

STATE OF NEW JERSEY  
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Elena Brady:

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THE STATE OPERATED SCHOOL DISTRICT  
FOR THE CITY OF NEWARK

Agency Dkt No.  
121-5/15

Petitioner,

- and -

ELENA BRADY

Respondent.

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**DECISION ON  
MOTION TO DISMISS  
AND/OR SUMMARY  
DECISION**

**Before: Joyce M. Klein, Arbitrator**

Appearances:

**For the Petitioner:**

Ramon E. Rivera, Esq.  
Christine M. Michaelson, Esq.  
Scarinci & Hollenbeck

**For the Respondent:**

Richard A. Friedman, Esq.  
Colin Lynch, Esq. on the Brief  
Melissa A. McAleer, Esq. on the Brief  
Zazzali, Fagella, Nowak,  
Kleinbaum & Friedman, P.C.

On or about August 22, 2014, the District served a Notice of Inefficiency on Respondent. With that Notice, Debora R. Weaver, Principal at the State Operated School District for the City of Newark's (District) Lincoln School, filed notice of charges based on 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.A.C. 6A:3-5.1 against Respondent Elena Brady (Respondent). Then District Superintendent Cami Anderson certified

tenure charges against Respondent and filed those charges with the Department of Education on September 18, 2014.

On December 7, 2014, I dismissed those charges in accordance with N.J.S.A. 18A:6-17.3(c) and N.J.A.C. 6A:3-5.1(c). In doing so, I found:

For the reasons stated herein, I determined that Respondent's Motion to Dismiss the inefficiency charges is properly before me for decision. The Respondent's Motion to Dismiss the tenure inefficiency charges under N.J.S.A. 18A:6-17.3 is granted. Respondent has established that N.J.S.A. 18A:6-17.3 does not provide for consideration of her 2012-2013 year summative evaluations for purposes of tenure revocation. The timeline established by N.J.S.A. 18A:6-123(c), (d) and (e) specifically requires full implementation of the new evaluation rubric "[b]eginning with the 2013-2014 school year." The regulatory scheme that became effective in March of 2013, as well as guidance issued by the Department of Education supports the finding that the 2012-2013 school year summative evaluations using the evaluation rubric required by TEACHNJ may not be used for purposes of tenure revocation pursuant to N.J.S.A. 18A:6-17.3. The District's pleadings do not include a basis for considering the tenure inefficiency charges pursuant to N.J.S.A. 18A:6-16.

On March 31, 2015, Debora R. Weaver, Principal at the District's Lincoln School, filed "charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 against Respondent. The District served Respondent with an Amended Notice of Inefficiency Charge on or about March 31, 2015. This notice provided in part:

The above charge is supported by the Statement of Evidence previously submitted under oath by DEBORA R. WEAVER dated August 22, 2014 and filed with the New Jersey Commissioner of Education on or about September 22, 2014.

Respondent filed a written response on April 20, 2015. On May 29, 2015, then District Superintendent Cami Anderson certified amended tenure charges against Respondent and filed those charges with the Department of Education. No new evidence or factual allegations were submitted with the Amended Tenure Charges.

On June 19, 2015, Respondent filed a Motion to Dismiss or for Summary Decision with David Hespe, Commissioner of Education. Also on June 19, 2015, Respondent filed an answer to the tenure charges. On June 23, 2015, M.

Kathleen Duncan, the Director of Bureau of Controversies and Disputes advised the parties that:

... following receipt of respondent's answer and motion for summary decision or to dismiss on June 19, 2015, the above-captioned tenure charges – which have been docketed as new charges and which are being processed with respect to Section 8 inefficiency charges only – were reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of the motion for summary decision/to dismiss, and should it be denied, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges which are not dismissed as the result of a motion under the preponderance of the evidence standard.

On July 14, 2015, the District filed a brief in Opposition to Respondent's Motion to Dismiss or for Summary Decision. On July 27, 2015, Respondent filed a brief in response to the District's Opposition to its Motion to Dismiss or for Summary Decision.

### **DISCUSSION**

Respondent seeks dismissal of the tenure charges filed against her by the District asserting initially that it is bound by the Opinion and Award dated December 7, 2014 which barred the District from proceeding against her based on Section 8 or any other section of the TEACHNJ Act. Respondent emphasizes that the inefficiency charges here rely upon the exact same facts and the exact same evidence as was included in the initial charges, which were dismissed. Respondent emphasizes that the District has not sought to vacate the December 7, 2014 Award and the time for vacating that Award is long since past.

