STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

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In the Matter of Tenure Hearing of
Nancy Mastriana and the
School District of the Township
of Hillsborough, Somerset County

Agency Docket No. 233-8/15

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ARBITRATOR
Joseph Licata, Esq.

OPINION AND AWARD DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

APPEARANCES

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

Issued: October 9, 2015

FOR THE RESPONDENT
Edward A. Cridge, Esq.
Mellk & O'Neil

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 August 26, 2015, the Hillsborough Township Board of Education ("Petitioner" or "Board") filed with the New Jersey Department of Education, Bureau of Controversies & Disputes, tenure charges against Respondent, Nancy Mastriana, seeking to dismiss her from employment from her position as a Special Education/Resource Center Teacher at Hillsborough Middle School. The Charges were brought under N.J.S.A. 18A:6-17.3a(2) because Respondent received partially effective ratings in two consecutive years. On September 4, 2015, Respondent filed an answer to the Tenure Charges. On Wednesday, September 9, 2015, by overnight mail, the Director referred the case to the undersigned pursuant to N.J.S.A. 18A:6-16, as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109.* However, the referral letter, transmitted by the Director to the parties by way of regular mail, was not received by the Board Attorney until Friday, September 11, 2015 at approximately 3:00 p.m.

On September 11, 2015, at 4:23 p.m., less than 90 minutes after the Board received said correspondence from the Director, the Board provided Respondent with a list of witnesses together with summaries of their testimony. On September 23, 2015, Respondent filed the within motion, arguing that the Board allegedly failed to comply with the procedural requirements of N.J.S.A. 18A:6-17.1(b)(3) by failing to provide Respondent with a list of witnesses and summaries of their testimony upon referral of the matter from the Director to the undersigned on September 9, 2015. On October 2, 2015, Petitioner filed a letter brief in opposition to Respondent's motion for summary decision.

THE POSITIONS OF THE PARTIES

Respondent

Respondent argues that the District failed, "upon referral of the case to arbitration," to provide her with a list of its witnesses, and with a complete summary of the anticipated testimony of any such witness. As such, Respondent contends that the District is now statutorily precluded from proffering witness testimony at the hearing in this case. Respondent refers the undersigned to IMO Tenure Hearing of Charles Coleman, Agency Dkt. No. 169-7/14 (Arbitrator David Gregory). In that matter, Arbitrator Gregory opined: "the law is largely the history of procedure. It is indubitable----procedure matters." Respondent next summarizes the statutory scheme establishing the mandatory timeframes that govern TEACH NJ arbitration disputes. N.J.S.A. 18A:6-17.1(b)(3) provides that:

> Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses....[emphases added].

According to Respondent, N.J.S.A. 18A:6-17.1(f-h) reinforce the importance placed on these timelines:

> (f). Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.
>
> (g.). An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the time line for rendering a written decision within 45 days from the start of the hearing without approval from the commissioner...
>
> (h.). The commissioner may remove an arbitrator from an arbitration case or an arbitration panel if an arbitrator does not adhere to the timelines set forth herein without approval from the commissioner.

In construing the aforementioned statutory provisions, Respondent asserts "the arbitrator has no discretion to extend timelines, and an arbitrator who unilaterally extends a timeline can be removed from the case by Commissioner of Education."

Perhaps most definitive, notes Respondent, the statute contains no provision allowing for the extension of Petitioner's obligation to provide a list of witnesses upon referral of the case to an arbitrator under N.J.S.A. 18A:6-17.1(b)(3), even with the Commissioner's approval. Although, according to Respondent, no reported decision has yet addressed the application of the statute or the definition of the phrase "upon referral" as used therein, the plain meaning rule must govern. That is, unless the legislative intent instructs otherwise, the words and language at issue must be given their plain and ordinary meaning. Citing, Township of Pemberton v. Berardi, 378 N.J. Super. 430, 437 (App. Div. 2005). "Upon" is a preposition which has substantially the same meaning as "on". Webster's New World Dictionary, Third College Edition, p. 1466. (1988). In the temporal sense, "on" is defined as "at or during the time of". Id. at 946.

