STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	AGENCY DOCKET NO. 53-3/15
between	**OPINION & AWARD**
STATE-OPERATED SCHOOL DISTRICT, CITY OF NEWARK,	**ON**
Petitioner,	**MOTION TO DISMISS**
-and-	
LINDA KELLY-GAMBLE,	
Respondent	

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATE OF ORAL ARGUMENT: June 8, 2015

DATE OF AWARD: August 24, 2015

APPEARANCES:

For the Petitioner:

Ramon E. Rivera, Esq., (Of Counsel & On the Brief(s))
Shana T. Don, Esq., (On the 6/8/15 Oral Argument)

For the Respondent:

Robert T. Pickett, Esq., PICKETT & CRAIG, ESQS.

I. BACKGROUND CONSIDERATIONS

Linda Kelly-Gamble is a tenured instructor with the State-Operated School

District City of Newark ("the Newark School District"). On August 22, 2014, Principal Maria Ortiz executed a NOTICE OF INEFFICIENCY CHARGES against the instructor. Paragraph 2 indicated that the tenure charges were being filed 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. CHARGE ONE: INEFFICIENCY submitted that "[d]uring the period from December 21, 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following ways: a. the Respondent was rated as 'ineffective' and/or 'partially effective' in 2 consecutive annual evaluations...."

The STATEMENT OF EVIDENCE identified Respondent's perceived inability to satisfactorily perform her instructional duties and responsibilities from December 21, 2012 to the point of the filing, and additionally referenced in part: "¶ 3. The Formal Observation Form dated December 21, 2012, wherein Respondent was rated 'Partially Effective;' ¶ 9. An Evaluation Summary Form dated February 20, 2013 wherein Respondent was rated 'Partially Effective;' ¶ 11. The Formal Observation Form dated April 15, 2013, wherein Respondent received an 'Ineffective' rating; ¶13. An Observation Form dated April 16, 2013, wherein Respondent was rated as 'Ineffective' in Tailored Instruction; ¶ 17. An Annual Evaluation Summary Form dated June 7, 2013, wherein Respondent was rated 'Partially Effective;' ¶27. Corrective Action Plan ('CAP') prepared by Respondent in collaboration with Maria J. Ortiz, Principal, dated November 25, 2013; ¶ 29. A Short Observation Summary Form dated December 6, 2013,

wherein Respondent was rated as 'Ineffective;' ¶ 45. A Long Observation Summary Form, dated May 9, 2014, wherein Respondent was rated 'Ineffective;' ¶ 47. A Short Observation Summary Form, dated May 15, 2014, wherein Respondent was rated 'Ineffective;' ¶ 49. An Annual Evaluation Summary Form dated May 15, 2014, wherein Respondent was rated 'Ineffective.'

On September 18, 2014, then-State District Superintendent Cami Anderson issued a CERTIFICATE OF DETERMINATION, with the tenure charges and accompanying documentation filed with David C. Hespe, Acting Commissioner of Education on September 19, 2014. These were received by DOE on September 22, 2014. On September 23, 2014, the Agency acknowledged receipt of the certified tenure charges in a letter to the parties.

Upon referral of the tenure charge to me for hearing, Petitioner thereafter filed a motion for a default judgment which was premised upon the belief that Respondent had filed an Answer to the tenure charge out of time. This application was denied by ORDER dated November 24, 2015, which substantially found that: the tenure charges were forwarded to the undersigned designated Arbitrator by the DOE, following review and assessment; Petitioner's case law was inapposite and factually distinguishable; it is well settled that our tenure laws were originally enacted and designed to establish a competent and efficient school system, and to protect teaching and other staff members from dismissal for unfounded, flimsy or political reasons, and that the statutory status of a tenured individual should accordingly not be lightly removed. *Citing*,

Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1989). *See,* I/M/O/ Tenure Charges between State-Operated School District, City of Newark, v. Linda Kelly-Gamble, DOE Docket No. 266-9/14 (Pecklers, 2014 at pp. 6-7).

On December 4, 2015 Respondent filed a MOTION TO DISMISS, with a December 19, 2014 REPLY. Petitioner submitted a brief IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS on December 12, 2014, and a SUR-REPLY on December 31, 2014. Oral argument on the motion was conducted on January 5, 2015, with an AWARD dismissing the tenure charges subsequently issued on January 30, 2015.

In doing so, I found *inter alia* that: full implementation of the new inefficiency standard governing teacher evaluations came into existence during 2013-2014; the comprehensive guidance published by the Department of Education itself severely undercuts the position of the Petitioner Newark School District; adopting Petitioner's position would require that I ignore the guidance from the very agency tasked with implementation as well as other critical components of TEACHNJ, such as N.J.S.A. 18A:6-17.3(d), which mandates that "[t]he only evaluation which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012 C.26 (18A:6-117 *et al.*); it would also eviscerate the remedial safeguards of the Act such as the School Improvement Panel, that are designed to assist an educator whose evaluations

have been less than stellar; the 2011-2012 Pilot Program in which the District participated preceded the August 6, 2012 adoption of TEACHNJ, with the regulatory guidance of Title 6A only coming into effect in 2013; how then can the instant tenure charge encompass the period from December 21, 2012 forward, because 2012-2013 was designed to be a pilot year within the State of New Jersey and the Newark School District; Petitioner's consideration of the same in connection with the subject tenure charge renders it infirm. *Citing*, I/M/O Tenure Charge of Inefficiency of Sandra Cheatham and School District of the City of Newark, Agency Docket No. 226-8/14 (Bluth, 2014). *See*, Kelly-Gamble Award, *supra*, at 47-53. On those bases, the tenure charges were dismissed with prejudice, with Ms. Kelly-Gamble immediately reinstated to her teaching position with full back pay and seniority and made whole for the loss of any contractual or statutory benefits during the interim period. *Id.* at 60.

On January 14, 2015, Principal Ortiz initiated an AMENDED NOTICE OF INEFFICIENCY CHARGES ("Amended Notice") against Ms. Kelly-Gamble. This indicated that the charges were 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. The Amended Notice went on to include the solitary charge of inefficiency and provided:

> During the period from August 6, 2012, to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:
>
> a. The Respondent has failed to implement curricular goals and objective(s).

b. The Respondent has failed to design coherent instruction.

c. The Respondent has failed to assess student learning.

d. The Respondent has failed to create an environment of respect and rapport.

e. The Respondent has failed to manage student behavior.

f. The Respondent has failed to manage classroom procedures.

g. The Respondent has failed to establish a culture of learning.

h. The Respondent has failed to communicate clearly and accurately.

i. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.

j. The Respondent has failed to engage students in learning.

k. The Respondent has failed to provide feedback to students.

l. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.

m. The Respondent has failed to reflect on teaching.

n. The Respondent has failed to contribute to the School and District.

o. The Respondent has failed to grow and develop professionally.

p. The Respondent has failed to demonstrate promptness and attendance.

q. The Respondent has received a partially effective rating for the 2012-2013 School Year in an annual summative evaluation.

r. The Respondent has received an ineffective rating for the 2013-2014 School Year in an annual summative evaluation.

The above charge is supported by the Statement of Evidence previously submitted under oath by Maria J. Ortiz dated August 22, 2014, and filed with the Commissioner of Education on or about September 22, 2014.

On January 15, 2015, Superintendent Anderson sent a correspondence to Ms. Kelly-Gamble, which informed Respondent that Charges of Inefficiency

previously filed against her had been amended to include 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, and that the amended tenure charges were based upon the STATEMENT OF EVIDENCE previously filed with the Commissioner of Education on September 22, 2014. Respondent was further advised that pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1, she was granted the opportunity to submit a written Statement of Evidence under oath in opposition to the charges within 15 days of the date of receipt. Following the filing of Ms. Kelly-Gamble's response and Statement of Evidence, on March 17, 2015, Superintendent Anderson executed the CERTIFICATE OF DETERMINATION.

On March 19, 2015, the tenure charges were preferred to the Commissioner of Education. Respondent eventually answered the same after receiving extensions until April 15, 2015. Ms. Kelly-Gamble concomitantly filed a NOTICE OF MOTION TO DISMISS TENURE PROCEEDINGS, which was received by the DOE Controversies & Disputes on April 16, 2015. On April 22, 2015, Director Duncan responded to Petitioner's April 21st request for a default judgment which was denied, notifying the parties that the amended tenure charge including Respondent's motion were being referred to me. That same date, I was notified of my appointment by Ms. Duncan under separate cover, with an additional correspondence to the parties confirming that the captioned tenure charges had been docketed as new charges, which were being processed with respect to Section 8 inefficiency charges only.

Following a briefing schedule that was contained in my initial April 27, 2015 letter to the parties which was modified during a May 14, 2015 conference call, Petitioner timely filed a letter brief in opposition to Respondent's MOTION TO DISMISS. Reply and Sur-reply briefs were later filed, with oral argument on both the motion and the merits conducted on June 8, 2015. The latter satisfied the initial 45 day requirement under the Act. In a letter that same date, I advised that the AWARD on Respondent's motion was due on or before July 23, 2015. On July 15, 2015, Director Duncan wrote to counsel by way of clarification of her April 22, 2015 letter, stating *inter alia* that "[t]he arbitrator shall review those charges – which are not dismissed as a result of a motion – under the preponderance of the evidence standard."