The District asserts that it filed amended tenure charges for inefficiency against Respondent based upon her "consistent lack of improvement and receipt of poor evaluation ratings of 'ineffective' and 'partially effective.'" pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1(b).

The District emphasizes that when Respondent's Motion to Dismiss was granted, the Motion was limited to the District's then filed tenure charges pursuant to Section 25 (N.J.S.A. 18A:6-17.3) and prohibited the District from advancing the charges to arbitration under Section 8 (N.J.S.A. 18A:6-16) as part of the same proceeding. Now, the District emphasizes the amended tenure charges invoking Section 8 are not part of the same proceeding and that issue was not addressed in the December 7, 2014 Opinion and Award.

As a result, the District has filed these amended tenure charges based on a charge of inefficiency under Section 8 of TEACHNJ because Respondent's evaluations for the 2012-2013 and 2013-2014 school years were "ineffective" and "partially effective." The District argues that if it is unable to pursue tenure charges for Respondent or any teacher for the 2012-2013 and 2013-2014 school years, Respondent and other similarly situated teachers would get a "free pass" for her performance during this time period.

Initially, Respondent asserts that the District's amended charges are untimely and thus must be dismissed. Assuming for the sake of argument that the District filed new charges, Respondent asserts that those charges have not been filed in a timely manner under either Section 25 or Section 8 of TEACHNJ and thus they must be dismissed. Specifically, Respondent argues that neither the statutory nor the regulatory scheme includes a procedure for the amendment of tenure charges, whether for inefficiency or for conduct unbecoming. Respondent asserts that by its amendment of previously dismissed charges, the District ignores the procedural protections outlined in both the statutory and regulatory scheme and is essentially attempting "an end run" around those procedures. Respondent emphasizes that the notice of tenure charges was initially proffered pursuant to Section 25 in August of 2014 and she filed a statement of position with the State District Superintendent in response in September of 2014. Respondent's Motion to Dismiss was granted on December 7, 2014. The District then had a three month period of time which was consensually extended for three weeks within which the District could have moved to vacate the Award but did not do so and that period expired on or about March 30, 2015. At this juncture, the District has filed "new" charges, that Respondent maintains, are simply a rehash of the same charges of "inefficiency" complete with the same statement of evidence and exhibits despite the fact that those charges have been dismissed.

Respondent argues that whether the current charges are filed pursuant to Section 25 of TEACHNJ or Section 8 of TEACHNJ or both is irrelevant because it is too late for the charges to be brought at all. Because the charges were certified in September of 2014, and the District was required to file charges against Respondent with the Commissioner of Education within thirty (30) days of filing with the State District Superintendent, the current charges are outside that time period and are thus untimely under TEACHNJ.

Respondent asserts further that if the charges are deemed to be filed under Section 8 of TEACHNJ, they are still untimely because the District filed charges with the State District Superintendent on May 29, 2015 based upon the identical facts and allegations as in the previous charges and pursuant to N.J.S.A. 18A:6-13, the District was obligated to vote on whether to file charges under Section 8 within forty-five (45) days of receiving Respondent's response to the charges and then subsequently was required to file those charges with the

Commissioner within fifteen (15) days of making its decision. Because it did not do so, Respondent asserts the charges were filed outside the applicable timeframe and thus were untimely. Respondent asserts that the statutory and regulatory timeframes are designed to protect the due process rights of those subject to tenure charges and by belatedly amending its earlier charges, the District violates Respondent's due process rights.

The District contends that the tenure charges were timely filed pursuant to N.J.S.A. 18A:6-13 and N.J.A.C. 6A:3-5.1. Noting that Respondent concludes that the State-appointed District Superintendent completed a Certification of Determination outside of the applicable time limit for tenure charges filed under Section 8, the District points out that N.J.S.A. 18A:6-13 addresses a board of education's obligation to make a probable cause finding within forty-five (45) days and provides "[i]f the board does not make such a determination within 45 days after receipt of the written charge, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon." The District notes that N.J.A.C. 6A:3-5.1 provides that this time limitation does not begin until Respondent has filed a response to the notice of tenure charges or until the fifteen (15) day time period in which to do so has expired. In this instance, the District points out that Respondent filed a written response to the amended tenure charges on April 20, 2015 so, according to the District, under N.J.A.C. 6A:3-5.1(b)(4) the District had forty-five (45) days from April 20, 2015 to make a determination as to the probable cause as to the amended tenure charges. The District points out that it determined that there was probable cause and the State-appointed District Superintendent completed the certification on May 12, 2015, well within the forty-five (45) day limitation.