Given the plain meaning of the word "upon" and the strict timelines mandated by the statute, it is clear that the language "upon referral" means "simultaneous to" or "at the time of" the referral. If this were not the case, the statute, as it does with every other timeline, would undoubtedly have included a fixed time after the referral date for the submission of the District's statement of evidence. As such, Respondent contends that the District cannot present any evidence that is not furnished "upon referral of the case for arbitration." Here, the parties were notified by correspondence dated September 9, 2015 that the case had been referred to arbitration as of that date. Notwithstanding this, the District did not provide its witness list or testimony summaries until September 11, 2015. Accordingly, the Respondent urges the Arbitrator to issue an order barring the District from proffering witness testimony in support of the tenure charges at any hearing in this matter.

Perhaps in anticipation of Petitioner's opposition, Respondent opines that its' interpretation of the statute is not unfair to the District, nor impossible for the District to anticipate. The District was aware, as of September 3, 2015, that Respondent had filed an Answer to the Tenure Charges. The District also knew that, pursuant to N.J.S.A. 18A:6-17.3(c), that the Commissioner of Education was required, "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." As set forth in the referral letter from Director Duncan, the Commissioner received Respondent's Answer on September 4, 2015, and referred the case to arbitration in conformance with N.J.S.A. 18A:6-17.3(c).

Therefore, having received Respondent's Answer, the District knew that referral to arbitration was imminent, and was charged with providing its witness list and testimony summaries "upon" the September 9, 2015 referral date. It failed to do so.

Additionally, Respondent observes that the District is given as much time as it wants, prior to filing the tenure charges, to marshal its resources and prepare its evidentiary materials. If the District was not prepared to meet its obligations under the statute, it should have refrained from filing the tenure charges until it was prepared to do so. Conversely, notes Respondent, the statutory scheme provides an extremely limited window of time for the recipient of the tenure charges to prepare his or her defenses after receiving the District's statement of evidence. The statute cannot be interpreted to allow a board of education to shrink that window by failing to adhere to the strict timelines of N.J.S.A. 18A:6-17.1(b)(3). To do so would eviscerate the procedure which has been implemented to protect the due process rights of teaching staff members defending tenure charges under the extremely expedited timelines of the TEACH NJ Act.

In light of the foregoing, Respondent asks the Arbitrator to conclude that Petitioner is barred from presenting witness testimony. Since Petitioner has the burden of proof, Respondent further reasons that Petitioner cannot shoulder its burden in the absence of witness testimony. Therefore, Respondent seeks Summary Decision in its favor dismissing the tenure charges.

Petitioner

It is the Board's position that Respondent's interpretation of the statute is misguided as it fails to consider that "the fundamental requirement[] of procedural due process and administrative fairness... [is] adequate notice." In re Consider Distribution of Casino Simulcasting Special Fund (Accumulated in 2005), 398 N.J. Super. 7, 21 (App. Div. 2008) (emphasis added); see also High Horizons Dev. Co. v. Dep't of Transp., 120 N.J. 40, 53 (1990); George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 19–20 (1994); In re Dep't. of Ins.'s Order Nos. A89–119 & A90–125, 129 N.J. 365, 382 (1992); Cunningham v. Dep't of Civil Serv., 69 N.J. 13, 22 (1975). Essentially, Respondent argues that the Board failed to act when it had no notice whatsoever of its alleged obligation to act. If the Arbitrator were to interpret the statute in accordance with Respondent's contentions, the Board would be deprived of the fundamental requirement of procedural due process, which is "adequate notice."

The Board was first notified of the referral to an arbitrator at approximately 3:00 p.m. on September 11, 2015. Less than 90 minutes after the receipt of the referral for arbitration, the Board provided Respondent a list of witnesses and summaries of their testimony.[1] Although Respondent contends that the Board was required to furnish the list of witnesses and summary of their testimony on September 9, 2015, neither Respondent nor the Board were aware of the referral on September 9, 2015. Respondent's interpretation of the term "upon," as used in N.J.S.A. 18A:6-17.1(b)(3), would render the

[1] The Board does not concede that same-day transmission is even required after receiving notice, but did so simply because it was able and this issue has been discussed previously.

statute unconstitutional, as it would eviscerate the Board's fundamental right to due process.[2] As such, Respondent's interpretation of N.J.S.A. 18A:6-17.1(b)(3) is clearly erroneous and Respondent's motion should be denied, as the Board fully complied with the statutory requirement.