On June 19, 2015, Petitioner filed a NOTICE OF MOTION FOR EMERGENT RELIEF with supporting letter brief with the Commissioner of Education. This sought an Order staying the arbitration before me, pending the District's appellate appeal filed on June 12, 2015. This application argued that: "[t]he Commissioner of Education transferred the tenure hearing to the same Arbitrator who heard the parties' previous tenure charge, in violation of N.J.S.A. 18A:6-17.1; the Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the tenure charges in violation of N.J.S.A. 18A:6-16." In a June 23, 2015 correspondence, Director Duncan acknowledged the receipt of Petitioner's motion on the 22nd, and fixed a schedule for Respondent's response to the motion, if any, along with Petitioner's reply.

On June 29, 2015 Respondent Kelly-Gamble submitted a response in opposition to Petitioner's motion with accompanying letter memorandum. This substantially argued that: it appears Petitioner has filed its motion under the wrong regulation in that there was never any "Petition of Appeal" filed with the Division of Controversies and Disputes; the *Crowe* factors have not been established on the District's emergent motion, and the granting of a stay or preliminary injunction would be improper; the Commissioner has previously ruled on Petitioner's "emergent relief" or "stay request" in both the *Thomas* and *Cheatham-Powell* matters on June 4, 2015 and June 9, 2015 respectively, that he lacked the jurisdiction to hear and decide Petitioner's motion for an emergent stay pending appeal before the Appellate Division.

Petitioner's July 7, 2015 letter brief in reply reiterated the District's position that: the Notice of Appeal with the Appellate Division questions the assignment of the Arbitrator before whom the matter is currently pending; this particular appeal is one of approximately nine which involve the same issue and are pending before the Appellate Division; at this time there is a MOTION TO DISMISS pending before Arbitrator Michael J. Pecklers, which raises legal rather than factual challenges to the inefficiency charges; it seems that Respondent's motion is premised in part, upon the lack of clear direction from the Commissioner's Bureau of Controversies and Disputes, which should have instructed the randomly assigned Arbitrator to review the facts under specific standards; the June 15, 2015 correspondence from Director Duncan does not appear to have

clarified the initial instructions transferring this matter to Arbitrator Pecklers to "handle as he deems appropriate;" the District is not seeking a stay of the Commissioner's decision pursuant to N.J.A.C. 6A:3-1.15 but as clearly stated in its moving papers per N.J.A.C. 6A:3-1.6; the Commissioner's decisions in I/M/O the Tenure Hearing of Sandra Cheatham-Powell, State-Operated School District of the City of Newark, Essex County, Agency Docket No. 68-3/15 and I/M/O the Tenure Hearing of Neil Thomas, State-Operated School District of the City of Newark, Essex County, Agency Docket No. 59-3/15, finding that the Commissioner lacked authority to hold an arbitration in abeyance, rather than citing N.J.A.C. 6A:3-5.5(b) is too narrow a reading of that administrative provision; allowing the Arbitrator here to decide a procedural matter was not contemplated by N.J.S.A. 18A:6-16 as amended by P.L. 1998, c.42 (the TEACHNJ Act).

In a July 14, 2015 letter to the parties, Commissioner Hespe denied Petitioner's application for emergent relief. In material part, the Commissioner determined that:

> [u]pon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief requesting an order staying the arbitration pending appeal to the Appellate Division since the matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

* * *

> Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated April 22, 2015. Subsequently, petitioner's Motion for Emergent Relief requesting a stay of the arbitration was filed with the Bureau of Controversies and Disputes on June 19, 2015.
>
> In its reply, petitioner insists that its request for relief is made pursuant to *N.J.A.C.* 6A:3-1.6 and not *N.J.A.C.* 6A:3-5.5 – although its Notice of Motion for Emergent Relief clearly requests 'an Order staying the arbitration.' *N.J.A.C.* 6A:3-1.6(a) provides, in relevant part, that 'where the subject matter of the controversy is a particular course of action by a district board of education or any other party *subject to the jurisdiction of the Commissioner,'* a petitioner can move for emergent relief '*pending the Commissioner's final decision in the contested case,'* [*emphasis added in original*]. Because *N.J.S.A.* 18A:6-9 grants an arbitrator – not the Commissioner – jurisdiction to 'hear and make a final determination' on controversies and disputes arising under the tenure laws, *N.J.A.C.* 6A:3-1.6 is inapplicable here.
>
> For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Notice is taken that no such application was made by the Petitioner to me, and that motion is therefore deemed abandoned. Upon receipt of the correspondence from the Commissioner, on July 17, 2015, Director Duncan was contacted and advised that a request was being made for an extension of time until August 24, 2015 pursuant to N.J.S.A. 18A:6-17.1g, based upon the delay caused by the filing of Petitioner's motion on June 19th, as well as pending vacation plans. This was memorialized in a July 20, 2015 letter to the director. The request was granted by Ms. Duncan in a July 22, 2015 letter. The instant AWARD on Respondent's MOTION TO DISMISS is accordingly issued within the

prescribed time period.

II. RELEVANT STATUTORY & REGULATORY LANGUAGE

NEW JERSEY STATUTES ANNOTATED TITLE 18A

18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

* * *

18A:6-16 Proceedings before commissioner; written response; determination

* * *

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 Ch. 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.

* * *

18A:6-17.1 Panel of arbitrators

* * *

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;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all 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 of 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.

* * *

18A:6-17.2 Consideration for arbitrator in rendering decision. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;

(4) the district's actions were arbitrary and capricious.

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

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

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

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

18A:6-17.3. Evaluation process, determination of charges. a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of the 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 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,

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C. 18A:6-117 et al.)

* * *

18A:6-120 School improvement panel. A. In order to ensure the effectiveness of its teachers, each school shall convene a school improvement panel. A panel shall include the principal, or his designee, an assistant or vice-principal, and a teacher. The principal's designee shall be an individual employed in the district in a supervisory role and capacity who possesses a school administrator certificate, principal certificate, or supervisor certificate. The teacher shall be a person with a demonstrated record of success in the classroom who shall be selected in consultation with the majority representative. An individual teacher shall not serve more than three consecutive years on any one school improvement panel, In the event that an assistant or vice-principal is not available to serve on the panel, the principal shall appoint an additional member to the panel, who is employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate.

Nothing in this section shall prevent a district that has entered a shared services agreement for the functions of the school improvement panel from providing services under that shared services agreement.

b. The panel shall oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the evaluation process except in those instances in which the majority representative has agreed to the contrary. The panel shall also identify professional development opportunities for all instructional staff members that are tailored to meet the unique needs of the students and staff of the school.

c. The panel shall conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially effective in his most recent annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the mid-year evaluation process, except in those instances in which the majority representative has agreed to the contrary.

d. Information related to the evaluation of a particular employee shall be maintained by the school district, shall be confidential, and shall not be accessible to the public pursuant to P.L. 1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented.

* * *

18A:6-122 Annual submission of evaluation rubrics. a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of teachers, principals, assistant principals, and vice-principals and all other teaching staff

members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

b. Notwithstanding the provisions of subsection a. of this section, a school district may choose to use the model evaluation rubric established by the commissioner pursuant to subsection f. of section 17 of P.L. 2012, c.26 (C.18A:6-123) to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members. In the case in which the district fails to submit a rubric for review and approval, the model rubric shall be used by the district to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members.

18A:6-123. Review, approval of evaluation rubrics. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L. 2012, c. 26 (C.18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.) to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals. The standards at a minimum shall include:

* * *

c. A board of education shall adopt a rubric approved by the commissioner by December 31, 2012.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved adopted evaluation rubric for all educators in all elementary, middle and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

f. The commissioner shall establish a model evaluation rubric that may be utilized by a school district to assess the effectiveness of its teaching staff members.

* * *

NEW JERSEY ADMINISTRATIVE CODE, TITLE 6A EDUCATION

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6A:3-1.5 Filing and service of answer

* * *

(g) Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

* * *

6A:3-5.1 Filing of written charges and certificate of determination

* * *

(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 timelines and procedures shall be observed:

* * *

5. Upon receipt of the charge, the Commissioner or his designee shall examine the charge. The charge shall 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 charge. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

* * *

6A:3-5.3 Filing and service of answer to written charges

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following

transmittal to an arbitrator.

6A:3-5.5 Determination of sufficiency and transmittal for hearing

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

* * *

III. CONTENTIONS OF THE PARTIES

Respondent Linda Kelly-Gamble

The Petitioner School District in its opposition to Respondent's MOTION TO DISMISS has attempted to erect illusory arguments to defeat the Motion. However, on closer review and assessment, the arguments fail miserably and are contradicted by Petitioner School District's prior assertions in this proceeding with the Respondent Kelly-Gamble. On the issue of the "timeliness" of the filing of the "Amended Tenure Charges", the Respondent's assessment is based on two assumptions: (1) That there is no record or admission by the Petitioner that it had "filed" Section 8 inefficiency charges against the Respondent simultaneously with the filing of the Section 25 charges; and (2) That Section 8 inefficiency charges were filed by the Petitioner simultaneously with the Section 25 tenure charges in the prior proceeding.