The TEACHNJ Act does not include an express provision for the amendment of tenure charges filed under Section 8 or Section 25. Respondent would base all time limits on the initial certification of charges in September of 2014. Absent a provision addressing the time for filing amended charges, such amendments must be viewed under the circumstances of their filing. The Commissioner of Education referred the charges to me with the direction that they "have been docketed as new charges." Regardless of the merits or other procedural issues that have arisen out of these charges, they were docketed as if they were new charges and shall be treated as such for purposes of evaluating timeliness.

In this instance, an Amended Notice of Inefficiency Charges was filed on March 31, 2015. Respondent filed a written response on April 20, 2015. The District Superintendent certified those charges and filed the amended tenure charges with the Department of Education on May 29, 2015. This is within forty-five (45) days after the Respondent's response as provided in N.J.A.C. 6A:3-5.1(b)(4) for a probable cause finding. N.J.A.C. 6A:3-5.1(b)(6) permits the State District Superintendent an additional fifteen (15) days to file charges with the

Commissioner of Education. In this instance, the District's Superintendent filed charges with the Commissioner of Education within the permitted forty-five (45) days. Accordingly, I find the amended tenure charges of inefficiency timely.

Respondent raises three alternate theories revolving around the fact that Respondent's initial tenure charges for inefficiency were dismissed in the December 7, 2014 Award. Respondent argues that the Law of the Case Doctrine, the doctrine of *res judicata* and the Entire Controversy Doctrine all require dismissal of the District's amended charges.

Respondent would rely upon the Law of the Case doctrine which "[r]equires judges to respect unreversed decisions made during the trial by the same court or a higher court regarding questions of law." Sisler v. Gannett Co., 222 N.J. Super. 153 (App. Div. 1987) (citing State v. Reldan, 100 N.J. 187, 203 (1985)), Respondent emphasizes that the Law of the Case doctrine avoids re-litigation of the same issue. In this instance, Respondent emphasizes the issue has already been decided so the amended charges should be controlled by the December 7, 2014 Opinion and Award.

Respondent argues that the District's effort to proceed under Section 8 of the TEACHNJ Act was rejected unequivocally in the December 7, 2014 Award. Nonetheless, Respondent asserts that the District has disregarded this ruling and certified amended charges against her based upon the same facts and occurrences that were initially rejected. Respondent argues that the fact that the District's claim has been rejected in this case and has not been challenged through an action to vacate should be sufficient to end this case.

In the event that the charges are treated as "new" charges, Respondent argues that they are barred as a matter of law under the doctrine of *res judicata*. Noting that *res judicata* contemplates that once a controversy has been "fairly litigated and determined", it may not be re-litigated. Respondent emphasizes that *res judicata* is a mandatory doctrine that must be applied to bar a party from re-litigating an issue that has already been fully disposed of in a new case. Citing Elkouri and Elkouri, How Arbitration Works (6<sup>th</sup> Ed. 2003), Respondent notes that the "issuance of an arbitration award generally bars any subsequent court or arbitration action on the merits of the same event." In this instance, since the charges have been dismissed, Respondent argues *res judicata* requires that the new charges be dismissed because the underlying facts have not changed. Further, Respondent argues whether the current charges are characterized as "amended" charges or "new" charges the issue has been litigated, the parties are the same and both sets of charges arise out of the same transaction or occurrence as the dismissed charges, thus requiring their dismissal under the doctrine of *res judicata*.



Respondent also argues that the District's amended charges are barred by the entire controversy doctrine, which bars the District from bringing "amended" or "new" charges based upon the same facts and occurrences at this point in the proceedings. Emphasizing that the entire controversy doctrine requires that courts determine an entire controversy in a single judicial proceeding whenever possible including the joinder of related claims and persons, Respondent emphasizes that New Jersey Court Rule 4:30-A provides in pertinent part:

[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine.

