

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Charges Against
ANTOINETTE MODRAK, EDWARD J. MACK,
AND PHYLLIS MACK

and

THE SCHOOL DISTRICT OF THE CITY OF LINDEN

INTERIM AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:


For the reasons set forth in the accompanying Opinion, the more prudent and more legally defensible procedure regarding tenure charges brought against the three Respondents by the School District of Linden, is to conduct a single consolidated proceeding throughout which the Respondents and their counsel may participate. The sequestration of non-party witnesses remains available as of right.

The District, as the charging entity, bears the burden of going forward and the burden of persuasion. Thus the District will proceed first regarding each Respondent. The order in which each Respondent's charges will be addressed remains to be determined, but the Arbitrator has decided, as a matter of fairness, not to issue an award regarding any of the Respondents until the evidentiary records regarding all three matters have been closed.

Therefore, the Arbitrator will schedule forthwith a pre-hearing conference for the purpose of determining appropriate hearing dates, exchange of documents and witness lists, and determining the order of proceeding, as the District may wish to make a single presentation involving the three Respondents or may apply to the Arbitrator for permission to make three separate presentations against the three Respondents within an integrated proceeding.

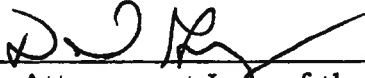
The undersigned Arbitrator hereby retains jurisdiction for the purpose of dealing with procedural motions, conducting evidentiary hearings, and rendering an Award regarding the tenure charges at issue in the instant case.

December 12, 2014


Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 12th day of December, 2014 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.



An Attorney at Law of the
State of New Jersey

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Charges Against
ANTOINETTE MODRAK, EDWARD J. MACK,
and PHYLLIS MACK
and
THE SCHOOL DISTRICT OF THE CITY OF LINDEN

The undersigned was duly appointed by the Commissioner of Education as Arbitrator to adjudicate three separate tenure charge cases brought by the Board of Education of Linden against three employees of the School District of the City of Linden. The District requested that these three cases be heard by one arbitrator in order to minimize the possibility of inconsistent results. Each Respondent retained counsel, and did not initially oppose the District's request that each of their cases be heard by the same arbitrator. The Board thereafter requested that each case be conducted as a separate proceeding in order that the Respondents not observe the testimony of the other two Respondents.

The Board also contended that, if its motion to conduct three separate proceedings before the same arbitrator were denied, each Respondent be sequestered during the testimony of the other Respondents.

Respondents' counsel disputed the right of the Commissioner of Education, or the Commissioner's designee, to determine unilaterally that the same arbitrator would be appointed in all three cases, and the Commissioner's assumption that an arbitrator appointed by the Commissioner of Education could determine whether to consolidate three tenure charge proceedings into a single proceeding. Counsel for Respondents predicated their willingness to submit their cases to the same arbitrator on the granting of their Motion of Consolidation of the three matters into a single proceeding, provided that each Respondent could be present to hear the testimony of the other two Respondents, as well as testimony by all of the Board's witnesses.

After a lengthy pre-hearing conference call with the Arbitrator, the parties prepared and executed an agreement, acquiescing to the Arbitrator the initial exercise of his authority to determine the issues of consolidation and sequestration raised by the parties. The terms of this agreement are set forth below.

The Arbitrator has duly reviewed the documents submitted by the parties in accordance with the procedures and parameters established during the pre-hearing conference, and has thoroughly considered the assertions and arguments submitted by the parties in their documents. The Arbitrator's analysis and determination regarding the issues of consolidation and sequestration are set forth below in the form of an Interim Award.

APPEARANCES

For the Linden Board of Education:

Mark A. Tabakin, Esq., of Wiener, Lesniak, Esqs.

For Respondent Edward J. Mack:

Vladimir Wolodymyr, Esq., of Caruso Smith and Picini, Esqs.

Peter Tscastyshchenko, Esq., of Caruso Smith and Picini, Esqs.

For Respondent Phyllis Mack:

Nicholas Poberezhsky, Esq., of Caruso Smith and Picini, Esqs.

For Respondent Antoinette Modrak:

Sanford R. Oxfeld, Esq., of Oxfeld Cohen Esqs.

ISSUES SUBMITTED

Shall the tenure charges certified by the Linden Board of Education against Respondent Edward J. Mack, Respondent Phyllis Mack, and Respondent Antoinette Modrak be presented to Arbitrator Daniel F. Brent as separate proceedings or in a consolidated, integrated proceeding?

