IN THE MATTER OF THE TENURE ARBITRATION BETWEEN

SCHOOL DISTRICT OF CAMDEN COUNTY TECHNICAL SCHOOLS, CAMDEN COUNTY, NEW JERSEY,

PETITIONER,

AND

BRETT FETTY,

RESPONDENT.

DOCKET NO. 302-11/19

BEFORE JACQUELIN F. DRUCKER, ESQ. ARBITRATOR

DECISION ON MOTION TO DISMISS

APPEARANCES:

FOR THE DISTRICT:

DAVID C. PATTERSON, ESQ.
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FOR RESPONDENT:

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I. PROCEDURAL BACKGROUND

The School District of the Camden County Technical Schools, Camden County ("District" or "Employer") initiated and the Camden County Technical Schools Board of Education ("Board") certified to the Commissioner of Education tenure charges ("Tenure Charges") seeking the demotion of Brett Fetty ("Respondent" or "Mr. Fetty"), who holds tenure as a Principal within the District. In lieu of an Answer, Respondent on December 10, 2019, timely submitted a Motion to Dismiss ("Motion"). Thereafter, by letter dated December 23, 2019, the Commissioner of Education, through the Office of Controversies and Disputes, referred the

charges to this Arbitrator pursuant to N.J.S.A. 18A:6-16. The Arbitrator conducted a conference call with counsel on December 20, 2019, at which time the parties agreed that full briefing and consideration of the Motion would proceed before further scheduling was undertaken. In anticipation of this process and with the agreement of the parties, the Arbitrator secured approval from the Office of Controversies and Disputes for an extension to June 30, 2020, of the statutory deadline for completion of this proceeding.

In accordance with the schedule agreed to by the parties, Respondent submitted his brief in support of the Motion, the District filed a response, followed by Respondent's brief reply. The District also provided a short sur-reply. All were timely conveyed to the Arbitrator and opposing counsel. In reaching the conclusions and decision herein regarding the Motion, the Arbitrator has given full, fair, and careful consideration to all arguments presented by the parties, the charges and all supporting documents provided by the District, and all authorities and citations offered by the parties.

II. THE CHARGES

The Camden County Technical Schools Board of Education on November 20, 2019, voted to certify to the Commissioner of Education that it had determined that the instant Tenure Charges and the evidence adduced in support by the Superintendent were sufficient, if true, "to warrant the demotion of Brett Fetty from his position as Principal at the Pennsauken Campus of the Technical Schools to an Assistant Principal position and reassignment to the Gloucester Township Campus." The Board conveyed same to the Commissioner of Education, with certification dated November 21, 2019. By letter dated December 23, 2019, the Commissioner, through the Office of Controversies and Disputes, referred the Tenure Charges to this Arbitrator pursuant to N.J.S.A.18A:6-16 for further proceedings and for a final determination.

The Board previously, on October 16, 2019, had certified tenure charges based on the same allegations set forth in the instant Tenure Charges, asserting, as here, that demotion and reassignment were warranted. Respondent in that proceeding also had submitted a motion to

dismiss, although that motion was based upon various technical, procedural shortcomings. Those charges were referred to Arbitrator Arnold H. Zudick, who granted the motion, dismissing the charges without prejudice to the District's right to re-file. *In the Matter of the Tenure Charges of the Camden County Technical Schools against Brett Fetty*, Agency Docket No. 173-7/19. In the Decision on Motion to Dismiss, Arbitrator Zudick held as follows: "The District shall reinstate the Respondent with full back pay and benefits consistent with the above Conclusion." The Conclusion referenced was as follows: "The District shall immediately reinstate the Respondent with full back pay and benefits, as if he were in a principal position, but this Decision is not intended to require the District to return the Respondent to the principal position at the Pennsauken (or at the Gloucester) Campus." Arbitrator Zudick did not hold, as incorrectly described in the District's Introductory Statement to the instant Statement of Charges, that Respondent "was not to be returned to duty as a Principal at either the Pennsauken or Gloucester Township Campus or the Technical Schools." The difference is the subtle but important distinction between what is directed by an arbitrator's ruling versus that which is simply "not required." The dismissal directed that, if the charges were refiled, "the District must provide sworn statements from those staff members it chooses to rely upon." In the Statement of Charges submitted in this proceeding, the District has complied with that directive. These Tenure Charges now are before this Arbitrator.