Because the District has fully litigated the tenure charges based upon Respondent's evaluation for 2012-2013 and 2013-2014 school years, Respondent asserts it cannot now re-litigate the case. Citing Arbitrator Gerber's decision in In the Matter of Tenure Charge of Inefficiency of Leonard Yarborough and School District of the City of Newark, Agency Docket No. 69-3/15 (June 8, 2015, Arb. Gerber), Respondent emphasizes that he held that when tenure charges based upon Section 25 were dismissed, the entire controversy doctrine precluded the District from filing new charges based upon Section 8.

Turning to the question of whether inefficiency charges for the 2012-2013 and 2013-2014 school years may be brought under Section 8, Respondent argues that under TEACHNJ inefficiency tenure charges may be brought only under Section 25. Therefore, the District's charges must be dismissed. Respondent cites the guide to the TEACHNJ Act issued by the Department of Education, which it contends provides that "inefficiency" charges are governed exclusively by Section 25. Among the dramatic changes to the tenure revocation process recounted by Respondent, the substitution of the former ninety (90) day improvement period during which teachers were provided notice of "inefficiency" and an opportunity to improve was replaced with a new Section 25 specifically addressing charges of inefficiency where teachers receive ineffective or partially effective annual summative ratings in two consecutive years. As a result of this statutory change, Respondent emphasizes the new regulatory framework was developed and partially implemented during the 2012-2013 school year and finalized with the beginning of the 2013-2014 school year. Respondent asserts that the tradeoff which provides teachers who may be subject to removal based upon only two years of inadequate performance with a quick and more limited review in exchange for a well-defined, streamlined discharge procedure, transparent and uniform observation and evaluation guidelines, processes and procedures and transparently uniform tenure removal procedures for claims of inefficiency.

Respondent asserts that under TEACHNJ, the legislature created a specific and exclusive definition of teacher "inefficiency" and provided a detailed statutory scheme for the filing of tenure revocation charges based upon that definition. At the same time, when the Department of Education implemented new regulations under TEACHNJ covering the filing and processing of tenure charges, it created a track for "inefficiency charges" and a separate track for other charges including "conduct unbecoming" and other misconduct charges. N.J.A.C. 6A:3-5.1. Respondent emphasizes that there is no provision for the filing of inefficiency charges under Section 8 rather than under Section 25.

Respondent cites the guidance issued by the Department of Education regarding the impact of the new law on "tenure decisions" addressing whether the summative ratings for the 2012-2013 year would count towards tenure decisions. Respondent cites the guidance, which provides "no evaluation outcomes in the 2012-2013 school year will impact tenure decisions. 2013-2014 is the first year when the statewide system will be in place and the first year when the summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start." Respondent emphasizes that under the new limited scope of review of teacher evaluations and the limitations on defenses included in Section 23 of TEACHNJ, teachers are no longer able to challenge an evaluation which complies with the proper procedures. Respondent argues that by seeking to file under Section 8, the District would interpret N.J.S.A. 18A:6-17.2 and 17.3 as optional. In other words, Respondent asserts that under the District's theory, if it fails to comply with the applicable procedures required to file charges under Section 25, it may ignore that section completely. Respondent suggests that if this is the case, the legislature's efforts to streamline tenure proceedings are ineffective because in creating TEACHNJ the legislature eliminated the ninety (90) day improvement plan previously included in Section 8 for purposes of providing teachers with notice and an opportunity to cure their performance. Respondent points out that a ninety (90) day improvement plan is superfluous with the new "corrective action plan" required by TEACHNJ. In other words, using Section 8 to process inefficiency charges would allow the District to ignore its obligation to have a CAP without affording the teacher a ninety (90) day notice period and opportunity to improve their performance.

Turning to arbitral precedent, Respondent notes the District's efforts to amend charges dismissed under Section 25 in order to pursue them under Section 8. Respondent emphasizes that the majority of arbitrators have rejected this argument. Respondent cites In the Matter of the Tenure Charge of Inefficiency of Ursula Whitehurst and the State Operated School District of the City of Newark, Agency Docket No.: 282-9/14, (Arbitrator R. Simmelkjaer), In the Matter of the Tenure Charge of Inefficiency of Neil Thomas, State Operated School District of the City of Newark, Agency Dkt. No.: 244-9/14 (Arbitrator R. Simmelkjaer), In the Matter of the Tenure Charge of Inefficiency of Sandra Cheatham, School District of the City of Newark, Docket No.: 226-8/14 (Arbitrator



