According to Montes, Respondent would claim he had the plans in his head and would not submit them in writing for her review. As plans are the “heartbeat of teaching” Montes explained, if she receives written plans she is better able to help the teacher plan better lessons; she can help with objectives, components, pacing, review, assessment and feedback. If she can’t review plan, she can’t give feedback, Montes testified.

Respondent attended collaborative meetings on April 4, 8 and 17, 2013 involving data analysis; an area Montes testified was Respondent’s strength.

In his annual summative evaluation and conference in June 2013 Respondent received a Partially Effective. According to Montes, Respondent did not show any improvement in competency number 1 relating to lesson-planning since his March 2013 midyear evaluation.

In the 2013-2014 School year Respondent was on a CAP, a plan that was initially authored by Respondent and revised following review – particularly of the “Professional Growth Plan” - and input by the Vice Principal based upon the teachers 2012-2013

summative evaluation, Montes testified. Among other things, the CAP included Action Steps for both the teacher and Montes relating to improving Respondent's lesson planning and classroom management. Montes explained that Respondent had expressed a desire to have his own culture in a class, rather than being required to observe other teachers in other classes and teaching an elective subject as he had taught problem solving in the 2012-2013 school year. As a result, Montes explained, Respondent was assigned an eight grade class that he taught 100% of the time and he was no longer requested to do as many extra duties such as back-up test coordinator so that he could focus upon his teaching and CAP.

Vice Principal Montes took an active roll in mentoring Respondent relating to lesson planning. She instructed him to submit his Unit plans to her for review prior to his developing lesson plans, directed Respondent to have three weeks of his lesson plans to her in advance, offered him written resources for his review and a template for lesson plans and informed him that he should request a meeting with Montes and she would schedule a conference if he needed "a refresher." Montes also sent Respondent a number of emails reminding the teacher when his plan submissions were late. As was the case in the 2012-2013 school year, Respondent attended numerous faculty meetings and collaborative meetings for professional development purposes, including such meetings on September 4, 5, 17 and 23, October 28, November 21, and 22, 2013, January 29 and March 24, 2014.

Montes conducted an unannounced, Long Observation of Respondent on or about September 25, 2013 and a post observation conference with the teacher on or about

October 15, 2013. For this observation Respondent was given an overall rating of Ineffective.

Montes explained that on December 2, 2013, after first quarter report cards had closed, she emailed Respondent and asked him what he believed were the issues that resulted in so many failing grades in his class. In response, Respondent wrote back that the students had a “lack of understanding” in positive and negative numbers and decimal operations, “incomplete responses to questions, linkage of prior knowledge to current content problems and careless mistakes. “ In his view, Respondent further wrote, “[s]tudents have demonstrated a lack of commitment in their learning, homework return rate is low.” Thereafter Montes and Principal Weaver met with Respondent, reviewed his grade book, and gave recommendations for implementing “power teacher” and ideas on establishing an assertive plan for classroom behavior strategies and getting parents involved. On December 6, 2013 Montes assigned Respondent to observe a “Corrective Instruction Lesson” by another teacher and to provide a list of his “noticing and wonderings” that would be discussed at his next conference with Montes.

Montes conducted a short, announced observation of Respondent on January 6, 2014. Pre-observation and post-observation conferences were held. Montes testified that she noticed some progress in Respondent’s lesson design, focus and culture, but that he nevertheless still had a Partially Effective rating overall.

In his mid-year evaluation Respondent was rated Partially Effective. It was noted in the Competency 1 Section of the evaluation that Respondent was not adjusting his lessons to different types of learners and had submitted only 25% of written lesson plans. Thereafter, Montes testified, they paired Respondent with another teacher so that

Respondent could benefit from that teacher's abilities in culture and achievement and Respondent could share his abilities in data analysis.

Montes conducted an announced long observation of Respondent on February 28, 2014. Pre and post observation conferences were held. For this observation Respondent received a rating of Ineffective. Montes recalled that she held a post-observation conference with Respondent right after the observation and she asked Respondent to self-evaluate his own performance and that when he did such Respondent gave himself a Partially Effective rating.