The Board respectfully requests the Arbitrator to employ "the oft-cited rule of statutory construction which holds that the purpose and reason for the legislation, considered as an integrated whole, should control rather than its literal terms." City of Newark v. Essex Cnty., 160 N.J. Super. 105, 113 (App. Div. 1978), aff'd, 80 N.J. 143 (1979); see also Loboda v. Clark Tp., 40 N.J. 424, 435 (1963); Schierstead v. Brigantine, 29 N.J. 220, 230-231 (1959); Westinghouse Elec. Corp. v. Board of Review, 25 N.J. 221, 226-227 (1957); Palkoski v. Garcia, 19 N.J. 175, 181 (1955); Caputo v. Best Foods, 17 N.J. 259, 264 (1955). In Alexander v. N. J. Power & Light Co., 21 N.J. 373 (1956), the Court aptly articulated the judicial role in interpreting legislative enactments:

> The statute is to receive a reasonable construction, to serve the apparent legislative purpose. The inquiry in the final analysis is the true intention of the law; and, in the quest for the intention, the letter gives way to the rationale of the expression. The words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms. The particular words are to be made responsive to the essential principle of the law. When the reason of the regulation is general, though the provision is special, it has a general acceptation. The language is not to be given a rigid interpretation when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the evident legislative design. The will of the lawgiver is to be found, not by a mechanical use of

[2] Even assuming for the sake of argument that the Arbitrator would accept Respondent's interpretation of the statutory timeline requirement (which he should not), Respondent fails to provide a single justification as to how she was prejudiced by receiving the list of witnesses and summary of their testimony 42 days as opposed to 44 days prior to the date of the previously scheduled October 23, 2015 hearing date in the within matter (which will now not even take place on that date).

> particular words and phrases, according to their actual denotation, but by the exercise of reason and judgment in assessing the expression as a composite whole. The indubitable reason of the legislative terms in the aggregate is not to be sacrificed to scholastic strictness of definition or concept. Wright v. Vogt, 7 N.J. 1, 80 A.2d 108 (1951). It is not the meaning of isolated words, but the internal sense of the law, the spirit of the correlated symbols of expression, that we seek in the exposition of a statute. The intention emerges from the principle and policy of the act rather than the literal sense of particular terms, standing alone.[Id. At 378-379.]

Additionally, Petitioner observes that a statute should not be interpreted in a manner that leads to absurd results. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). Here, Respondent's interpretation of N.J.S.A. 18A:6-17.1(b)(3) indisputably violates that fundamental canon of statutory construction, and leads to nothing other than an "absurd result." The Legislature could not have intended to deprive the Board of its fundamental right to due process by imposing upon it an obligation to act without notice. As such, the only sensible construction of N.J.S.A. 18A:6-17.1 that would serve the apparent legislative purpose would be to provide the Board with a reasonable opportunity to furnish the requisite documents to Respondent after notice of the case's referral to arbitration.

Additionally, Respondent's interpretation of the term "upon," as used in N.J.S.A. 18A:6-17.1(b)(3), becomes unequivocally erroneous upon closer examination of Title 18A of the New Jersey Statutes, which frequently provides for the use of "immediately upon" when the urgency of immediate or simultaneous action is required. Some of the numerous examples include:

> Notwithstanding any provision of P.L.1968, c. 410 (C.52:14B-1 et seq.) or any other law to the contrary, the commissioner may adopt, immediately

> upon filing with the Office of Administrative Law, such rules and regulations as the commissioner deems necessary. [N.J.S.A. 18A:37-32.1 (emphasis added)].
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> Upon the appointment of a former police officer of an educational institution, the appointing educational institution, county or municipal law enforcement agency, State law enforcement agency or the New Jersey Transit Corporation shall notify the former educational institution immediately upon the appointment of a police officer formerly with that institution and shall reimburse the institution within 120 days of the receipt of the certified costs. [N.J.S.A. 18A:6-4.12 (emphasis added)].
>
> A member of the board of trustees appointed to the board of governors pursuant to subsection b.ii. of N.J.S.18A:65-14 shall cease being a member of the board of trustees immediately upon taking the oath of office as a member of the board of governors. [N.J.S.A. 18A:65-15 (emphasis added)].