S. Bluth October 16, 2014), In the Matter of the Tenure Charges Against Elena Brady, State Operated School District for the City of Newark, Dkt. No. 270-9/14 (Arbitrator J. Klein, December 7, 2014), In the Matter of the Tenure Charges Against Linda Kelly-Gramble, State-Operated School District of the City of Newark, Docket Nos. 226-9/14 (Arbitrator M. Pecklers).<sup>1</sup>

Relying upon the principle of statutory construction that where two statutes address a subject and one statute addresses the subject with specificity and the other statute deals with the subject generally, the specific statute controls, Respondent asserts that the purpose of TEACHNJ is to separate inefficiency charges from other types of charges and keep them procedurally and substantively distinct from charges brought under Section 8. Respondent points out that Section 25 requires the District to comply with the new evaluation system. Respondent asserts that there is no provision for inefficiency charges to proceed to arbitration under Section 8 as a fallback or alternative or for a district to disregard the requirements in Section 25. Giving meaning to all words and phrases, Respondent points out that there is no evidence that the legislature intended to revamp the tenure revocation system for inefficiency and then allow school districts to bring charges under Section 8 if they were unsuccessful under the revamped Section 25.

Respondent emphasizes that is the District sought to file statutory tenure charges against her on statutory grounds other than inefficiency, it was free to do so last year in accordance with the requirements of Section 8 but it did not do so. Respondent contends that the District is not free to file Section 25 charges, lose and then seek to re-file the same charges under Section 8.

The District argues that the Law of the Case doctrine is discretionary and does not apply in the case of an "ambiguous or uncertain decision" and applies usually only "where a judge must decide whether a ruling made during one stage of the action is binding throughout the remainder of the trial." Sisler v. Gannett Co., Inc., 222 N.J. Super. 153, 159 (App. Div. 1987), cert. denied, 110 N.J. 304 (1988) (citing Procanik v. Cillo, 206 N.J. Super. 270, 293 (Law Div. 1985)). In this case, the initial tenure charges against Respondent were dismissed on a procedural issue regarding Section 25 of TEACHNJ without review in support of the charges or analyze the legal sufficiency of the District's legal position. Further the Opinion and Award in this matter was ambiguous with regard to using the authority of Section 8 to bring charges, holding only that the charges could not proceed to an analysis under Section 8 in this proceeding. Because the substance of the District's underlying charges has not been litigated, if the matter proceeds to a hearing on the merits, it will be the first opportunity for the parties to argue their positions with respect to the subject of the allegations against the

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<sup>1</sup> Respondent provided additional examples of awards issued in August of 2015. Because the District did not have an opportunity to address those more recent awards, I do not address them.

Respondent. Accordingly, the District asserts that this issue has not been argued let alone re-litigated. For these reasons, the District asserts that the Law of the Case doctrine is inappropriate and should not be applied in this case.

The District asserts that the doctrine of *res judicata* does not apply to preclude litigation of the current charges because the issue has not been litigated in a prior proceeding and the doctrine of *res judicata* applies only to a valid and final adjudication on the merits of a claim. Restatement (Second) of Judgments, § 27, (1982). Because the merits of the amended tenure charges against Respondent have not been adjudicated, the defense of *res judicata* does not apply, according to the District. Because the charge under Section 8 (N.J.S.A. 18A:6-16) was not addressed on the merits, the District maintains that the Section 8 charge has not been adjudicated. The District argues that even if it is bound by the December 7, 2014 Opinion and Award, that decision does not preclude it from bringing the amended tenure charges because that decision did not address the charge now presented under Section 8.

Assuming for the sake of argument that the merits of Respondent's inefficiency charge had been litigated, pursuant to § 28 of Restatement (Second) of Judgments, *supra.*, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstance:

The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws...

The District argues that unless it is able to proceed with tenure charges under Section 8, the evaluations during the 2012-2013 period cannot be used at all for purposes of tenure charges. This result, according to the District, would result in an inequitable administration of TEACHNJ, which was promulgated to streamline the tenure charge process. The District also notes that absent TEACHNJ the District would simply have charged Respondent under Section 8. As a result of the enactment of Section 25, the District points out that the evaluations of 2012-2013 are rendered meaningless. So, the District argues that pursuant to Restatement (Second) of Judgments, *supra.*, § 28, this matter must proceed to a hearing even if the issues presented here have already been litigated and received a final judgment.