Montes evaluated Respondent for his annual 2013-2014 school year summative evaluation and gave Respondent a rating of Partially Effective. Montes testified that Respondent had been given a wealth of information throughout the school year to help him improve; information on lesson plan design, classroom management, professional reading materials, collaborative meetings and frequent one-on-one conversations with administrators. Notwithstanding that Respondent was given significant support throughout the year, Montes testified, Respondent had shown only small growth during the 2013-2014 school year in some competencies and he had not reached effectiveness in any of the areas in which he needed to improve.

### **Respondent's Testimony**

Respondent testified that in his view his December 2012 formal observation was done in a way that did not reflect the overall composition of the class; who the students were in terms of being very challenged and having discipline issues. According to Respondent, the students were not up to the grade level in math and that made it difficult

to teach an effective grade level class. Additionally, Respondent noted, there was another visitor in the classroom during the observation – a parent of a student – and he had not been informed that such would be the case before the observation. In terms of the behavior of the students that day, Respondent observed, they were indifferent to the presence of either a parent of the school’s vice principal; they behaved poorly regardless.

Respondent testified that he thought his October 15, 2013 long evaluation was a “got you kind of evaluation.” Again, to understand his circumstance one has to consider the background of the students in the class, Respondent explained, and this class was composed of regular math students and special education students but without teacher assistants (at least until towards the second half of the year). Like the class of the year before, this class had very low skills in math.

Respondent testified that he attended staff development days and other meetings where subjects relating to teacher effectiveness were taught and that he found the sessions helpful.

In regard to his short observation of January 6, 2014, and resulting Partially Effective rating, Respondent testified that he disagreed with the rating explaining that he believed he had done well and applied all the techniques and concepts that should have been applied, and that this class of students was a relatively good performing class.

For the February 28, 2014 observation, Respondent testified, “that was not my day” and he recalled telling Vice Principal Montes that he had tried something new and it was the worst day he had in his class.

Respondent recalled that his next observation was on April 9, 2014 when he was observed by Principal Weaver and that he was satisfied with the class; the students

followed instructions and were engaged. He received an Effective rating for this observation. When describing the class on April 9 and the rapport with the students that day, Respondent testified that it was a very interesting class.

And quite a few times Mrs. Montes herself had come to my class and found a similar dialogue taking place and has jumped into teaching. You know, she saw we were having a good rapport. We were going through the steps, different concepts. The class became so interesting she would have joined in and, if I'm not overstating now, she practically took over the class, you know, and it has happened a couple of times. So generally, I follow on the patterns of what was reported on April 9<sup>th</sup>.

According to Respondent, he does not think the observations of his teaching performed by Montes were fair, that in his opinion she did not give the right recognition to the fact that there were troubled students in the school and that the challenge of the students is not addressed by blaming the teachers. He testified that he does not believe he received the support necessary for him to be an effective teacher. He further testified that had he provided Montes his lesson plans on a timely and consistent basis such would not have been a help to him as "the content of the lessons that I delivered were not my weakness. My weakness that was identified was student behavior..."

### **Positions of the Parties**

#### **Petitioner / District**

The District argues that it is appropriate under TEACHNJ for it to consider Respondent's 2012-2013 evaluation as well as her 2013-2014 evaluations as they were performed pursuant to an evaluation rubric established consistently with the statute and NJ Department of Education (Department) guidance. In this regard, the District asserts,

the District was one of eleven school districts approved to participate in the Department's 2011-2012 teacher evaluation pilot program. As a result, the Department of Education allowed the District to begin using a new "framework" and new rating system on a "pilot" basis to evaluate teacher performance in the 2011-2012 school year. The framework and new rating system was then used throughout the entire district in the 2012-2013 school following the adoption of a related Memorandum Of Agreement (MOA) between the District and Teacher Union and passage of TEACHNJ. The District made a few minor modifications to its framework to comply with Department of Education requirements and again applied the framework to teachers in the 2013-2014 school year. As a result, Respondent was subject to evaluation under the 2012-2013 framework and the 2013-2014 framework.