The three-month time period within which the District could have moved to vacate your Arbitration Opinion and Award – but did not – expired on or about

April 30, 2015. What did the District do following the dismissal of the charges against Respondent Kelly-Gamble? For nearly three (3) months – it did nothing. And now, long after the timeframes set forth by applicable statute and regulations governing the filing of tenure charges have expired, and long after its timeframe to move to vacate your decision has expired, the District simply seeks a "do-over" of the case and served notice of what it, disingenuously, refers to as "new" charges on Respondent Kelly-Gamble. Of course, the charges are not "new" (if that word is to have any meaning at all). Rather, they rehash the same charges of 'inefficiency," previously dismissed by you, as the Arbitrator, complete with the same STATEMENT OF EVIDENCE and exhibits.

Whether the instant charges are brought pursuant to Section 25 of *TEACHNJ*, Section 8 of that statute, or both, is of no moment. It is simply too late for the charges to be brought at all. The District is now far beyond the time periods contemplated by law for either the certification of tenure charges, or the amendment of same (if such an amendment were even possible, seeing as how there is no procedure for amended tenure charges set forth in *TEACHNJ*, nor does the District cite to one in its opposition to the MOTION TO DISMISS.

In its submission in opposition to Respondent's Motion To Dismiss, the Petitioner School District continues to insist that the Amended (Section 8) Charges filed with the Commissioner of Education on March 18, 2015, were filed in a timely manner consistent with N.J.S.A. 18A:6-13 without ever addressing Respondent's contention that (1) the amended Section 8 Charges were filed "late" in that it, again

assuming that it could be filed with the implementation of *TEACHNJ Act*, should have been filed at the same time the Section 25 tenure charges were filed with the Commissioner in September 2014, especially since the Section 8 Charges are exactly the same as the advanced Section 25 Charges; and (2) with the dismissal of the prior inefficiency charges, both Section 25 and Section 8 charges as pled by the Petitioner, the Petitioner cannot now resurrect those same charges as "amended charges" in light of your dismissal in the prior proceeding in contravention of the principles of *doctrine of the law of the case, collateral estoppel and res judicata.*

What the Petitioner has ignored in echoing that it has filed the Amended Tenure Charges in a timely fashion is that it knew, again assuming that it was appropriate under the *TEACHNJ ACT*, that Section 8 charges were available to it in the alternative at the same time it had filed Section 25 Charges against the Respondent. The Respondent's argument on the issue of timeliness is quite simple: The Petitioner should have filed the Section 8 Charges at the same time it filed the Section 25 Charges on or about September 24, 2014 and having failed to explicitly do that it is now too late to file those same charges as amended charges some six (6) months later on March 18, 2015. As we noted in our prior submission, assuming no simultaneous Section 8 filing with the Section 25 filing, N.J.S.A. 18A:6-13 is very exacting in its time requirements for filing of tenure charges. Filing essentially the same tenure charges it filed under Section 25 in the prior proceeding at this "late" stage is fatal to the Petitioner's efforts to resurrect, if you will, charges that were deemed "dismissed" by you in your earlier arbitration ruling in this proceeding.

Likewise, if the Section 8 inefficiency charges were joined and pled in the prior proceeding with Section 25 inefficiency charges, those charges must now also be deemed "dismissed."

Specifically, under Section 25, N.J.S.A. 18A:6-17.3, the District was required to file charges against Respondent Kelly-Gamble with the Commissioner of Education within 30 days of filing with the State District Superintendent. See also N.J.A.C. 6A:3-5.1. In this case, the District certified the charges in September 2014. The charges filed were based on the identical series of facts and allegations as the instant amended charges, and thus the District was under an obligation to file the tenure charges against Respondent Kelly-Gamble within 30 days thereof. Clearly, the current charges are filed well outside that time period, and thus the charges are untimely under TEACHNJ and must be dismissed.

Alternatively, if the charges are deemed to be filed pursuant to Section 8, N.J.S.A. 18A:6-16, the charges are still untimely. Once charges were filed with the State District Superintendent, Respondent Kelly-Gamble could submit a statement of position and a written statement of evidence under oath within 15 days of receipt of the charges. N.J.A.C. 6A:3-5.1. Upon receipt of the position statement or expiration of the 15 days, the State District Superintendent had 45 days to decide on whether to certify the charges to the Commissioner of Education. *Id.;* N.J.S.A. 18A:6-13. It had 15 days to file written charges with the Commissioner after making a decision. N.J.A.C. 6A:3-5.1. Once again, in this

case, the District filed the original inefficiency charges with the State District Superintendent in September 2014. The charges filed were based on the identical series of facts and allegations as the instant amended charges, and thus the District was under an obligation to vote on whether to file charges under Section 8 within 45 days of receiving Respondent Kelly-Gamble's response to the charges, and then was required to file the charges with the Commissioner within 15 days of making its decision. Clearly it did not do so, and the charges were filed outside the applicable timeframe. Thus, they are untimely filed under *TEACHNJ* and must be dismissed.

The statutory and regulatory time frames set forth above exist for a reason – to protect the due process rights of educators subject to tenure revocation charges. The District's conduct in belatedly amending its prior charges makes a mockery of due process. Under the District's theory, it is unbridled by any time constraints at all when faced with the dismissal of its inefficiency charges, rendering the strict procedural time-frames set forth above a nullity. File a charge, lose on the merits, refuse to seek vacation of the award, and simply file again under a new theory – an amendment to the original inefficiency charges. Perhaps if the instant amended charges are dismissed (and they should be), the District will simply file another amended charges again . . . this time under some new meritless theory. Such an indefinite and arbitrary approach runs directly contrary to the applicable statutory and regulatory guidelines for the commencement of tenure charges against educators set forth in *TEACHNJ* and

its implementing regulations, as well as Respondent's right to due process.

The Petitioner throughout its arguments against the earlier motion to dismiss in the prior proceeding constantly asserted that it had filed Section 8 charges simultaneously along with the Section 25 charges. We note the following statements taken from the Petitioner's submission in opposition to Respondent's earlier Motion To Dismiss in the prior proceeding:

- "I hereby file 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:6-17.3 and N.J.A.C. 6A:3-5.1." (See Exhibit A at Certification of Shana T. Don, Esq., hereinafter "Don Cert."). **These charges were filed based upon both the "new" inefficiency standard of TEACHNJ's N.J.S.A. 18A:6-17.3, encompassing two consecutive annual evaluations for poor performance and the "old" inefficiency of N.J.S.A. 18A:6-16. Id.**" At pages 1-2 from Petitioner's Memorandum of Law in Opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14) and at page 36 of the Arbitration Award of Respondent Kelly-Gamble. [*Emphasis Added*].

- "Additionally, the documents listed below were described in, and appended to the Statement of Evidence **in support of the Inefficiency charges, both "old" and "new" in support of Respondent's inefficient teaching performance:**" At page 10 from Petitioner's Memorandum of Law in opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14) [*Emphasis Added*].

- While N.J.S.A. 18A:6-17.3 provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effecting; N.J.S.A. 18A:6-16 provides for charges when those specific conditions have not been met but dismissal is nonetheless warranted on the basis of inefficiency or any of the other grounds specified in the statute, see N.J.S.A. 18A:6-10. **Here, the District pled tenure**

> **charges under both statutes, N.J.S.A. 18A:6-10 and 17.3.** At page 25 from Petitioner's Memorandum of Law in Opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14) [*Emphasis Added*].

- Accordingly, even if the Arbitrator here concludes, notwithstanding the facts and argument presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charge against Respondent should not be dismissed. **Instead, the charge must be evaluated under NJ.S.A. 18A:6-16, as initially pled, and the case must proceed to hearing.** At page 29 from Petitioner's Memorandum of Law in Opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14), and at page 43 of the Arbitration Award of Respondent Kelly-Gamble. [*Emphasis Added*]. (*See,* Exhibit C attached to submitted Memorandum of Law in Support of Motion).

As noted by you in your arbitration award in the prior proceeding in this matter:

> *Petitioner's contention that it has pled an alternative statutory basis under N.J.S.A. 18A:6-16 to entitle a hearing on the sufficiency of the inefficiency charges under the "old" [Section 8] tenure law also is unpersuasive.* ***Rather, a cursory reference in a pleading does not obviate the fact that the solitary tenure charge of INEFFICIENCY and the accompanying STATEMENT OF EVIDENCE make it abundantly clear the instant charges were brought under N.J.S.A. 18A:6-17.3.*** At page 55 of the Arbitration Award of Respondent Kelly-Gamble. [*Emphasis Added*]. (*See,* Exhibit C)

If we are to accept the Petitioner's admissions in its pleadings and submissions in the prior proceeding that it had "pled" the Section 8 inefficiency charges, then the dismissal of the tenure inefficiency charges (both Section 25 and Section 8), by you in the prior proceeding now precludes the Petitioner from resurrecting amended inefficiency tenure charges in a new tenure revocation proceeding that

were previously dismissed along with the Section 25 charges by you in your arbitration ruling on January 30, 2015.