The District asserts that the entire controversy doctrine does not apply to preclude the amended tenure charges. Emphasizing that the previous charges against Respondent were dismissed based upon the arbitrator's interpretation of TEACHNJ, which she determined does not allow for evaluations from the 2012-2013 school year to be considered in tenure charge matters under Section 25.

The District maintains that this is not a conclusive determination of the legal controversy between the parties and dismissal of these charges would not achieve an equitable result because the District would be unable to bring tenure charges against any teachers based upon their poor evaluations in the 2012-2013 school year. Further, the District asserts that the tenure charges do not constitute duplicative litigation because the merits of the charges have not been heard. The District maintains that this is not a situation where the District lost on the merits of the previous tenure charges and now seeks to re-file.

The District asserts that the arbitrator has jurisdiction to decide this matter for inefficiency under Section 8 of TEACHNJ and inefficiency tenure charges are not limited to being filed only under Section 25 of TEACHNJ. The District asserts that the contention that the legislature intended that inefficiency charges can proceed only under N.J.S.A. 18A:6-17.3 is tantamount to arguing that the legislature intended to hand poorly performing teachers a "free pass" for two years after the effective date of the Act. The District notes that this has been rejected by several arbitrators. (IMO the Tenure Hearing of Henchey and the School District of the Borough of New Milford, Bergen County, Agency Dkt. No. 8-15 (January 3, 2015)).

The District also notes that arbitrators who dismiss charges under Section 25 have suggested dismissal might not have been required if the charges had been filed under Section 8. (In the Matter of the Tenure Hearing of Williams, Agency Dkt. No. 501-14 (December 20, 2014)). Citing the Henchey and Williams awards, the District asserts that where Section 25 of TEACHNJ is inapplicable, a school district must be permitted to proceed with an inefficiency charge in an appropriate case and N.J.S.A. 18A:6-16 provides a statutory basis to do so. The District points out that since TEACHNJ's adoption, arbitrators have considered charges of inefficiency in non-mandatory cases pursuant to N.J.S.A. 18A:6-16. IMO Tenure Hearings of Lawrence E. Hawkins and the State Operated School District of the City of Newark, Dkt. No. 243-10/13 (March 10, 2014). The District points out that under N.J.S.A. 18A:6-16 the arbitrator is required to determine whether the evidence in the record presented supports the charge of inefficiency and the Commissioner had the authority to determine procedural issues pursuant to N.J.S.A. 18A:6-17.3. To that end, the District cites Pugliese v. State-Operated School District of the City of Newark, Dkt. No. A-0857-13T2; Chavez v. State-Operated School District of the City of Newark, Dkt. No. A-1012-13T2 (App. Div. May 19, 2015), which held that the Commissioner must determine the appropriate standards to be used by arbitrators when adjudicating tenure hearings. In this instance, the District points out that on June 23, 2015 the parties were advised that the matter was to proceed based upon Section 8 inefficiency charges only.

The Law of the Case doctrine is a discretionary principle of law designed to prevent parties from relitigating issues that have already been decided. In the December 7, 2014 Award, I found that Section 25 did not allow the District's revocation of tenure charges to go forward based upon summative evaluations for the 2012-2013 and 2013-2014 school years. In this amended charge, the District seeks to move forward on the same inefficiency charges, but under Section 8 (N.J.S.A. 18A:6-16). The December 7, 2014 Opinion and Award provided that there was "no basis for proceeding under N.J.S.A. 18A:6-16" based upon the pleadings, thus did not reach the question of whether the District could have proceeded under N.J.S.A. 18A:6-16 had that been included in the initial proceeding. Because the question of whether the District could proceed to bring tenure charges for inefficiency against Respondent under Section 8 was not directly addressed, I find that the Law of the Case doctrine does not apply to preclude a discussion of its application to the inefficiency charges brought against Respondent.

The doctrine of *res judicata* provides an affirmative defense that prohibits the same parties from "litigating a second lawsuit on the same claim...that could have been—but was not—raised in the first suit." Elkouri & Elkouri, How Arbitration Works (6<sup>th</sup> Ed. 2003) p. 387. *Res judicata* applies where the claim is fully disposed of in the first case. Here, the issue previously decided was whether the tenure charges of inefficiency for the 2012-2013 and 2013-2014 school years could proceed under Section 25. Now, the District seeks to address the same charges under Section 8. Since the initial case decided only whether the charge of inefficiency could proceed under Section 25, the matter has not been fully decided and is not subject to dismissal under the doctrine of *res judicata*.