Contrary to the assertion of Respondent, the District argued, it implemented its 2012-2013 evaluation rubric in a timely manner to be effective under governing law. In this regard, TEACHNJ establishes "deadlines" by which certain requirements must be met. Thus, the statute required school districts to institute pilot programs to test their new evaluation rubrics by January 31, 2013, **at the latest**. N.J.S.A. 18A:6-123(d) ("Beginning **no later than** January 31, 2013, a board of education shall implement a pilot program..."). (Emphasis added). Here, the District did just that; it implemented a pilot program with Department of Education approval in the 2011-2012 school year – thereby complying with the requirement that its pilot program be instituted "no later" than January 31, 2013.

Similarly, the District continued, TEACHNJ required all New Jersey public school districts to develop "evaluation rubrics" to assess the performance of their

teachers, and established a deadline to obtain approval for their “rubrics” from NJDOE by December 31, 2012. The District complied with that mandate. The District adopted an evaluation rubric – a rubric approved by the Department - as part of a performance evaluation system known as the Newark Public Schools Framework for Effective Teaching to be implemented beginning in the 2012-13 school year. To inform its teachers and school administrators of the new Framework and to provide guidance on its implementation, the District conducted training and published a Guidebook to the Framework for use in 2012-2013. The Framework clearly describes the new “levels of performance” as highly effective, effective, partially effective and ineffective.

The District further argued that it complied with the deadline established by the Act that school districts implement their evaluation rubrics by the beginning of the 2013-2014 school year **at the latest**, citing N.J.S.A. 18A:6-123(e) (“[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric”). Again, the District asserted, the District complied with the statute and implemented its framework containing the evaluation rubric for the 2012-2013 school-year; an implementation date that predated the 2013-2014 deadline set by statute. Nothing in TEACHNJ nor any regulations, the District maintained, provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3.

Considering the plain meaning of the statute’s language and the guidance and actions of the Department of Education, the District argued, neither the statute nor the DOE required school districts to; (a) treat the 2012-2013 school year, and only 2012-

2013, as a “pilot” year and (b) wait a year to implement their evaluation rubrics if the rubrics had been adopted and approved earlier.

Consequently, the District asserted, its efficiency charges against Respondent are appropriately considered by the arbitrator under TEACHNJ.

Respondent’s attempt to have the charges dismissed on procedural grounds is inappropriate, the District maintained. In this regard, the District argued, it is the Commissioner of Education who is solely authorized to determine the sufficiency of the evaluation process and resulting tenure charges. N.J.S.A. 18A:6-16. Thus, a dispositive motion by a teacher subject to tenure charges based upon the failure of a board of education to follow the evaluation process may only be made to the Commissioner prior to the referral to an arbitrator.

Once it is found that the tenure charges are sufficient, based upon appropriate criteria and a referral is made to an arbitrator, an arbitrator’s authority is confined to a determination of the following: (a) whether or not the employee's evaluation failed to adhere substantially to the evaluation process; (b) whether there was a mistake of fact in the evaluation; (c) whether the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination, or; (d) whether the board of education’s actions were arbitrary and capricious. N.J.S.A. 18A:6-17.2. Therefore, whether the District acted in compliance with law in filing charges based upon the 2012-2103 school year has been answered in the affirmative by the Commissioner of Education and is outside the scope of the arbitrator’s authority.

Moreover, the District asserted, the statute does not contemplate that arbitrators will have the authority to interpret the statute or to evaluate the legislative intent of the Act. That authority is the courts.

Considering all of the evidence presented at the hearing, the District argued, it has met its burden of supporting the charge. The teacher evaluations conducted within the District in 2012-2013 were valid, effective, and “counted” for all purposes, including to support tenure charges such as those presented here, as were the evaluations conducted in the 2013-2014 school year. Respondent’s contention to the contrary should be rejected.

The arbitrator’s authority under TEACHNJ is limited to a determination of whether the approved evaluation system contained in the District’s Framework was “substantially” adhered to when applied to Respondent. In this regard, the relevant evidence offered at hearing by the District including the total number of observations conducted each school year, and voluminous other evidence and testimony of witnesses establishes the Respondent’s inefficiency as a tenured teacher to children. The Respondent was offered a collaborative CAP Process and extensive professional development opportunities and recommendations.