If the tenure charges are heard as a single consolidated, integrated proceeding, shall Respondents be sequestered during the testimony of other Respondents?

Shall the tenure charges certified by the Linden Board of Education against Respondent Edward J. Mack, Respondent Phyllis Mack, and Respondent Antoinette Modrak be sustained? If so, what shall be the penalty?

NATURE OF THE CASE

Respondent Edward Mack, who is employed by the School District of Linden as a custodian, was denied an annual increment following an unsatisfactory evaluation for the 2013-2014 school year. Mr. Mack grieved this increment withholding penalty. Mr. Mack's wife, Phyllis Mack, is employed as a school secretary at Linden High School. She was

charged by the District with colluding with Mr. Mack to fabricate an evaluation purportedly giving the Grievant a satisfactory evaluation and with enlisting the aid of Respondent Antoinette Modrak, who is the Principal of Linden High School and a long time friend of Miss Mack, to sign and falsely date the evaluation for the purpose of submitting the evaluation as evidence in the grievance and arbitration proceeding concerning the denial of the annual increment to Mr. Mack. The Linden Board of Education certified tenure charges, alleging conduct unbecoming each Respondent in their respective roles as employees of the School District.

Although the request for appointing a single arbitrator was made by the District and processed by the Commissioner of Education's office, the parties were not in agreement as to whether the matters would be consolidated into a single proceeding. Thus, the Respondents' failure immediately to object to the same arbitrator hearing the case should not be construed as precluding from the Respondents from arguing that their consent to the single arbitrator is predicated on their being a consolidation into a single proceeding.

Respondents and the District recognized the advantage in having one arbitrator weigh the charges against the three Respondents, each of whom belong to a different bargaining unit, performs a different function

for the School District of Linden, and arguably may have different levels of responsibility for the events at issue in the instant case. Where the parties disagree is whether the Respondents can be precluded from hearing testimony of the other Respondents that are made to the decision maker who will adjudicate these tenure charges. The parties' positions have been set forth at great length in the documents they submitted. The parties' arguments and case citations are hereby incorporated by reference.

Stated succinctly, the Board contended that the potential advantage to tailor testimony that would accrue to the Respondents if they could be present for the testimony of other Respondents would significantly handicap the District's ability to meet its burden of persuasion in a tenure charge hearing. The District asserted that permitting the Respondents to be present for the testimony of other Respondents in a consolidated proceeding would so taint the ability of the Arbitrator to determine the credibility of witnesses, including the Respondents, as to impair the conduct of a fair hearing and materially affect the outcome of the instant proceeding.

Respondents asserted that sequestering Respondents would unfairly exclude them from hearing all of the testimony on which the tenure charges brought against them would be evaluated, and thus

deprive them of an essential procedural right and eliminate a fundamental element of due process. Respondents further contended that there is no valid legal basis for excluding them from a consolidated proceeding by exercise of the practice of sequestration as applicable to non-party witnesses. Respondents further asserted that the Arbitrator should either recuse himself from two of the three cases, or declare a consolidated proceeding in the interest of fairness and justice.

MEMORANDUM OF UNDERSTANDING

It is hereby agreed by and between the parties hereto as follows:

1. The threshold issue of whether these three procedural matters shall be consolidated into a single proceeding will be decided by Arbitrator Daniel Brent;
2. For purpose of these three cases only, each party hereby respectively agrees that Arbitrator Brent will have jurisdiction to decide the issue of consolidation and not the Commissioner of Education and shall not challenge the authority/jurisdiction of the Arbitrator to make this determination in any subsequent Appeal;
3. Each party specifically reserves the right and does not waive the right to Appeal or challenge any other issues or rulings made relative to the arbitration(s) hearings being conducted, including

but not limited to, the right to challenge the merits of Arbitrator Brent's ruling(s) on the issue of consolidation. This includes possible interlocutory appeals.

Signatories to this Memorandum have been authorized by his/her client to execute this Memorandum. This Memorandum may be executed in counterparts.

DISCUSSION AND ANALYSIS

The instant matter apparently presents a case of first impression under the new TeachNJ statute, which provides that arbitrators appointed to adjudicate tenure charge proceedings shall conduct such hearings using the Labor Arbitration Rules established by the American Arbitration Association. Rule 27 in the most recent version of the AAA Labor Arbitration Rules, amended and effective as of July, 2013, provides that:

The parties may offer such evidence as is relevant and material to the dispute, and produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. The arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conforming to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the arbitrators and all of the parties, except for any of the parties' absent, in default or has waived the right to be present.