The District asserts one charge of "unbecoming conduct" and alleges that said conduct was in violation of the District's Policy 3351 – Healthy Workplace Environment as well as Policy 3211 -- Code of Ethics. The District also references "failure in his performance," citing various domains of the Multidimensional Principal Performance Rubric. The District in its Statement of Charges asserts that the allegations constitute "just cause, warranting [Respondent] to be removed from his position as Principal of the Pennsauken Campus with CCTS and re-assigned as an assistant principal at the Gloucester Township Campus with mandatory employee assistance program counseling, as assigned by the manager of human resources/affirmative action officer." The Statement of Charges also states that the conduct unbecoming "warrants an increment withholding for" Respondent. The District, however, clarified in its briefing on the Motion that it had already effectuated this step through a Board resolution and was not seeking a ruling in

this forum regarding the increment. Indeed, the increment withholding is not referenced in the Board's certification of the charges, and the Board voted only that the charges should be preferred against Respondent "for conduct unbecoming and to demote Mr. Fetty from the position of Principal at the Pennsauken Campus of the Technical Schools to an Assistant Principal positions and reassignment to the Gloucester Township Campus of the Technical Schools."

III. THE MOTION TO DISMISS

In the pending Motion to Dismiss, Respondent asserts two arguments. First, Respondent argues that the District failed to follow the investigative protocols of its Healthy Workplace Environment policy, thereby violating its own policy, and thus should have no recourse in this forum. Second, Respondent contends that the District, in seeking to implement a demotion, is inappropriately attempting to use the formal processes of N.J.S.A. 18A-6-10 *et seq.* ("Tenure Law") for "what amounts to be an internal personnel decision."

As to Respondent's first argument, the Arbitrator finds that, while the District relies in large part upon the Healthy Workplace Environment policy in its charges against Respondent, the Tenure Charges do not rest entirely on that policy. Further, whether the processes articulated in the policy were or were not followed is a question of fact that cannot be disposed of without the taking of evidence. For these and other reasons, addressed below, the Arbitrator provides no ruling regarding the use of the processes under that policy and any effect they may have on proceedings under the Tenure Law.

Before turning to Respondent's second, more availing argument, the Arbitrator notes that much of Respondent's Motion is based upon his contentions that the actions alleged in the charges would not, even if true, constitute conduct unbecoming. Conduct unbecoming, argues the Respondent, contemplates actions that are "so egregious fair warning to the employee that such conduct is prohibited is not required." He cites a number of Tenure Law decisions in which conduct unbecoming was found, and each involves actions of arguably greater severity than what

is alleged here. Yet Respondent's contention that conduct unbecoming is limited only to egregious action that would warrant discharge disregards the specific terminology of the statutory scheme. The Tenure Law provides protection by establishing the limited grounds and strict procedures through which tenured employees may be subject to either of two actions: "dismissal or reduction in compensation." The statute then specifies the grounds for either action, to wit: "inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. By its very terms, therefore, the processes of the Tenure Law are not limited only to instances in which a school district seeks – and alleged conduct is so egregious as to warrant – termination of a teacher or principal's employment. The element of unbecoming conduct can be a basis for the other available action, which is reduction in compensation. Thus, the specific structure of the statute precludes Respondent's theory that unbecoming conduct is only that which would support discharge from employment. By the same token, however, this statutory specificity, which undercuts Respondent's characterization of unbecoming conduct, operates to support Respondent's second argument, to which the analysis now turns.

A district's use of the Tenure Law proceedings to address issues such as unbecoming conduct is limited by the clear and stark terms of the statute. Tenure Law proceedings in this forum are available in instances in which a district has determined that "dismissal or reduction in compensation" is warranted. Here, the District has concluded that a step less severe than dismissal is warranted. It thus does not seek Respondent's dismissal, nor does it seek the other available action, which is reduction in compensation. The Arbitrator has contemplated whether a reduction in compensation may be implicit in the District's effort to demote Respondent to Assistant Principal, but the District has not made that argument and, in fact, has noted in its brief instances in which the post of Assistant Principal garners higher compensation than that of Principal. Thus, nothing offered by the District enables the Arbitrator to construe the effort to demote Respondent as the operational equivalent of a reduction in compensation.