Alternatively the District continued, should the rubric of N.J.S.A. 18A:6-17.2 be found not to be the appropriate criteria under which to judge the evidence in this matter, the District has met its burden under the long-established efficiency standard of the preponderance of credible evidence. That standard requires that the District offer evidence that would lead a reasonably prudent person to conclude that the Respondent is an ineffective educator. Considering the totality of the circumstances here, including the testimony of the District’s witnesses and evaluations a reasonable person could

concluded that the ineffectiveness of Respondent as an educator is sufficient to revoke his tenure protections.

The tenure charges are appropriately before the arbitrator and the District has met its burden of supporting its charges and Respondent has failed to rebut the District's case by establishing that; (a) the employee's evaluation failed to adhere substantially to the evaluation process, (b) there was a mistake of fact in the evaluation, (c) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination or (d) that the board of education's actions were arbitrary and capricious. Under such circumstances, the District concluded, Respondent's employment as a tenured teacher within the District should be terminated.

### **Respondent**

The tenure charges against Respondent must be dismissed, Respondent argued, as they unlawfully rely upon evaluations performed during the 2012-2013 school year. In enacting TEACHNJ the Legislature clearly intended the 2012-2013 school year to serve as a "pilot year" for all administrators and teaching staff members in assessing teaching effectiveness. See N.J.S.A. 18A:6-123. Under TEACH NJ, it was not until the 2013-2014 school year that the statute was deemed to be in full force and effect and was the first year that evaluations would count for purposes of tenure charges. Try as it might, Respondent maintained, the District cannot avoid that simple and obvious reality and fact. The purpose of 2012-2013 pilot-year was to train certified teaching staff members and evaluators on the District's evaluation instruments and procedures, and for the Department of Education ("DOE") to prepare and finalize its regulations, which later

became known as Achieve NJ and which did not become effective until October 2013. The pilot nature of the 2012-2013 school year is further supported by the obvious fact, Respondent asserted, that the implementing regulations were not even promulgated until after the 2012-2013 school year had concluded. Additionally, such a conclusion is further supported by the Department of Education's own guidance on the questions. Thus, in its "Educator Evaluation Frequently Asked Questions (FAQ)" previously published on its web-site in answer to the question "Will summative ratings "count" this year (2012-13) toward tenure decisions?" the Department of Education stated:

A: No- the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (for teachers needing to be rated at least effective for two of three years) will start.

Although the Department FAQ statements were informal in nature and may not rise to the status of regulation, the Respondent argued, the Department's statements nevertheless represent the practical interpretation of the statute by the agency charged with instructing local governmental units on how they were to comply with the new law. As such, Respondent maintained, there is judicial precedent to support Respondent's assertion that the DOE FAQ guidelines should be given substantial deference.

Respondent further argued that numerous recent decisions of arbitrators relating to motions to dismiss efficiency charges filed by the District<sup>1</sup> support its position that the evaluations performed by the District on Respondent during the 2012-2013 year are not

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<sup>1</sup> In the Matter of Sandra Cheatham; In the Matter of Neil Thomas; In the Matter of Elena Brady; In the Matter of Charles Coleman; In the Matter of Lorraine Williams; In the Matter of Sandra Brienza; In the Matter of Leonard Yarborough; In the Matter of Ursula Whitehurst; In the Matter of Ratiba Ahmed; In the Matter of Toni Lenzand In the Matter of Leslie Johnson.

appropriately considered for purposes of efficiency tenure charges. In those cases Respondent asserted, arbitrators held that the charge affecting their respective Respondent alleging inefficiency pursuant to N.J.S.A.18A:17.3 was insufficient and/or premature because the TEACH NJ Act was not enacted until August 2012 and not implemented until October 2013, and further because the District presented no evidence that it was somehow exonerated from the requirements of Act.

The inapplicability of the 2012-2013 evaluations to charges of inefficiency are further established by the absence of a School Improvement Panel (SIP) during the 2012-2013 school year. Again, Respondent maintained, the District must be in compliance with all requirements of TEACH NJ as established by the Commissioner of Education and/or Department of Education as a precondition for considering annual summative evaluations as a basis for filing efficiency tenure charges. As the schools in which Respondent was assigned in the 2012-13 and 2013-14 school years did not have SIPs for those entire years, Respondent asserted, the District was out of compliance with TEACH NJ and, consequently, his 2012-13 and 2013-24 evaluations may not be used as a basis to file tenure charges.