Accordingly, for the foregoing reasons, it is respectfully submitted that the instant tenure charges – whether construed as amended or new, are simply out of time and should be dismissed. The dismissal of the tenure charges against Respondent Kelly-Gamble is now the "law of this case," and the District's amendment of those charges is constrained Respondent believes by that doctrine. Specifically, the amended inefficiency charges rely on the exact same facts and the exact same evidence as presented in the initial charges. Further action by the District herein seeking to amend tenure charges that have already been dismissed is, frankly, absurd, fundamentally unfair, in clear violation of Respondent Kelly-Gamble's due process rights, and should not be permitted to proceed in clear defiance of your Arbitration Award and Ruling.

The Law of the Case doctrine "[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). The policy behind the doctrine is that "[o]nce an issue is litigated and decided in a suit, re-litigation of that issue should be avoided if possible." Id. (citing State v. Hale, 127 N.J. Super 407, 410, 317 A.2d 731 (App. Div.1974)).

Thus, because this issue has already been decided in this case in a prior

arbitration proceeding with a definitive award and ruling by you, as the Arbitrator, the amended charges are bound by the law of the case in that regard. Specifically, it is undisputed that the initial charges filed against Respondent Kelly-Gamble were unequivocally dismissed by you in your January 30, 2015, Opinion and Award granting Respondent Kelly-Gamble's motion for dismissal of the tenure revocation proceeding. In opposition to Respondent Kelly-Gamble's motion to dismiss the original inefficiency tenure charges, the District specifically sought to proceed under Section 8 of the *TEACHNJ Act*. Your assessment in your arbitration award and ruling on the Petitioner School District's Section 8 effort echoed the same sentiment as articulated by Arbitrator Bluth In the Matter of Sandra Cheatham. That request was unequivocally rejected by Arbitrator Bluth. In doing so, Arbitrator Bluth held as follows:

> Finally, **I reject the District's contention that if a teacher is exonerated under Section 25, that does not preclude a similar procedure under Section 8 by which a teacher may be dismissed under the conditions that are delineated under that Section**. The District insists if I find Respondent not culpable of the charges against her in Section 25, I should treat the charges as if they had been filed under Section 8. **I reject this notion completely**. The fact is the District chose to file under Section 25. It now asks if it loses in that forum I should convert it to a Section 8 matter. **To acquiesce to that request would give the District the proverbial "two bites at the apple." The District made a choice. That choice was Section 25. The fact it has been unsuccessful in achieving its goal does not give it a sound basis to ask for a "do-over."** For all of the reasons delineated herein, I find the District erred when it discharged Respondent when it used 2012-13 as one of the two evaluation years. Accordingly, I determine the appropriate remedy is reinstatement

with full back pay and benefit. It is so ordered.

(*See,* Exhibit "F") (*Emphasis Added*).

To be candid, the *Law of the Case Doctrine* should put an end to this proceeding. Although the District's untimely effort to amend the charge is meritless and, indeed, frivolous for a plethora of other reasons discussed above, the mere fact that the District's theory has already been rejected in this case and not appealed via petition to vacate is, respectfully, enough to end this legal dance and charade. Accordingly, for the forgoing reasons, as well as those that follow, the amended charges against Respondent Kelly-Gamble should be dismissed.

If we assume that Petitioner School District could under the *TEACHNJ Act* file Section 8 inefficiency charges simultaneously with Section 25 inefficiency charges, as it apparently did, then we must assess the impact of your arbitration dismissal order on those same charges as of January 30, 2015, the date of the dismissal, on any effort to amend the same charges anew under the Section 8 inefficiency umbrella in this current proceeding. It is Respondent's posture that the Petitioner can no longer assert the so-called amended inefficiency charges in light of your dismissal of all charges filed in the prior proceeding by you. As a result of that dismissal by you, the Petitioner can no longer assert those same charges as "amended" charges in an amended proceeding based on the concepts of "law of the case doctrine", "entire controversy doctrine", "*collateral estoppel*" and "*res judicata*" as fully set forth in Respondent's memorandum of law in support of this Motion.

Even if the charges are treated as "new" charges —— which they obviously are not —— the "new" charges are, nonetheless, barred as a matter of law pursuant to the doctrine of *Res Judicata*. *Res Judicata is "[a]n ancient* judicial doctrine which contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to re-litigation." Lubliner v. Board of Alcoholic Beverage Control for the City of Paterson 33 N.J. 428 (1960). *Res Judicata and Collateral Estoppel* rest upon policy considerations which seek to guard the individual against vexatious repetitious litigation and the public against the serious burdens which such litigation imposes on the community." *Id*.

As Respondent noted in her earlier submission, *Res Judicata* is a mandatory doctrine that a tribunal must apply to bar a party from re-litigating in a new case an issue already fully disposed of. For *Res Judicata* to bar the re-litigation of a claim, the following three elements must be met:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

Therefore, regardless of whether or not the instant inefficiency charge is properly characterized as "amended" or "new" charges, the result is the same since the very issues the District seeks to litigate in its amended filed charges has already been litigated, the parties are the same and the amended charges

arise out of the same transaction and/or occurrence as the dismissed inefficiency charges.

Thus, the doctrine of *Res Judicata* compels, in Respondent Kelly-Gamble's view, dismissal. The doctrine of *Res Judicata* applies to arbitration awards. See Chattin v. Cape May Green, Inc. 216 N.J. Super 618 (App. Div. 1987); Nogue by Nogue v. Estate of Santiago, 224 N.J. Super. 383 (App. Div. 1988). Not only do our courts recognize the binding and preclusive effect of arbitration awards, but arbitrators, when appropriate, will apply the doctrines of *Res Judicata*, as well as the related concepts of *Collateral Estoppel*, *Stare Decisis*, etc., where appropriate to bar re-litigation through arbitration of a prior arbitration award. See *Elkouri & Elkouri, How Arbitration Works*, p. 578- 579 (6th Ed. 2003).

Therefore, regardless of whether or not the instant inefficiency charges are properly characterized as "amended" charges or as "new" charges, the result is the same since the very issue the Petitioner School District seeks to litigate in its amended/new charges has already been litigated — the parties are the same, and the amended charges arise out of the same transaction and/or occurrence as the dismissed inefficiency charges. Thus, even if the *Law of the Case Doctrine* somehow does not bar re-litigation of the issue and the charge, the Doctrine of *Res Judicata* compels dismissal. Accordingly, for the forgoing reasons, as well as those that follow, it is respectfully submitted that the amended charge against Respondent Kelly-Gamble should be dismissed. Bondi v. Citigroup,

423 N.J. Super. 377 (App. Div. 2011). *See also*, Brunetti v. Borough of New Milford, 68 N.J. 576 (1975).

Assuming that somehow the District can overcome the doctrines of Law of the Case and *Res Judicata*, the untimeliness of its amended charge, and the entire controversy doctrine, its amended charge nevertheless remains substantively subject to dismissal because Section 25 of TEACHNJ is the exclusive means through which a district can bring charges of inefficiency. A brief review of the history underlying the passage of TEACHNJ and its implementing regulations, the statutory and regulatory language itself, as well as arbitral precedent, makes clear that charges of "inefficiency" are now defined by and required to proceed pursuant to Section 25, and only pursuant to Section 25, of the *TEACHNJ Act*.

As we noted in our earlier submission, the Petitioner School District was well aware that the new Section 25 under the *TEACHNJ Act* now defined "inefficiency", as confirmed by the terms of the statute itself as well as Department of Education regulations and authoritative guidance (See Exhibit D attached hereto). Section 8 clearly remains available for other charges such as "incapacity" or "conduct unbecoming." However, Section 8, for purposes of charges of inefficiency, is now a hollow tenure charge option and relic as Section 25 now defines that charge.

As you noted in rendering your ruling, Arbitrator Pecklers, you specifically

and unequivocally rejected the Petitioner School District's arguments by quoting Arbitrator Simmelkjaer In The Matter of The Tenure Charge of Inefficiency Against Neil Thomas, *Agency Docket. No. 244-9/14* (Exhibit Q) approvingly on his conclusion on the issue:

> [I]n the Arbitrator's [Simmelkjaer's] opinion, had the legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially effective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with Section 25 of *TEACHNJ* and the other consistent with Section 8. N.J.S.A. 18A:6-16 – it had the wherewithal to provide the appropriate statutory language. **In the absence of such language, the Arbitrator is compelled to dismiss the charges.**
>
> *(Emphasis added) See Arbitrator Pecklers' Award and Ruling attached as Exhibit C, at pages 55-56.*

Indeed, the Petitioner School District affirmed that it had filed in the prior proceeding under both Section 25 and Section 8 as you noted in your Award and Ruling when citing the "arguments" of the Petitioner District on Section 8 inefficiency charges in which the Petitioner School District argued that:

> Importantly, as a distinction in the Thomas case, this matter was initially [pled] under both sections of the Tenure Law - the old and the new. (The Arbitrator in *Thomas* provided '[s]ince the District's Inefficiency charge was not pleaded in the alternative, but rather based on *TEACHNJ*, it cannot amend its pleading at this juncture." While N.J.S.A. 18A:6-17.3 provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effective, N.J.S.A. 18A:6-16 provides for charges when those specific conditions have not been met but dismissal is nonetheless warranted on the basis of inefficiency or any other grounds specified by statute. *See*, N.J.S.A. 18A:6-10. ***Therefore, because the District pled***

> ***tenure charges under both statutes and the Arbitrator has jurisdiction to decide this matter of inefficiency under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act this case should proceed to hearing.*** [*Emphasis Added*]
>
> (*See,* Arbitrator Pecklers' Award and Ruling at page 41 as Exhibit C attached hereto).