According to Petitioner, the above statues demonstrate that when the Legislature intends for the action to be taken "at the time of" or "immediately" with another action, it explicitly provides for such a requirement. In contrast, N.J.S.A. 18A:6-17.1(b)(3) merely states "upon referral of the case to arbitration" and not "immediately upon referral to arbitration," thereby providing for a reasonable opportunity, upon notice, for the Board to furnish the list of witnesses and summary of their testimony once the case is referred to arbitration.

Notably, the United States Court of Appeals for the Third Circuit, in United States v. Carson, 969 F.2d 1480, 1487 (3d Cir. 1992), interpreted the phrase "immediately upon" as used in 18 U.S.C.A. 2518(8)(a)[3] to mean "'as soon as was practical' and not instanter." (citing United States v. Vastola, 915 F.2d 865, 875 (3d Cir. 1990)). The Court proceeded to reason that "[i]f tapes are not sealed immediately, i.e., as soon as

[3] 18 *U.S.C.A.* 2518(8)(a) requires electronic surveillance tapes be sealed *"[i]mmediately upon* the expiration of the period of the order, or extensions thereof."(emphasis added).

administratively practical, they must be suppressed at trial...." Carson, 969 F.2d at 1487 (citing Vastola, 915 F.2d at 870)(emphasis added). In Carson, the Court discounted weekend days where a taping order expired on a Wednesday and the tapes were sealed the next Monday, and where order expired on a Thursday and the tapes were sealed the next Wednesday; in both instances, the Court held that the tapes were sealed "immediately." Id. at 1498.[4] As such, a delay of three to four days was interpreted to be in compliance with the statutory requirement of "immediately upon." Herein any "delay" was arguably two days long, and the statute in question does not even contain the term "immediately." If the Court of Appeals permitted a three to four day delay—plus a weekend—in a criminal case, where an individual's liberty and freedom are in jeopardy, to be in compliance with the term "immediately upon," an arguable delay of two days in an administrative proceeding such as this should unequivocally satisfy the requirement of "upon" as set forth in N.J.S.A. 18A:6-17.1(b)(3).

Petitioner reasons further that the Legislature clearly intended to provide the Board with a reasonable opportunity to provide Respondent with a list of witnesses and summary of their testimony after the referral of the case for arbitration, without setting a strict time limitation. Again, the Legislature has shown that it uses the phrase "immediately upon" when it seeks immediate action and it did not do so here. It was more than diligent in its efforts to timely provide Respondent the list of witnesses and

[4] While there were other tapes that were suppressed, with significant delays, the relevant part of the ruling in Carson applies to the tapes where the delays were only a few days long.

summary of their testimonies on the same day of receipt, which is not even required, thereby warranting denial of Respondent's motion.

Respondent also argues that the Board should have anticipated the charges would be referred to arbitration by September 9, 2015, in light of the fact that Respondent's answer was filed on September 3, 2015. However, such an argument clearly disregards the language of the statute which provides that "[t]he 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." N.J.S.A. 18A:6-17.3(c) (emphasis added). The language of the statute grants the Commissioner five days after the period provided for a written response, which is 10 days, not the time the answer was actually filed by Respondent. Since the 10th day for Respondent's answer fell on a Saturday, September 5, 2015, and September 7, 2015 was a national holiday, Respondent's answer was not due until September 8, 2015. See New Jersey Court Rule R.1:3-1. Therefore, the Commissioner was not obligated to refer the case to arbitration until September 14, 2015. It is disingenuous for Respondent to suggest that the Board should have anticipated that the Commissioner would refer this case for arbitration on September 9, 2015, when the Commission could have waited until September 14. Further, Respondent completely disregards the possibility (albeit remote) that the Commissioner might not have referred the case to arbitration,[5] and there can be no

[5] Which the Board believes would have been inappropriate given the weight of the evidence set forth in the Tenure Charges.

obligation to furnish the witness list or documents until referral actually takes place. Respondent has presented no valid argument that would warrant dismissal of this case, and therefore, Respondent's motion must be denied in its entirety.

Lastly, the Board submits that Respondent's attempt to have this case dismissed on alleged technicalities is against the public policy of this State. "Unquestionably it is the policy of our courts to decide cases on the merits." Essex Cnty. v. City of E. Orange, 214 N.J. Super. 568, 576 (App. Div. 1987); see also Dole v. Arco Chem. Co., 921 F.2d 484, 487 (3d Cir.1990)(discussing strong policy for deciding claims on the merits as opposed to technicalities); see generally, Wright & Miller, Federal Practice and Procedure: Civil §§ 2369, 2370 (1971). As such, in consideration of public policy and Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), the goal of which is to raise student achievement by improving instruction, the Board respectfully requests that the Arbitrator decide this case on the merits and deny Respondent's motion for summary decision.