Respondent argued that considering N.J.S.A. 18A: 6-17-3(c) provides:

Notwithstanding the provisions of N.J.S.A. 18A: 6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charge 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.

And further provides that where a District has filed tenure charges alleging inefficiency premised upon teacher evaluations, but has failed to follow the evaluation development process required by TEACH NJ, the Commissioner may dismiss the tenure charges or simply forward them to an assigned Arbitrator for further assessment of a District's compliance with the evaluation requirements of the TEACHNJ Act. As a result, Respondent asserted, if a matter has been referred to an assigned Arbitrator, then the Arbitrator must have the authority of the Commissioner and is charged with the responsibility to assess a District's compliance with the evaluation and assessment requirements of the TEACHNJ ACT. If the assigned Arbitrator finds that the Petitioner District has failed to follow the evaluation requirements or is deficient for any reason, the Arbitrator is obliged to dismiss the tenure charges. Here, it is undisputed that the District failed to abide by the evaluation process set forth in the TEACHNJ ACT and accordingly, the tenure charges against Respondent must be dismissed.

In conclusion, Respondent argued, the Petitioner School District is unable to cite any legal authority and evidence that would permit the Arbitrator to simply ignore the plain and unambiguous language of the relevant statute and regulation. The District's compliance with the portions of TEACHNJ relating to the establishment and approval of evaluation procedures is a prerequisite to proceeding with Inefficiency Charges and any finding to sustain those charges, Respondent asserted. Accordingly, Respondent's 2012-2013 summative evaluation is not properly the subject of consideration by either the Commissioner or the Arbitrator in this case. Moreover, Respondent argued, if said evaluation is not subject to consideration, then the District's tenure charges are facially deficient in that it includes only one (1) summative evaluation (for the 2013-2014 school

year), as opposed to the two consecutive annual evaluations required by TEACH NJ. Likewise the evidence is clear that (1) the Petitioner District failed to provide Respondent with the required minimum three (3) observations during the 2012-2013 school year even assuming that year was not a “pilot” year for the District and (2) that the Petitioner District failed to provide the Respondent with the required fourth observations in the 2013-2014 school year based on his CAP status. As such, the tenure charges at issue should be dismissed consistent with the procedural defects identified and with other arbitration rulings involving this Petitioner School District.

Moreover, Respondent continued, Respondent’s evaluations “failed to adhere substantially to the evaluation process.” In this regard, even if the 2012-2013 summative evaluation could be considered for tenure purposes, the District failed to comply with its own evaluation system – the 2012-2013 Framework - that was in effect for that school year. In this regard Respondent argued, the record reflects that Respondent did not receive the minimum number of formal observations required by the District’s evaluation system. Thus, Respondent maintained, the evidence establishes that rather than the three observations required, Respondent was given to only one formal observation during that school year; a December 19, 2012 observation that did not include a mandatory pre-observation conference at all or a post-observation conference within the time period provided for such. Similarly, when the 2013-2014 school year is considered, the District again failed to observe Respondent the minimally required number of times. As required by the 2013-2014 Framework, because Respondent was subject to a CAP he should have been given at least four observations. He was not, Respondent asserted. Considering that (1) the school did not have an established School Improvement Panel during the 2012-

2013 school year, (2) the District's evaluation rubric for that year had not been approved by the Department of Education, (3) Respondent was not given the required observations in either of the two school years at issue and (4) for some of the observations that were performed the District failed to provide Respondent with a post-observation conference within the time prescribed for such; thus rendering the observations null and void, Respondent concluded, the District has failed to support its tenure charges against Respondent and they should be dismissed.

## **Discussion**

### **The Referral of the Matter to the Arbitrator**

By letter dated December 22, 2014 from the State of New Jersey Department of Education the parties were notified that:

...following receipt of Respondent's answer on October 10, 2014, the above-captioned tenure charges have been reviewed pursuant to **N.J.S.A. 18A:6-17.3c**; upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Timothy J Brown, Esq. as required by statute.