AAA Labor Arbitration Rule 47 provides that:

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties...all other rules shall be interpreted and applied by the AAA."

Rule 21 provides that:

The arbitrator and the AAA shall maintain the privacy of the hearing unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party, during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

The four parties to this dispute, the School District of Linden and the three Respondents, have affirmatively indicated their understanding, and conditional acceptance, of the benefits of having the three sets of tenure charges adjudicated by the same arbitrator. These charges arose from allegations of misconduct that, according to the charges, appears to be inextricably interrelated and would require overlapping proofs if tried in separate proceedings.

If these matters had arisen in an employment relationship governed by a collective bargaining agreement, the usual custom and practice for applying the AAA Labor Arbitration Rules would mandate that a decision to join or consolidate multiple grievances be predicated on the consent of both parties, who are usually the employer and the

union representing the aggrieved employee, as it is well settled practice in this Arbitrator's thirty-five years of experience that a party in a dispute arising under a collective bargaining agreement may decline to consent to join multiple grievances into a single proceeding unless the parties have specifically provided otherwise in their collective bargaining agreement. However, the three instant tenure charge cases did not arise under a collective bargaining agreement, but occurred under a statutory framework for determining whether the status of tenure conferred by an employer by operation of law can be rescinded and the employees subject to the instant tenure charges may be dismissed.

Although there is merit to the District's contention that separate proceedings would create more equitable opportunities for the District to present its case by avoiding having Respondents listen to other testimony, from both parties' perspective, adjudicating these three sets of tenure charges in three entirely separate cases before three different arbitrators would create greater risk not only for inconsistent results, but also for erroneous results, as each arbitrator would only have access to a limited portion of the evidence addressing less than the totality of facts and circumstances underlying the allegedly interrelated conduct of the three Respondents. Neither party will benefit from a disparity of testimony or credibility determinations resulting from hearings dealing with the same conduct that are conducted independently of each other. .

Even if a single arbitrator were to conduct three separate proceedings creating three separate mini-trials, from an arbitrator's perspective, this alternative poses a significantly more substantial and less theoretical risk of inequitable results in that the arbitrator would inevitably be using information learned in the course of one hearing while weighing evidence submitted in the other two hearings. Whether this information is used to make subtle credibility determinations or to evaluate testimony in a wider context, it is impossible for any arbitrator mentally to segregate completely relevant admissible material information adduced in one hearing while conducting two separate hearings involving the same events.

Unlike a jury that has been instructed to ignore testimony, an experienced arbitrator can reliably distinguish between information that is admissible and information that cannot be used properly to form the basis of a decision. However, admissible information adduced by witnesses in one proceeding may also be relevant in the conduct of a second or third proceeding.

Moreover, even if Respondents were sequestered, stenographic records of the second two proceedings would be available to the parties during those hearings, and could be used for the purpose of proving prior

inconsistent statements or other relevant purposes in such subsequent hearings. Thus, the District could not practicably insulate each of the three proceedings, as it proposes, from scrutiny of each Respondent's testimony by the other Respondents before they testify.

Another significant complication in conducting three separate proceedings is determining the sequence of hearing the three matters. Notwithstanding the District's argument that the three Respondents performed three different jobs for the District, and thus may be governed by different standards of performance or for determining what constitutes unbecoming conduct, the Arbitrator is fully competent to distinguish between the different job responsibilities and ethical standards that may govern each Respondent's conduct. Nevertheless, it would be imprudent for any arbitrator hearing three cases, whether as separate hearings or as an integrated proceeding to issue a decision involving any Respondent until all three separate proceedings were concluded, as information might be adduced in a subsequent proceeding that was material and relevant to the determination before the Arbitrator in the context of a prior proceeding.

In order for the parties to be aware of the full scope of material presented to the Arbitrator, and thus have confidence that the Arbitrator was considering only evidence properly before him in a given proceeding,

the better methodology is to conduct an integrated hearing at which all the three Respondents would be present as the evidentiary record is developed. Organizing boundaries, including sequestration of Respondents, during separate proceedings involving various Respondents would pose substantial challenges. Conversely, creating a single unified proceeding, in which the admissible relevant evidence submitted by the District and by the three Respondents could be utilized by the Arbitrator to reach informed decisions based on the full perspective of the intertwined circumstances underlying the three sets of tenure charges case, would eliminate the necessity for erecting barriers between information heard in a proceeding affecting one Respondent while considering the fate of another Respondent. Moreover, all parties would fully understand the evidence presented by the District regarding the interrelated alleged misconduct affecting all three Respondents.