OPINION

Initially, I have decided to address the motion in an exercise of discretion. The instant motion is treated as one for summary decision because an Answer, as opposed to a Motion to Dismiss, was filed. N.J.A.C. 6A:3-5.3. 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, Respondent did not meet the prerequisite filing with the Commissioner, but instead filed the motion after transmittal of the case to the undersigned. No relief is forthcoming from

the Labor Arbitration Rules of the American Arbitration Association, which does not provide a party 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 referral of the case from the Commissioner. This notwithstanding, in this case, I have elected to exercise discretion in favor of deciding the motion due to the novelty of the challenge raised.

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 Respondent's moving papers and the opposition filed by the Petitioner. Because the parties' respective positions do not raise a genuine issue of material fact, I am satisfied that summary decision is appropriate. For the reasons that follow, however, I must deny Respondent's motion for summary decision.

In my opinion, an examination of the relevant statutory text does not unambiguously answer the question as to when an initial referral, appointment, or

assignment of an arbitrator is deemed effective in connection with a board of education's simultaneous obligation to provide the prescribed evidence to a respondent. It is true that certain timeframes clearly commence from a discrete point in time or the occurrence of an event (illustrated by *underlined italics* below). This includes timeframes commencing "upon receipt" of a document. Since that language is not attached to the introductory sentence of N.J.S.A. 18A:6-17.1(b)(3) there is support for Respondent's motion based on the premise that the Legislature knew how to express such an intent and did not do so here. However, not all triggering points of pertinent timeframes are clearly expressed by the text of the statute. Obviously, where the legislation does not unambiguously fix a triggering point in relation to other timeframes, in my view, there is room for judicial or arbitral interpretation based on traditional canons of statutory construction (all timeframes deemed to lack a precise triggering point are set forth in **boldfaced type**).

> N.J.S.A. 18A:6-16, "Proceedings before commissioner; hearing"
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> *Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's 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.**
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> *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.

N.J.S.A. 18A:6-17.3, entitled, "Filing with the secretary of the board of education notice of a charge of inefficiency; procedural requirements", states:

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. . .**

N.J.A.C. 6A:3-5.1 (c) states:

.....

c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following procedures and timelines shall be observed:

1. When the conditions described in N.J.S.A. 18A:6-17.3.a(1) or (2) have been satisfied, the superintendent shall promptly file with the secretary of the district board of education a charge of inefficiency.

2. *The charges of inefficiency shall be transmitted to the affected tenured employee and the employee's representative, if known, within three working days of the date they were filed with the secretary of the district board of education or the State district superintendent. Proof of mailing or hand delivery shall constitute proof of transmittal.*

3. *The affected tenured employee shall have an opportunity within 10 days of receipt to submit to the district board of education or the State district superintendent a written statement of position under oath demonstrating how the school district failed to comply with the evaluation procedures.*

4. *Within 30 days of the filing, the district board of education or State district superintendent shall forward a written charge to the Commissioner unless the district board of education or superintendent determines the evaluation process has not been followed*. Such determination shall be made by a majority vote of the district board of education's full membership or by the State district superintendent.

5. *Upon receipt of the charge, the Commissioner or his or her designee shall examine the charge*. The charge shall again be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charges. **The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.**

6. Within five days of the individual's deadline to submit a written response to the charge, the Commissioner shall appoint an arbitrator to hear the case and refer the case to the arbitrator, unless he or she determines the evaluation process has not been followed.

N.J.S.A. 18A:6-17.1 states:

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S.18A:6-16, except as otherwise provided pursuant to P.L.2012, c. 26 (C.18A:6-117 et al.):

(1) **The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;**

(2) The arbitrator shall receive no more than $1250 per day and no more than $7500 per case. The costs and expenses of the arbitrator shall be borne by the State of New Jersey;

(3) **Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative.** The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. *At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative*. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. *Notwithstanding the provisions of N.J.S.18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.*

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The

determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.2A:24-7 through N.J.S.2A:24-10.