(Emphasis added)

No motions were referred to the Arbitrator by the Commissioner.

### **Respondent's Argument Relating to the Arbitrator's Authority**

Respondent asserts that the tenure charges should be dismissed, because the District has not complied with certain requirements of TEACH NJ relating to the promulgation, approval and implementation of the District's evaluation process; requirements including piloting/testing, approval and establishment of an evaluation

rubric, teacher improvement processes and SIPs; and the application of such for a minimum of two school years - none of which school years may have occurred prior to the 2013-14 school year. As part of his argument, Respondent asserts that at least two post-2012-13 school year summative evaluations are a “prerequisite” for; (a) the Commissioner of Education to refer an efficiency case to an arbitrator for hearing and (b) the jurisdiction of an arbitrator to hear and consider tenure charges alleging inefficiency.

### **Sections 23 and 25 of TEACHNJ**

Sections 23 of TEACHNJ, among other things, establishes the extent of the authority of arbitrators relating to their consideration of, and rendering decisions upon, charges of teacher inefficiency. In this regard, Section 23 provides:

23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

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

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator’s determination as to the quality of an

employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

Sections 25 of TEACHNJ, concerns the responsibilities of superintendents, boards of education and the Commissioner of Education in evaluating and processing charges of inefficiency. Section 25 of the Act provides:

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

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

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

(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

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

c. Notwithstanding the provisions of N.J.S.18A:6-16 or any

other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall, 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.).

**TEACHNJ Grants Only Narrow Authority  
to Arbitrators in Inefficiency Cases**

Considering the above-quoted language of TEACHNJ, I am not persuaded by Respondent's argument. Section 23 of TEACHNJ establishes the authority of arbitrators in cases presenting questions of efficiency. Section 25 establishes the authority of the Commissioner of Education in cases presenting questions of efficiency. Section 25 c. (18A: 6-17-3(c), (ii)) grants the Commissioner of Education authority to make one of three determinations upon receipt of a charge of inefficiency filed under Section 25 a.; the Commissioner may (1) determine the evaluation process has been followed and refer the case to an arbitrator, (2) determine the evaluation process has not been followed and dismiss the charges, or (3) determine that based upon the submissions of the parties the Commissioner cannot conclusively determine one way or the other whether the evaluation process has been followed and consequently cannot determine that the evaluation process "has not been followed." Where the Commissioner refers a matter to an arbitrator, as the Commissioner has done here, after concluding that he cannot determine that the evaluation process has not been followed, I am of the view that the statute affirmatively directs the arbitrator to "hear the case" pursuant to Section 23 of the

Act. Section 25 is focused upon the authority of superintendents, boards of education and the Commissioner and with perhaps the exception of the assignment of a case to an arbitrator to “hear the case” nothing in Section 25 grants authority to arbitrators.

Considering the specifically described authority of arbitrators contained in Section 23 of the Act and the absence of any similarly enabling language in Section 25, I am persuaded that Section 25 does not confer authority upon the arbitrator to step into the shoes of the Commissioner and determine whether the District has complied with statutory requirements in the promulgation and implementation of the District’s evaluation process.<sup>2</sup> In this regard, it is widely recognized that an arbitrator’s authority is defined by the mutual grant of authority by the parties or, as in this matter, by statute. In either event the authority of an arbitrator is only as broad as the authority granted. In the instant matter, I am of the view that the authority grant to me by statute as arbitrator is limited. Considering the pointed and narrow grant of authority to me in Section 23 of the ACT, the statute offers me no authority to consider and rule upon the District’s compliance or non-compliance with provisions of the statute governing the promulgation and establishment of evaluation rubrics, SICs, CAPs, mentorship programs, etc. The Act assigns such tasks to the Commissioner.

The Commissioner’s referral of this matter to me was specifically pursuant to TEACHNJ Section 25 (N.J.S.A. 18A:6-17.3c) and no other Section of the Act, and grants me the narrow authority to determine the case under the provisions of Section 23 and no other.