New Jersey Court Rule 4:30a provides, "[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine." The Entire Controversy Doctrine requires that courts determine an entire controversy in a single judicial proceeding whenever possible. Arbitrator Gerber addressed the application of the Entire Controversy Doctrine to instances where the District has amended initially dismissed tenure charges to seek tenure revocation based upon inefficiency under Section 8.

The Entire Controversy Doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings. There was nothing to prevent the District from alternatively pleading a count of inefficiency under Section 8 in its initial papers.

IMO Tenure Charge of Inefficiency of Leonard Yarborough and School District of the City of Newark, Agency Docket No. 69-3/15 (June 8, 2015, Arb. Gerber), p. 16.

In this case, during the initial pleadings, the District argued that it should, in the alternative, be permitted to proceed under Section 8, but did not include it in its pleadings or amend its pleadings to include tenure revocation under Section 8. With the amended charges, the District seeks a second chance to pursue the exact same charges of inefficiency against Respondent as were dismissed under Section 25. The charges of inefficiency were dismissed pursuant to Section 25 in large part because the statute did not contemplate that such charges would be brought before the new procedural process to evaluate tenure charges for inefficiency was implemented. In this instance, the District seeks to apply those same standards pursuant to Section 8. The District points out that the December 7, 2014 Award was not a "conclusive determination of the legal controversy" and thus the doctrine does not apply here. As noted previously, the District could have included Section 8 in its initial pleadings. The District has not proffered a reason why it did not do so. As the District has pointed out, the objectives of entire controversy doctrine include encouraging "the conclusive and comprehensive determination of a legal controversy" and promotion of "judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation." Under these circumstances, the District's amended tenure charges have not met the objectives of the entire controversy doctrine. By not including Section 8 in its initial pleadings, the District deprived the parties of the opportunity to receive a conclusive and comprehensive determination of whether the tenure charges of inefficiency against Respondent could properly proceed to hearing. Instead, when its initial charges pursuant to Section 25 were dismissed, it filed amended charges under Section 8, seeking a second chance to pursue the same charges of inefficiency against Respondent. Accordingly, I find that the entire controversy doctrine precludes further consideration of the amended tenure charges against Respondent.

The District asserts that unless it is allowed to pursue tenure charges pursuant to Section 8, it is between a proverbial rock and a hard place with respect to its ability to pursue charges of inefficiency for the 2012-2013 school year. The December 7, 2014 Award found that the 2012-2013 school year could not be used to pursue charges of inefficiency under Section 25. According to the District, if it cannot pursue inefficiency charges against Respondent for the 2012-2013 school year pursuant to Section 8, it has no vehicle for addressing Respondent's poor performance for that school year and Respondent will be given a "free pass." The District did have the opportunity to address Respondent's alleged inefficiency for the 2012-2013 school year under Section 8, together with any other alleged performance issues under the standards for inefficiency that were in effect prior to the implementation of TEACHNJ in the 2013-2014 school year. As Arbitrator Licata observed, "boards of education still

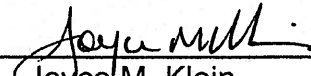
had the ability to take action prior to the commencement of the 2013-2014 school year for inefficiency under Section 8." IMO Tenure Charges Against Lawrence Henchey and the School District of the Borough of New Milford, Bergen County, (Arb. Licata, January 6, 2015) p. 4. That the District did not pursue such a charge under Section 8 at the time does not mean that it was deprived of its ability to charge Respondent with inefficiency for the 2012-2013 school year.

Accordingly, for all of the reasons discussed above, I enter the following:

**AWARD**

Respondent's Motion to Dismiss the charges is granted in its entirety. Respondent Elena Brady shall be reinstated to her teaching position with the State Operated School District of Newark with full back pay, benefits and seniority.

Dated: September 11, 2015  
Ocean Grove, New Jersey

  
\_\_\_\_\_  
Joyce M. Klein

State of New Jersey        }  
County of Monmouth       } ss:

On this 11<sup>th</sup> day of September, 2015, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.



WILLIAM T. HEANEY  
NOTARY PUBLIC OF NEW JERSEY  
ID # 2421775  
My Commission Expires 8/11/2017