In Ursula Whitehurst and the State-Operated School District of the City of Newark, Agency Docket No. 282-9/14, Arbitrator Robert T. Simmelkjaer determined unequivocally that this District could not pursue an inefficiency charge under Section 8 despite the District's claims that it could pursue such a charge if it was not successful under Section 25. Arbitrator Simmelkjaer concluded as follows:

> The Arbitrator is not convinced that having dismissed the inefficiency charge against Ms. Whitehurst based on the District's non-compliance with N.J.S.A. 18A:6-17.3, through its utilization of the Respondent's annual summative evaluation for the 2012-2013 school year, he can now proceed to a hearing under N.J.S.A. 18A:6-16.
>
> ***
>
> Since the one charge of Inefficiency filed with the Commissioner alleges that over a two year period "from September 2012 to the present..." encompasses the two consecutive years of ineffective or partially effective annual summative ratings under section 25 and the Statement of Evidence reinforces the charge, the District is bound by the procedural requirements of section 25.

Id. at 48. (See Exhibit "M").

Additionally, Arbitrator Simmelkjaer unequivocally held that:

> [i]t is undisputed that the District may proceed against the Respondent on statutory grounds other than Inefficiency by filing such charges in accordance with the requirements of section 8. **However, the District can not file inefficiency charges on alternative grounds or once its filing under section 25 has been found deficient rehabilitate these insufficient charges under section 8 and then proceed to arbitration of this basis. Clearly had the Legislature in enacting TEACHNJ intended this outcome, it would have written the appropriate language.**
>
> ***
>
> In the Arbitrator's opinion, had the Legislature intended that a teacher charged with inefficiency for two consecutive years, with ineffective or partially effective ratings on their annual summative ratings, be evaluated utilizing two different and asymmetrical evaluation procedures — one consistent with section 25 of TEACHNJ and the other consistent with section 8, N.J.S.A 18A:6-16— it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charge.

Id. at 50 [*Emphasis Added*] (See Exhibit "M").

Similarly, In the Matter of the Tenure Charge of Inefficiency of Neil Thomas, State-Operated School District of the City of Newark, Agency Docket. No.: 244-9/14, Arbitrator Simmelkjaer addressed this issue again against this same District, concluding that inefficiency tenure charges could not be brought under Section 8:

> [T]he Respondent logically argues that the District, having brought the charges pursuant to Section 25, is bound by the procedures in that section of the statute . . . less "[f]ailure to adhere to these requirements [ ]

result in the tenure charge being dismissed."

Moreover, on this point, **the District cannot rehabilitate charges found to be deficient under Section 25 by proposing that they be reconsidered under Section 8 as a default position.** As the Respondent reasonably argues:

> The District cited absolutely no language in Section 25 of the Act - - any other authority - - which would indicate that the Legislature intended for deficient inefficiency charges to simply proceed to arbitration via Section 8 of the Act. Indeed, if the District's flawed and unsupported argument is adopted, it would render the language in Section 25 superfluous.

Id. at 47 [*Emphasis Added*]. (*See* Exhibit "Q").

Further, Arbitrator Simmelkjaer concluded that:

> [h]ad the Legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially ineffective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures - - one consistent with Section 25 of TEACH NJ and the other consistent with Section 8, N.J.S.A. 18A:6-16 - - it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charges.

Id. at 51. (See Exhibit "Q").

And likewise, in In the Matter of Tenure Charges Against Elena Brady, State-Operated School District for the City of Newark, Docket. No. 270-9/14, Arbitrator Joyce M. Klein addressed this issue brought on behalf of the same District:

The notice of "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:6-17.3 and N.J.A.C. 6A:3-5.1" against the Respondent charge her with inefficiency under Section 25 N.J.S.A. 18A:6-17 rather than under Section 8 N.J.S.A. 18A:6-16 which covers tenure charges other than those of inefficiency under the provisions of TEACHNJ.** The District's efforts to proceed under Section 8 are limited by the charges themselves, which include N.J.S.A. 18A:6-17.3 and not N.J.S.A. 18A:6-16 at this juncture. **As there is no basis for proceeding under N.J.S.A. 18A:6-16, I do not address whether such a proceeding would be warranted based upon the record in this case.**

Id. at 25. [*Emphasis Added*] (*See,* Exhibit "G").

In a decision only recently issued and after the District filed amended charges against a teacher pursuant to Section 8 of TEACHNJ, in In the Matter of Tenure Charges Against Rinita Williams, State Operated School District of the City of Newark, Docket Nos. 241-8/14 & 17-1/15, Arbitrator Tia Schneider Denenberg, citing to the arbitration decisions in *Whitehurst* and *Thomas*, flatly rejected the District's pursuit of charges of inefficiency under Section 8 as well. (*See* Exhibit "M").

Lastly, in the prior arbitration proceeding In the Matter of Tenure Charges Against Linda Kelly-Gamble, State Operated School District of the City of Newark, Docket No. 266-9/14, you, as the assigned Arbitrator, specifically concluded that Section 25 was the exclusive avenue for pursuit of charges of inefficiency:

> As argued by the Respondent, the new inefficiency standard of N.J.S.A. 18A:6-17.3 with attendant regulations represented wholesale changes to

> inefficiency cases heard under N.J.S.A. 18A:6-10, among them the elimination of the 90 day improvement period. N.J.S.A. 18A:6-17.2 limited the discretion of the arbitrator when considering an inefficiency charge. **Nothing convinces me that the Legislature intended inefficiency cases filed during and after the 2013-14 School Year to be heard under both**.

Id. at n. 5, p. 56. [*Emphasis Added*] (See Exhibit "C").

The District apparently believes that through Section 8 it does not need two years of ineffective or partially ineffective ratings to bring charges. If the Legislature had intended for deficient Section 25 inefficiency charges to proceed to arbitration via Section 8, it would have so stated. Instead, as discussed above, it specifically and clearly revamped the entire process of bringing inefficiency tenure charges against a teacher, removing them from the general framework of Section 8 and creating an entirely new and specific process under Section 25. Section 25 separated out inefficiency from all other charges with its own statutorily and regulatory provisions concerning unique timeframes, procedures and requirements, all of which are different from the requirements set forth in Section 8, which involve charges brought on grounds other than inefficiency. It is a well-settled tenet of statutory construction, that "where one statute deals specifically with a subject and another statute deals with that subject only generally or inferentially, the specific statute is controlling." City of East Orange v. Essex County Register of Deeds and Mortgages, 362 N.J. Super. 440, 444 (App. Div. 2003) (citing Wilson v. Unsatisfied Claim & Judgment Fund Board, 109 N.J. 271, 278 (1988)).

If the District wished to proceed against Respondent Kelly-Gamble on statutory grounds other than "inefficiency" – such as "incapacity," "unbecoming conduct," or "other just cause" – it was free to do so last fall by filing such charges against her in accordance with the requirements of Section 8 of the Act when it filed the original charges. It chose not to do so. What it cannot do is file Section 25 charges and lose, and then attempt to re-file the exact same charges under Section 8. *TEACHNJ Act* clearly dictates that all inefficiency charges must be filed, if at all, pursuant to the requirements set forth in Section 25. There is no "alternate" filing method for inefficiency charges. If the Legislature had intended for deficient inefficiency tenure charges to proceed to arbitration via Section 8, it would have so provided. It did not. That being the case, the amended charges filed by the Petitioner School District must be dismissed consistent with your prior arbitration Award and ruling on January 30, 2015.

The Petitioner School District has raised one last issue that needs to be addressed briefly. The Petitioner has complained to you, as the Arbitrator in this proceeding, that the Respondent's Motion To Dismiss is "untimely". As you know, the Commissioner of Education has the authority to address any "defects" in the tenure revocation proceeding, including failure of responding party to file an appropriate answer in tenure proceedings. Respondent admits that she was given an extension of time to file her formal answer in this proceeding by April 15, 2015. But for a shipping error in the Fed Ex delivery to the Division of Controversies and Disputes in the Commissioner of Education's Office in the

Department of Education, the Answer would have been filed in a timely manner. Respondent, through counsel, advised the Division of the shipping error and the "excuse" was accepted with the Motion following the next day on April 16, 2015.

It is apparent that the Commissioner accepted the Respondent's Answer and Motion by the transfer and assignment of the tenure revocation proceeding along with the MOTION TO DISMISS. I am attaching a copy of the transmittal letter from the Hon. Kathleen Duncan, the Director of the Division within the Commissioner's Office. As a result, there is no dispute regarding the filed Answer and Motion. Again, this is another example of the Petitioner School District creating an issue where there is none. *See,* Letter from the Division Of Controversies and Disputes transmitting the tenure revocation proceeding to you as the assigned Arbitrator.