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<sup>2</sup> In this latter regard, I note that the reference in Section 25 d. to the portions of the Act concerned with the promulgation and establishment of evaluation rubrics, like the other portions of the section, is addressed to the activities of superintendents, boards of education and/or the Commissioner, not arbitrators.

**The District Has Met Its Burden Under  
Section 23 of TACHNJ**

Of the four permissible areas of arbitrator consideration identified in Section 23 of the Act, I find there is plainly insufficient or no evidence in the record to establish that: (a) there is a mistake of fact in Respondent's 2012-13 or 2013-14 evaluations, (b) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law or (c) the District's actions were arbitrary and capricious. Based upon the arguments of the parties, the determinative issue here is whether or not Respondent's evaluations; "failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan." Contrary to the argument of Respondent, I find that the District adhered substantially to the District's 2012-2013 and 2013-2014 evaluation processes, including the corrective action plan adopted for Respondent in the 2013-2014 school year.

The Observation and Evaluations Process contained in the District's 2012-2013 Framework identified both required and recommended elements. The required elements for tenured teachers such as Respondent included one formal, full-period observation and Post-Observation conference within 10 calendar days and an Annual Evaluation. The process also included elements that were "Optional," "Recommended" and "Strongly Recommended." Thus, goal-setting conferences early in the school year were "recommended," partial period observations were "strongly recommended," pre-observation conferences were "optional" and mid-year review conferences were "strongly recommended." The record establishes that with regard to its evaluation of

Respondent in the 2012-2013 school year the District substantially adhered to the evaluation process. Respondent was given a partial period observation on October 24, 2012, a long observation on December 19, 2012, a mid-year evaluation on March 18, 2013 and an annual evaluation. Although the evidence established that the post-December 19, 2012-observation conference may have been delayed beyond the ten calendar days provided in the Framework, I do not find that any such delay or other minor deviation from the directives of the Framework materially affected the outcome of Respondent's 2012-2013 annual summative evaluation. This is particularly so under circumstances where, as here, the District also performed a short observation of Respondent and provided him a mid-year evaluation, thereby plainly doing more than the minimum required by the evaluation process.

The Observation and Evaluations Process contained in the District's 2013-2014 Framework required that Respondent, having received a Partially Effective for his 2012-13 annual summative evaluation, must have a CAP, and that teachers with a CAP must have at least two short observations and at least two long observations, at least one observation must be completed by a different observer, post-observation conferences after each observation, at least one pre-observation conference, a mid-year review conference and an annual evaluation. I find that with regard to its evaluation of Respondent in the 2013-2014 school year the District substantially adhered to the evaluation process. Respondent was given two short and two long observations not all performed by the same observer, had a corrective action plan that was the product of a collaborative effort between Respondent and vice principal Montes, received a mid-year evaluation and conference and an annual evaluation. Moreover, throughout the two years

at issue Respondent was provided a substantial amount of training and/or opportunity for training in the subject areas where he needed improvement, was given the opportunity for one-on-one conferences with administrators and had such conferences, had the opportunity to observe and partner with other teachers, had the opportunity to have his daily lesson plans reviewed by vice principal Montes and had resource materials identified for him that could assist him in improving his performance. Although the evidence is unclear in some cases when pre and post-observation conferences were held – as opposed to when they may have been signed-off by the teacher – the record establishes that they were held. Under the circumstances, I find that any degree of deviation from the directives of the Framework that may have occurred were insufficient to materially affect the outcome of Respondent’s 2013-2014 annual summative evaluation.

I find that the District adhered substantially to the evaluation process in both school years at issue.

### **Conclusion**

Considering I am precluded by the Act from reviewing the determinations relating to Respondent’s classroom performance made by the District’s evaluator’s and have found that none of the four reasons identified in Section 23 of the Act for dismissing the inefficiency charge against Respondent have been established, I conclude that the District has met its burden of establishing the truth of its tenure charge of inefficiency.

**AWARD**

The subject tenure charges against Respondent, Edward Newton are sustained.

Dated: March 23, 2015



Timothy J Brown, Esquire  
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 276-9/14 relating to tenure charges against Edward Newton on Monday, March 23, 2015.



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Timothy J Brown