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

g. **An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner.** *An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval from the commissioner*. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

h. The commissioner may remove any arbitrator from an arbitration case or an arbitration panel if an arbitrator does not adhere to the timelines set forth herein without approval from the commissioner. If the commissioner removes an arbitrator from an arbitration case, the commissioner shall refer the case to a new arbitrator within five days. The newly-assigned arbitrator shall convene a new hearing and then render a written decision within 45 days of being referred the case.

As can be gleaned, the statutory text governing the triggering date for important timeframes is clear in some respects, but not so clear in others. Additionally, while I agree from a practical standpoint with Respondent's suggestion that the Board could have supplied the information prior to receiving notice of the referral to arbitration, in my opinion, N.J.S.A. 18A:6-17.1(b)(3), though ambiguous in some respects, plainly does not require a board to act prior to the referral. As to the ambiguity noted in boldfaced type above, it is presumed that there likely exist decisions of the OAL, Commissioner and/or Courts clarifying the timelines in question. To the best of my knowledge, the instant challenge under TEACH NJ presents a case of first impression. Having said this, however, with respect to TEACH NJ, one would surmise that the Legislature intended for

both parties to be fully informed as to their respective rights and obligations under the relatively new law. One would also be specifically inclined to conclude that the Legislature intended for both parties to have clear notice of the triggering date or event for the commencement of intertwined or reciprocal procedural timelines.

For example, a respondent knows that within ten (10) days of the date of the hearing, he or she must provide all evidence to the board's representative. Since the initial hearing date can be adjourned within (or, at times, outside of) the initial 45-day timeframe it is not uncommon for the 10 day window to be adjusted as well, thereby providing a respondent with even greater notice and opportunity. As such, it is hard to imagine that the Legislature intended to keep a board of education in suspense as to the effective date of referral, especially when the board must act upon that date or else be precluded from introducing evidence at arbitration. As Petitioner aptly observes, a statute should not be interpreted in a manner that leads to absurd results. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). Therefore, I am not inclined to conclude that the Legislature intended for a board of education 's obligations to provide evidence to commence on a date when it had no notice of the referral of the matter to arbitration.

The principle of reciprocity noted above would militate in favor of a conclusion that a board's obligation to provide the prescribed evidence must logically commence upon receipt of the notice of referral, especially where administrative practice is to mail the notice of referral (as opposed to facsimile or email) thereby making it impractical, if not impossible for a board to comply with N.J.S.A. 18A:6-17.1 (b)(3). To rule otherwise

would be tantamount to placing a ball and chain around the ankle of a board of education at the start of each and every case, making it even more difficult to remove a teacher for inefficiency under the new statutory schematic, as compared to the old -- which runs contrary to the core purpose of the new legislation. Thus, I find, an examination of the parties' respective arguments in light of the purpose of the new legislation supports the Board's interpretation.

Nonetheless, the lack of precise drafting concerning the language of 18A:6-17.1(b)(3) led to my examination of legislative history. As originally introduced on February 6, 2012 by Senator Ruiz, Senate Bill No. 1455 provided:

> Notwithstanding N.J.S.18A:6-17 or any other section of law to the contrary, any tenure charge transmitted to the Office of Administrative Law pursuant to N.J.S.18A:6-16 shall be adjudicated in an expeditious and timely manner as follows:
>
> a. The initial hearing on the charge shall commence within 30 days of its transmittal to the Office of Administrative Law.
>
> b. Upon transmittal of the charge, the employing board of education shall provide all evidence to the employee or the employee's representative. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely to the employing board of education or its representative. Both parties shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.
>
> c. Notwithstanding the provisions of N.J.S.18A:6-25 or any other section of law to the contrary, the final determination on the controversy or dispute shall be rendered within 30 days of the start of the hearing by the administrative law judge.

The preference for arbitrators in lieu of administrative law judges came about in a "The 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). The Substitute repeals section 1 of P.L.1998, c.42 (C.52:14B-10.1), which outlines the procedure when cases were referred to the Office of Administrative Law.