Petitioner State Operated School District City of Newark

At the outset, it should be clear that the District Certified and filed the Amended Tenure Charges of Inefficiency with the Commissioner of Education on or about March 17, 2015. These Tenure Charges expressly address the "old" or "Section 8" inefficiency charges of N.J.S.A. 18A:6-16. The underlying Arbitration Award dismissed Tenure Charges filed against the Respondent pursuant to N.J.S.A. 18:6-17.3, brought pursuant to the "new" provisions of Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-16, *et seq.*, as adopted August 6, 2012. Following

the Arbitrator's decision and directive the District Amended the Tenure Charges to include the "old" or "pre-Act" inefficiency standard as set forth in N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-16. A new docket number was assigned by the Commissioner of Education, who noted that these charges were to be considered only under this section.

Further, it is of no moment that the District has not moved to vacate this Arbitrator's Award of January 30, 2015. Here, the Respondent has likewise not filed any action to confirm the Award in accordance with N.J.S.A. 18A:6-17.1, which provides that "[t]he arbitrator's determination shall be final and binding and may not be appealable to the Commissioner of Education or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10." N.J.S.A. 18A:6-17.1 expressly refers to the mechanism of enforcement of arbitration awards through the process set forth in N.J.S.A. 2A:24-7. Therefore, the Award is binding as per TEACHNJ, unless and until it is confirmed, modified or vacated in superior court via summary action pursuant to R. 4:67-2. *Id.*

Tenure arbitrations are individual matters, each addressing a unique set of circumstances. Each must be adjudicated separately and on their own merits. TEACHNJ was implemented in order to address the individuality of these matters providing for arbitration rather than an administrative law hearing, which focuses on the facts of the case rather than a body of case law. Here, the underlying matter was dismissed and no final decision on the merits was reached. For the

reasons discussed further below, once a matter is transmitted to arbitration by the Commissioner, the arbitrator must proceed to a hearing on the merits. As such, this matter should proceed to a hearing on the merits of the tenure charges against the Respondent.

These Amended Tenure Charges were filed subsequent to the decision In the Matter of the Tenure Hearing of Linda Kelly-Gamble, State-Operated School District of the City of Newark, Agency Docket No. 266-9/14 (Pecklers, January 2015). Following the dismissal, the District submitted the instant Amended Tenure Charges, adding a charge of inefficiency pursuant to Section 8 of TEACHNJ (the "old" statute) to that previously alleged pursuant to Section 25 of TEACHNJ. Simply put, the evaluations for Respondent during the 2012-2013 school year were poor, and should not be ignored. Respondent should not get a "free pass" for her performance during this time period. However, this is precisely the result which will be achieved should the instant matter be dismissed because the District will be unable to pursue tenure charges for Respondent during this time period under either Section 8 or Section 25 of TEACHNJ.

The Amended Tenure Charges of Inefficiency were brought against the Respondent based on her consistent lack of improvement and receipt of poor evaluation ratings of "ineffective" and "partially effective." Based upon this performance, the District filed Amended Tenure Charges for Inefficiency against Respondent, a tenured teacher within the District, 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) with the Commissioner of Education. The Amended Tenure Charges must proceed to a substantive hearing to determine the question of whether they are sufficient to warrant the Respondent's dismissal or reduction in her salary by a preponderance of the evidence, which, as discussed more fully below, is an entirely different standard from that delineated under the "new" TEACHNJ Act. The Amended Tenure Charges must therefore be evaluated under the "preponderance of the evidence" standard, rather than as argued by the Respondent under the evaluation criteria of the new Act.

Respondent here is seeking to have her cake and eat it. She alleges in her Motion to Dismiss that the inefficiency charge pursuant to Section 25 of TEACHNJ, should be dismissed because the charges were premature. Specifically, Respondent alleges that the evaluations for the 2012 - 2013 school year should not "count" for tenure decisions. Respondent further asserts that the inefficiency charges can only be brought pursuant to Section 25 rather than Section 8 of TEACHNJ and therefore the District's amended charges must be dismissed. Here, the Respondent is arguing that the tenure charges of inefficiency are both too early and too late. The former argument entirely ignoring the legislative history and effective date of TEACHNJ, the latter holding the District to an impossible standard of predicting the future. As explained in more detail below, the Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-10, implemented by Section 8, N.J.S.A. 18A:6-16, as well as Section 25, N.J.S.A. 18A:6-17.3. As in this case, the

Arbitrator has dismissed the charges under Section 25, they must now proceed and be evaluated under Section 8.

In addition, the Amended Tenure Charges were filed timely as required by N.J.S.A. 18A:6-13 and N.J.A.C. 6A:3-5.1. Here, the Amended Tenure Charges were initially served on the Respondent after their being submitted to the State-District Superintendent on or about January 15, 2015. (*See,* Exhibit C). As the Amended Tenure Charges addressed Section 8 charges, the Respondent was afforded the statutorily mandated time period of fifteen (15) days rather than the ten (10) day response time as prescribed for charges brought under Section 25. (Cf. N.J.A.C. 6A:3-5.1(b)(3) and N.J.A.C. 6A:3-5.1(c)(3). The Respondent filed a written response to the Amended Tenure Charges with the District on January 31, 2015. Thus, the District had 45 days from January 31, 2015, to make a determination as to the probable cause in the amended tenure charges pursuant to N.J.A.C. 6A:3-5.1(b)(4). In accordance with this regulation, the District did determine that there was probable cause to the amended charges and the State-Appointed District Superintendent completed the Certification of Determination on the 45th day, March 17, 2015. (*See*, Exhibit D).

This matter was subsequently received by the Commissioner of Education, who acknowledged receipt of the tenure charges for which an Answer was to be timely filed pursuant to N.J.A.C. 6A:5-5.3 noting that, "the tenure charges will not be evaluated under N.J.S.A. 18A:6-17.13 because a decision pursuant to that section has already been reached." (*See,* Exhibit E). As such, the amended

tenure charges were properly brought pursuant to Section 8 of TEACHNJ alleging Inefficiency. The Respondent is clearly seeking a free pass from the tenure law and this explicitly was not provided by the Legislature when TEACHNJ was enacted. For the reasons set forth more fully below, the Motion to Dismiss should be denied and the matter should move forward towards a hearing on the merits of the Section 8 Tenure Charges.

The question under Section 8 inefficiency charges is whether the District has met its burden under the long-established preponderance of credible evidence standard. See I/M/O Owen Newson and the State-Operated School District of the City of Newark, Docket. No. 276-9/12 (Pecklers, 2013) (evaluating a tenure charge filed after the effective date of TEACHNJ, but relying on evaluations performed before the effective date under the "preponderance of the evidence" standard.). Pursuant to the older standard, the burden is on the District to prove the tenure charges by a preponderance of the credible evidence. In Re Polk, 90 N.J. 550 (1982). This requires that the District offer evidence that would lead a reasonably prudent person to conclude that the Respondent is an ineffective educator. I/M/O Zinznewski, School District of Twp. of Edison, Middlesex County, OAL Docket No. EDU 4727-08 (May 5, 2010).

This standard is separate and apart from that as statutorily defined for Section 25 charges. Under the rubric of N.J.S.A. 18A:6-17.2, governing Section 25 charges, the question is whether the Respondent has rebutted the presumption set forth by the Commissioner that the District has followed the

Evaluation Process pursuant to N.J.S.A. 18A:6-17.1 based on tenure charges, having been determined by the Commissioner to be sufficient, the arbitrator's authority is confined to determine based on the evidence presented at a hearing whether or not:

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

N.J.S.A. 18A:6-17.2.

For the charges preceded above regarding inefficiency under Section 25, the Arbitrator can only make a determination on the above-listed four elements. Contrary to the Section 25 standard, pursuant to N.J.S.A. 18A:6-16, the issue before the arbitrator here is whether the evidence in the record presented supports the charge of inefficiency. See I/M/O Tenure Hearing of Lawrence E. Hawkins, State-Operated School District of the City of Newark, Docket. No. 243-10/13 (March 10, 2014) *39-43; I/M/O Tenure Hearing of Gerald Carter, State-Operated School District of the City of Camden, Docket. No. 269-12/12, (July 18, 2013) *24-27; and I/M/O Tenure Hearing of Felicia Pugliese, State-Operated

School District of the City of Newark, Docket. No. 272-9/12 (February 15, 2013) *8-10. The only issue for the arbitrator is whether the record supports a finding that the charges are true. *See,* Chavez, *supra,* *11-12. Without developing the record at a hearing and considering the District's evidence, which goes beyond the summary Statement of Evidence, it is impossible to make this determination.

In keeping with the Arbitrator's prior determination, the evaluations conducted during the 2012–2013 school year are not the sole basis for the inefficacy charges. Nor was there a "free" year without evaluation. These evaluations and the relevant testimony that will be adduced should be considered along with the remainder of the evidence to be presented in assessing the totality of the circumstances. TEACHNJ was enacted on August 6, 2012, by the New Jersey Legislature and went into effect prior to the start of the 2012-13 school year. P.L. 2012, c. 26, §28. N.J.S.A. 18A:6-117. The effective date of adoption of TEACHNJ is provided below N.J.S.A. 18A:6-117 and states the following regarding the effective date: "Adopted L. 2012, c.26, §1, approved August 6, 2012, in the 2012-2013 school year." Each statute provided thereafter, N.J.S.A. 18A:6-118 through 129 provides that it was adopted "August 6, 2012, in the 2012-2013 school year." In addition, the statutes that established the procedure for adjudicating tenure charges, N.J.S.A. 18A:6-16 through 17.5 also cite that same was approved "August 6, 2012, in the 2012-2013 school year."