As parties, the Respondents have a right to be present throughout the hearings during which evidence will be adduced that will affect their employment status. Not only is this right recognized in the longstanding practice of labor arbitration under the AAA rules, but it is also well settled according to the New Jersey case law cited by Respondents. While many of these cases address the right of a criminal defendant to be present, the fact that the tenure charges are conducted pursuant to the TeachNJ statute, and that the loss of tenure involves state action

depriving someone of a significant property right, mandate that Respondents be permitted to hear testimony in a consolidated hearing arising out of the same set of circumstances.

A useful analogy may be RICO proceedings, where multiple defendants are permitted to hear the testimony of other defendants in an action involving serious criminal charges. If this practice is acceptable where loss of liberty is at stake, why should consolidation of proceedings addressing charges involving loss of tenure be exempted from similar procedures? Although the District's concerns are rational and reasonable, the balance of equities in determining this dispute involving consolidation into a single integrated proceeding and sequestration of Respondent parties clearly mandates protecting the rights of Respondents to hear all of the evidence against them that will be presented to the Arbitrator and for the Arbitrator to consider the entire evidentiary record regarding the three Respondents in determining whether any or all of the Respondents are culpable of the tenure charges lodged by the District and the appropriate penalty if any such culpability is found.

Another course of action proposed by a Respondent was for the Arbitrator to recuse himself from two of the three cases. The Arbitrator has decided not to recuse himself from two of the cases for several

reasons. First, the parties were unanimous in indicating their preference that the tenure charges against the three Respondents be heard by the same arbitrator. The advantages of this arrangement are manifestly evident both to the parties and to the Arbitrator. The benefits of a single arbitrator assessing the credibility, materiality, and probative value of the proofs submitted regarding all these interconnected tenure charges outweighs any potential detriment to the District that may arise because Respondents were permitted to hear the testimony of other Respondents, whether in a consolidated or integrated proceeding or in three separate cases.

Second, two of the Respondents are married to each other, and according to the charges, two of the Respondents have had a longstanding friendship outside of the workplace. Thus, the incremental benefit of permitting Respondent's to hear other Respondents' testify in person, while theoretically potentially deleterious to the District's case, would not occur in a vacuum. Even if three arbitrators heard three separate cases, or if the Respondents were sequestered as the District has requested, there is no guarantee that the testimony offered by each Respondent would be isolated from the other two Respondents to the extent that the District's objective in seeking three hearings or sequestration of the Respondent during an integrated proceeding would be realized.

A party's expressed concern about the Arbitrator being confused in an integrated proceeding seems exaggerated, as arbitrators routinely determine the relative credibility of management witnesses versus employee witnesses, and among witnesses called by each party, even when those witnesses have heard each other at earlier stages of the grievance procedure or during depositions in commercial cases.

The parties may argue about what adverse inferences, if any, should be drawn because the Respondents were present during the testimony of other Respondents. However, the absence of sequestration is not a material defect when balanced against assuring a fair hearing at which Respondents can hear all the testimony upon which their tenure charges will be evaluated. No useful purpose would be served in depriving Respondents of a fundamental element of due process on the speculative hope that more reliable, less rehearsed testimony would be adduced.

For all the reasons set forth above, the more prudent and more legally defensible procedure regarding the tenure charges brought against the three Respondents by the School District of Linden is to conduct a single consolidated proceeding throughout which the Respondents and their counsel may participate. The sequestration of non-party witnesses remains available as of right.

The District, as the charging entity, bears the burden of going forward and the burden of persuasion. Thus the District will proceed first regarding each Respondent. The order in which each Respondent's charges will be addressed remains to be determined, but the Arbitrator has decided, as a matter of fairness, not to issue an award regarding any of the Respondents until the evidentiary records regarding all three matters have been closed.

Therefore, the Arbitrator will schedule forthwith a pre-hearing conference for the purpose of determining appropriate hearing dates, exchange of documents and witness lists, and determining the order of proceeding, as the District may wish to make a single presentation involving the three Respondents or may apply to the Arbitrator for permission to make three separate presentations against the three Respondents within an integrated proceeding.

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December 12, 2014

Daniel F. Brent, Arbitrator