After reviewing the relevant legislative history, it is the opinion of this Arbitrator that the linguistic change from "upon transmittal of the charge" (to the Office of Administrative Law) to "upon referral of the case for arbitration" does not represent a legally significant change regarding the subject of notice or, as Petitioner phrases it, "due process." An examination of predecessor statutes and OAL regulations governing the transmittal of a contested case from the Commissioner of Education is suggestive of the legislative intent concerning the exchange of discovery in this matter, i.e., that "upon referral" was intended to mean upon receipt of the notice of referral. N.J.S.A. 52:14B-10.1. "Adjudication of cases under the Tenure Employees Hearing Law" is directly on point:

> Any statute, rule or regulation to the contrary notwithstanding, all contested cases, as defined in section 2 of P.L.1968, c. 410 (C.52:14B-2), except those cases in which criminal charges are also filed, arising under the Tenure Employees Hearing Law, article 2 of chapter 6 of Title 18A of the New Jersey Statutes, and referred to the Office of Administrative Law shall be adjudicated pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), in an expeditious and timely manner except as follows:
>
> > a. *The discovery process shall begin immediately upon the notice of the referral of the case to the Office of Administrative Law and a discovery request shall be initiated by transmitting the request to a receiving party within 30 days of receipt of the notice of referral*. Answers to a discovery request shall be made within 30 days of the receipt

> of the request, except that if the discovery is available only by motion, the answer shall be due within 30 days of receipt of an order granting the motion. Additional discovery shall be permitted by motion or upon the consent of the parties, but shall be filed with the administrative law judge within 10 days of the filing of the answers to interrogatories. The administrative law judge may extend discovery time by no more than 30 days for disputes over sufficiency, completion or other just cause.

N.J.A.C. 1:6B-10.1, the time period for exchanging discovery, commences upon "receipt" of the notice of referral.

> (a) *The parties shall commence discovery immediately upon receipt of the notice of referral*.
>
> (b) A party may notify another party to provide discovery by one or more of the following methods: written interrogatories; production of documents or things; permission to enter upon land or other property for inspection or other purposes; and requests for admissions. *These discovery requests shall be initiated by transmitting the request to the receiving party within 30 days of receipt of the notice of referral*.

As the predecessor statute and regulation implicitly recognize, a party cannot assume responsibility for meeting a legally significant discovery timeline absent notice of the event that triggers the timeline. Therefore, it is not the Commissioner's referral of the case to the OAL that triggers the timeframes governing the parties' respective discovery obligations, but rather it is the receipt of notice of referral that governs. Because nothing in the legislative history underlying N.J.S.A. 18A:6-17.1(b)(3) suggests that the drafters would have had a reason to obliterate such a fundamental principle of due process, I am inclined to conclude that the predecessor notice requirement was intended to continue in the new legislation. Therefore, logic, statutory purpose, and legislative history favor the

Board's interpretation that it was not obligated to comply with its discovery obligations until it received notice of the September 9, 2015 referral letter on September 11, 2015.

Finally, I take notice that the Commissioner or Director can always change the method of transmittal of the notice of referral to both the arbitrator and the parties from regular mail to email and/or facsimile in order to reconcile any discrepancy between the operative statutory language and internal administrative practice. Certainly, the Legislature could not have intended to severely handicap a board of education's ability to present its case to an arbitrator based on the method of transmittal used by the Commissioner. In contrast, if the delay in compliance with N.J.S.A. 18A:6-17(b)(3) could be attributable to a board representative, then an opposite conclusion would be warranted. In the case before me, however, it is not disputed that the Board acted immediately upon its' September 11, 2015 receipt of the Director's September 9, 2015 notice of referral.

Based on the foregoing, I deny Respondent's motion to bar Petitioner from presenting the evidence that it submitted to Respondent on September 11, 2015.[6] I correspondingly deny Respondent's Motion for Summary Decision.

[6] In light of the facts of this matter, I need not determine whether a board of education is entitled to an additional "reasonable period of time" following receipt of the notice of referral to comply with N.J.S.A. 18A:6-17.1 (b)(3).

AWARD

Based on the foregoing, I deny Respondent, Nancy Mastriana's motion to bar Petitioner, Hillsborough Board of Education from presenting the evidence that it submitted to Respondent on September 11, 2015. I correspondingly deny Respondent's Motion for Summary Decision.

Respectfully submitted,

Joseph Licata

Dated: October 9, 2015

State of New Jersey)
) :SS
County of Bergen)

On the 9th day of October, 2015, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public

JOSEPH KIM
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES AUGUST 22, 2016