Respondent argues that the proper and exclusive mechanism by which the District may take action in response to the allegations against him is the internal complaint process set forth in the Healthy Workplace Environment policy. While certainly that policy provides a means by which

some of these concerns may be addressed, the Arbitrator does not conclude and this ruling is not to be construed as a holding that the Healthy Workplace Environment procedures provide the only forum through which a demotion could be achieved or that the policy articulates a step that must be exhausted before tenure charges may be preferred.[1] The Arbitrator does not and need not address those issues in reaching her holding in this matter.

The District argues that, because Respondent holds tenure as a Principal, there is no way for the District to move him to a lesser position other than through Tenure Charges adjudicated in this forum. Yet the District cites no precedent and no reading of the statute or regulations that supports the use of this forum for that purpose. The District also argues that the demotion "is clearly a disciplinary matter affecting Respondent's employment," yet the Tenure Law did not establish this forum as a general system for imposition of corrective discipline. In this regard, the District likens the Tenure Act processes to the provisions regarding civil service protection under Title 11A – Civil Service. Specifically, the District emphasizes that N.J.S.A. 11A:2-6 provides specifically for "disciplinary demotion" in addition to suspension, fine, or removal. This does not support the District argument. In fact, it illustrates how a statute would be worded if it were intended to provide for a means by which districts could implement options such as demotion. The Tenure Act, in its specificity, contains no option for a district to seek demotion or action other than dismissal or reduction in compensation. As required by the canon of statutory construction *expressio unius es exclusio alterius*, one must conclude that the legislature, by specifically articulating only two forms of action, with no additional or general options, intended this forum to be available for adjudication of only those charges in which a district asserts that an employee's actions warrant dismissal or reduction in compensation.

[1] Policy Number 3351 Healthy Workplace Environment: cites the importance of a healthy workplace environment; describes the characteristics of such an environment; identifies "unacceptable conduct"; specifies that "unacceptable conduct" under the policy does not include conduct based upon protected class or activity (which is addressed through various laws); sets forth a procedure for employees to report unacceptable conduct; provides that the Superintendent or designee will conduct an investigation and then inform the reporting person of completion; allows the Superintendent/designee latitude in determining what will be revealed to the reporting person; and concludes that, if the investigation determines that conduct prohibited by this policy has taken place, the Superintendent or designee "will meet with the offender(s) and the victim(s) to review the investigation results and to implement remedial measures to ensure such conduct does not continue or reoccur." The policy also states, "Appropriate disciplinary action may be taken depending on the severity of the conduct."

This limitation also is reflected in the regulations governing this proceeding. As Respondent notes, N.J.A.C. 6A:3-5.2(a)(1) hews closely to the statutory terminology and requires that the certificate of determination accompanying tenure charges "shall contain a certification by the district board of education secretary" that the board "has determined the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or a reduction in salary. . . ." In this case, the Board has certified not that the charges are sufficient to warrant dismissal or a reduction in salary, but, rather, that they are sufficient to warrant only demotion. Thus, the Board's certification does not comport with the regulations or the Tenure Law and seeks to use this forum for a purpose that is beyond its strict and specific statutory scope.

The Arbitrator does not opine on how or whether a demotion may be effectuated. She holds only that this forum, through its enabling statute and the applicable regulations, is available only in those instances in which a board of education has found that evidence exists that warrants one of two actions: dismissal or reduction in compensation. As neither is sought in this instance, the Tenure Charges against Respondent must be dismissed.[2]

[2]As Respondent has noted, arbitrators adjudicating charges under the Tenure Law can fashion remedies other than discharge or reduction in compensation. Nothing in this Decision is intended to suggest that the statutory restrictions on the purposes for which a district may invoke these processes imposes any limitation on the remedies found by arbitrators following adjudication of properly posed charges.

DECISION

For the reasons stated in this Decision on Motion to Dismiss, the Arbitrator finds that the Tenure Charges brought by the District against Respondent must be dismissed. As provided in N.J.S.A. 18A:6-14, Respondent is to be reinstated immediately with full pay from the first day of his suspension.

Dated: March 23, 2020

Jacquelin F. Drucker, Esq.
Arbitrator

AFFIRMATION

I, Jacquelin F. Drucker, Esq., an attorney admitted to the practice of law in the State of New York, hereby affirm under penalty of perjury that I am the duly appointed Arbitrator in the foregoing matter and that this document, which I have executed on this day, is my Decision on Motion to Dismiss, issued in resolution of the foregoing matter and in compliance with all relevant and applicable laws.

Dated: March 23, 2020

Jacquelin F. Drucker, Esq.