The District piloted a new teacher evaluation system in the 2011-2012

school year, not 2012-2013 as asserted without support by Respondent. Thus, evaluations conducted in the 2011-2012 pilot did not "count" for official purposes, but the experience of that pilot program informed the development of the teacher evaluation process adopted, approved and implemented in subsequent school year 2012-2013. It is indisputable that the Legislature purposefully adopted and approved TEACHNJ "August 6, 2012, in the 2012-2013 school year." As such, there is no question that the evaluations in the 2012-2013 school year were to be used towards determining if tenure charges were warranted, if not as the sole basis.

TEACHNJ required school districts to institute pilot programs to test their new evaluation rubrics by, January 31, 2013, at the latest. N.J.S.A. 18A:6-123(d) ("Beginning no later than January 31, 2013, a board of education shall implement a pilot program..."). [*Emphasis Added].* It also required school districts to implement their evaluation rubrics by the beginning of the 2013-2014 school year at the latest. *See,* N.J.S.A. 18A:6-123(e) ("[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric"). [*Emphasis Added*]. Neither the Legislature nor the Department of Education required school districts to wait a year to implement their evaluation rubrics if the rubrics had been adopted and approved earlier. Further neither entity would require New Jersey school districts to treat the 2012-2013 school year, and only 2012-2013, as a "pilot" year. The cited provisions provided the latest dates by which districts were required to test and implement

their new rubrics; they did not prohibit implementation of approved rubrics earlier than the stated deadline. Nothing in TEACHNJ or any regulations provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3.

Moreover, the Commissioner of Education has upheld tenure charges for inefficiency under N.J.S.A. 18A:6-17.3 based upon annual summative ratings for the consecutive years of 2012-2013 and 2013-2014. I/M/O Tenure Hearing of Renee Pulliam-Newell, State-Operated School District of the City of Newark, Agency Docket. No. 276-9/14, where the Commissioner entered default judgment for charges under TEACHNJ Act based upon evaluations conducted during the 2012-2013 and 2013-2014 school years, for inefficiency.

Furthermore, in the recent decision of I/M/O LaRhonda Ragland and the State-Operated School District of the City of Newark, Docket No. 258-9/14 (Arbitrator Timothy Brown, Esq.) (February 2, 2015), the Arbitrator concluded that he had the authority to review the tenure charge pursuant to N.J.S.A. 18A:6-17.3 (new inefficiency law) and that once the Commissioner transferred the matter, the Arbitrator was required to hear the merits of the case. The Arbitrator concluded that the "the Commissioner's referral of this matter to me was specifically pursuant to TEACHNJ Section 25 (N.J.S.A. 18A:6-17.3(c)) and no other Section of the Act, and grants me the narrow authority to determine the case under the provisions of Section 23 and no other."

Similarly, In the Matter of the Tenure Hearing of Edward Newton, State-Operated School District of the City of Newark, Agency Docket No. 276-9/14 (Arbitrator Timothy Brown, Esq.) (March 23, 2015), the Arbitrator concluded that the District met its burden to warrant dismissal under Section 25 of the Act pursuant to the tenure charge of inefficiency. For all of these reasons, the teacher evaluations conducted within the District in 2012-2013 were valid, effective, and "counted" for all purposes, including: to support tenure charges such as this one. Respondent's contention to the contrary should be rejected.

Respondent argues that the instant charges must be dismissed because the parties are barred from re-litigating in a new case an issue already disposed of. However, this is a mischaracterization of the facts here. A party asserting the defense of collateral estoppel has the burden of demonstrating that the issue was litigated in a prior proceeding. State v. Kelly, 201 N.J. 471, 488 (2010). The merits of the Amended Tenure charges against there were never adjudicated, and as such, the defense does not apply.

The District previously filed an inefficiency tenure charge against Respondent (Docket No. 266-9/14) under Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3. In response to Respondent's claim that the charge asserted there was defective because of the inapplicability of Section 25 (because evaluation ratings obtained in 2012-13 did not "count" toward the two years' ratings required under that provision), the School District requested that the Arbitrator consider the charge under both Section 25 and Section 8 of TEACHNJ, N.J.S.A. 18A:6-

16, to avoid the necessity of filing a Section 8 charge later, in a separate proceeding. The Arbitrator denied the School District's request and dismissed the charge on the basis of Respondent's contention pertaining to Section 25 (the inapplicability of the 2012-13 evaluation rating). See, In the Matter of the Tenure Hearing of Linda Kelly-Gamble, State-Operated School District of the City of Newark, *supra*, Therein, this Arbitrator did not reach the merits of the charge under Section 8 – *i.e.* he never addressed whether the School District had met its burden of proving inefficiency. As such, the Section 8 charge was not adjudicated. Therefore, even if the School District is "bound by" the Arbitrator's decision in the previous matter, it is not precluded by that decision from bring the instant charge, as the Arbitrator's decision did not address the charge now presented pursuant to Section 8.

As stated above, Respondent cannot meet the burden of demonstrating that the issue was litigated in a prior proceeding. While the two charges of inefficiency against her have been predicated on the same facts, if viewed only from the position of the statement of evidence, they are supported by different statutory authority, as Respondent acknowledges. Moreover, the decision dismissing the previous charge was based on statutory grounds inapplicable to the instant charge, specifically the requirements of N.J.S.A. 18A:6-123(d), which are applicable only to charges brought pursuant to Section 25. *See,* N.J.S.A. 18A:6-17.3(d). As the Section 8 charge was not addressed in the previous case and the only issue decided there was inapplicable to the Section 8 charge, the

issue of Respondent's inefficiency has not been decided, and the Section 8 charge against her is not precluded by res judicata.

In the instant matter, the law of case doctrine is clearly inapplicable. In the first instance, the initial tenure charges for Respondent were dismissed on a procedural issue regarding Section 25 of TEACHNJ. Here, the Arbitrator did not review any evidence in support of the charges in coming to his determination, nor did he analyze the legal sufficiency of the District's position. Therefore, the issue regarding the substance of the District's underlying charges was never litigated, and no legal determination was made in this regard. Should this matter proceed to a hearing and heard on the merits, it will be the first time the parties have an opportunity to argue their positions with regard to the substance of the allegations against the Respondent. This issue has yet to be argued -- let alone re-litigated.

The law of the case doctrine sets forth that unreversed decisions made during the trial by the same court regarding questions of law should not be disturbed. State v. Reldan, 100 N.J. 187, 203 (1985). The policy for such a doctrine is that "once an issue is litigated and decided in a suit, re-litigation of that issue should be avoided if possible." State v. Hale, 127 N.J. Super. 407, 410 (App.Div.1974). However, the law of the case doctrine is discretionary. State v. Reldan, *supra,* 100 N.J. at 205.

Additionally, the application of this doctrine is discretionary, and "should be

applied flexibly to serve the interests of justice." State v. Reldan, *supra*, 100 N.J. at 205. Here, the interests of justice would not be served by a procedural dismissal. As stated above, if the evaluations for the 2012-2013 school year do not "count" for purposes of tenure charges under Section 25, and the District's request to charge Respondent under Section 8 was denied, Respondent simply gets a free pass for his poor performance during this time period. This was clearly not the intent of the drafters of TEACHNJ. Essentially, the District would be unable to pursue any charges against any teachers for their poor evaluations in the 2012-2013 school year. The interests of justice would be served by permitting this matter to proceed to a hearing on the merits. Consequently, the law of the case doctrine is inappropriate in the instant matter. Therefore, this is not a "second bite at the apple" as Respondent asserts, and this matter must proceed to a hearing for a determination on the merits of the inefficiency charge under Section 8.

Codifying the entire controversy doctrine, New Jersey Court Rule 4:30A requires all claims against all potential defendants be brought in one encompassing litigation. The threefold objectives behind the doctrine are (1) to encourage the comprehensive and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation. Cogdell v. Hospital Ctr. at Orange, 116 N.J. 7 (1989).

Respondent asserts that the District is re-litigating the tenure charges against her because these charges have already been brought before an arbitrator and the District lost. However, that decision was not based upon Respondents evaluations or the merits of the District's case demonstrating the Respondent's inefficiency based on a preponderance of the evidence at a hearing. The Arbitrator dismissed the previous charges against Respondent based on his interpretation of TEACHNJ which he determined does not allow for evaluations from the 2012-2013 school year to be considered in tenure charge matters. This is not a conclusive determination of the legal controversy presented between the parties. Further, a dismissal of the instant charges would not achieve an equitable result because the District would essentially be unable to bring tenure charges against any teachers based upon their poor evaluations from the 2012-2013 school years. Lastly, the instant tenure charges do not constitute a duplicative litigation because the merits of the charges have yet to be heard. This is not a case where the District lost on the merits of the previous tenure charges and now wishes to re-file. Accordingly, in recognition of the underlying principles of the enforcement of the entire controversy doctrine, the District's tenure charges against Respondent should proceed to a hearing and determination on the merits.

The Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-10, implemented by Section 8, N.J.S.A. 18A:6-16, as well as Section 25, N.J.S.A. 18A:6-17.3. *See,* Chavez, *supra*. The contention that an

inefficiency charge cannot proceed on any basis other than N.J.S.A 18A:6-17.3, and that a charge cannot proceed on that basis either until all applicable requirements are met – essentially, that the Legislature intended to hand poorly performing teachers a "free pass" for two years after the Act's effective date – has been rejected by TEACHNJ arbitrators. In I/M/O Tenure Hearing of Henchey, Agency Docket No. 8-15 (January 3, 2015), for example, the arbitrator stated the following:

> I am not convinced ... that there was a moratorium on filing a Section 8 tenure charge alleging inefficiency insofar as the 2012-13 school year is concerned.

Id. at pg. 24.

Henchy concluded that since the effective date of TEACHNJ, "the applicable statutory provisions serving as vehicles for processing tenure charges" have included both Section 8 and Section 25. *Id.* at p. 26. *See also,* I/M/O Tenure Hearing of Henchey, Agency Docket No. 9-15 (Jan. 6, 2015) at p. 4. Similarly, the Arbitrator in I/M/O Tenure Hearing of Pugliese, Agency Docket. No. 272-9/12 (February 15, 2013), confirmed, Superior Court of New Jersey, Chancery Division, Essex County, Docket. No. C84-13 (Sept. 16, 2013), appeal pending, Docket. No. A-000857-13, stated that "[t]o hold otherwise would be to usurp the power of the legislature." *Id.* at pg. 8-9.

Arbitrators in several cases in which Section 25 charges have been dismissed have suggested that dismissal might not have been required if the

charges had been pled, in the alternative, on the basis of Section 8 as well as Section 25. *See,* I/M/O Tenure Hearing of Yarborough, Agency Docket No. 509-14 (December 29, 2014); I/M/O Tenure Hearing of Williams, Agency Docket No. 501-14 (December 20, 2014); I/M/O Tenure Hearing of Brady, Agency Docket No. 478-14 (Dec. 7, 2014). Thus, these Arbitrators have read TEACHNJ to allow inefficiency charges to proceed on grounds other than Section 25, contrary to Respondent's contention here.

The statements in Pugliese, Henchey, Yarborough, Williams, and Brady also represent a sensible reading of TEACHNJ that is consistent with the legislative intent. In cases such as this, where Section 25 of TEACHNJ is inapplicable because it was held that a charge cannot be based on two years of "ineffective" or "partially effective" ratings, a school district must nevertheless be permitted to proceed with an inefficiency charge in an appropriate case. More importantly, N.J.S.A. 18A:6-16 provides the statutory basis to do so.

As discussed *supra*, N.J.S.A. 18A:6-10 requires that once a matter is transmitted to arbitration by the Commissioner, the arbitrator must proceed to a hearing on the merits. Under N.J.S.A. 18A:6-16, the question before the arbitrator is whether the evidence in the record presented supports the charge of inefficiency. *See,* Hawkins, *supra,* *39-43; Carter, *supra,* *24-27; Pugliese, *supra,* *8-10. The only issue for the arbitrator is whether the record supports a finding that the charges are true. *See,* Chavez, *supra,* *11-12.

On or about March 27, 2015, the Respondent's counsel requested an extension of time to "file a written response." (*See,* Exhibit H). An extension of time from April 2, 2015, until April 12, 2015, was granted. (*Id., see,* NJ DOE Controversies and Disputes Extension noted on Correspondence). Subsequently, on April 13, 2015, the day after the extended time to answer, the Respondent's counsel again requested an additional extension, until April 15, 2015, this time to file an "Answer and Motion." (*See,* Exhibit I). An additional extension of time, until April 15, 2015, was granted by the Division. (*Id., see,* NJ DOE Controversies and Disputes Extension noted on Correspondence). The Division expressly noted that "**No further extensions will be granted**". *Id.* [*Emphasis Added*].

Despite the two extensions, the Respondent did not file an Answer on April 15, 2015. Moreover, the Respondent unilaterally announced an additional extension of time to file a Motion by April 16, 2015, an additional two days after the extended deadline. (*See,* Exhibit J). In accordance with N.J.A.C. 6A:3-5.3 and N.J.A.C. 6A:3-5.3, any request for an extension of time to answer can only be granted by the Commissioner. Further, N.J.A.C. 6A:3-5.3(1) permits "**the filing of a motion to dismiss in lieu of an answer provided the motion is filed within the time allotted for the filing of an answer.**" *Id.* [*Emphasis Added*]. Even assuming that the Division could accept an answer filed outside the extended deadline, the Respondent's Motion to Dismiss, filed in addition to rather than in lieu of an Answer, submitted a further two days after the twice

extended deadline should be rejected.

Respondent recasts three (3) arguments in support of her reply. Her primary, averment is that the Arbitrator's dismissal of the District's prior tenure charges based on Section 25 constitutes an adjudication on the merits, triggering the various equitable doctrines she cites. Respondent additionally asserts that because, as she would have it, Section 25 is now the only mechanism by which tenure charges can be brought and it was previously found that Section 25 omits the 2012-2013 evaluations, the skipping of an entire academic year for purposes of tenure decisions is appropriate and even legislatively condoned. Finally, Respondent reiterates her position that the District's Amended Tenure Charges were untimely. None of these arguments are meritorious.

Contrary to the Respondent's allegations, the tenure charges at issue in this proceeding were timely filed. The Respondent, in a series of confusing arguments claims that the tenure charges should be dismissed as untimely because the District has made some kind of "assessment" based upon two flawed "assumptions". *See,* Respondent's Letter Brief in Reply to the District's Opposition to Respondent's Motion to Dismiss, dated May 22, 2015, at *2. In this connection, it must be noted that both assumptions are entirely without merit and wholly fabricated by the Respondent and ascribed to the District without any legal or factual basis. The Respondent alleges that the District is assuming: "(1) that there is no record or admission by the Petitioner that it had 'filed' Section 8 inefficiency charges against the Respondent simultaneously with the filing of the

Section 25 charges; and (2) that section 8 inefficiency charges were filed by the Petitioner simultaneously with the Section 25 tenure charges in the prior proceeding." *Id.* The District made no such assumptions and has not made any argument that would lead to the conclusion that the District had not previously contended that the tenure charges, initially filed in August 2014, were and did comprise N.J.S.A. 18A:6-16, or "Section 8 inefficiency charges."

In making such allegation, the Respondent overlooks the Arbitrator's prior decision I/M/O the Tenure Charge of Linda Kelly-Gamble and the State-Operated School District of the City of Newark, Essex County, Docket No. 266-9/14 (January 30, 2015), and the record in this case. This argument is somewhat undercut by her alternate argument that these tenure charges must be dismissed under the inapplicable "law of the case doctrine" – where the Respondent argues that the Arbitrator's prior decision dismissing the Section 25 charges only and to proceed based upon the perfection of new charges under Section 8. *See,* Respondent's Brief at *7.

Here, the initial tenure charges, were brought pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:17.3 and N.J.A.C. 6A:3-5.1. During the prior proceeding this Arbitrator clearly determined that the initial tenure charges had been filed "pursuant to Section 25 of ...TEACH NJ... N.J.S.A. 18A:6-17.3(a)(2)", addressed only those charges and dismissed that charge of inefficiency with prejudice. This was made clear in Arbitrator Pecklers' direct rejection of the District's contention that it had plead an alternate statutory basis under N.J.S.A.

18A:6-16, holding that the Initial Tenure Charges had been plead, and were to be considered, under N.J.S.A. 18A:6-17.3. I/M/O the Tenure Charge of Linda Kelly-Gamble and the State-Operated School District of the City of Newark, Essex County, Docket. No. 266-9/14 (Pecklers, January 2015). The Arbitrator ruled that the initial tenure charges failed under N.J.S.A. 18A:6-17.3, and therefore "**if Petitioner [the District] wishes to proceed against Respondent on an alternative statutory basis, it must do so via the perfection of new tenure Charges before the Commissioner of Education.**" *Id.*, at 56. [*Emphasis Added*] This is exactly what the District has done.

The Tenure Charges at issue in this proceeding, the Amended Tenure Charges, were submitted to the State-Appointed Superintendent by Principal Maria Ortiz on or about January 14, 2015. The Amended Tenure Charges, which added the citation to the relevant statutes N.J.S.A. 18A:6-16, were filed in accordance with the procedure and timelines set forth in N.J.A.C. 6A:3-5.3. These tenure charges were subsequently served on the Respondent, who submitted an answer to the District on January 31, 2015. These Tenure Charges were then reviewed and Certified by the State-Appointed District Superintendent and filed with the Department of Education for on March 17, 2015. The Department of Education then reviewed the Tenure Charges after receiving the Respondent's own untimely Answer and transmitted the tenure charges to Arbitrator Pecklers as new tenure charges. In transmitting the tenure charges to an Arbitration proceeding the Department of Education clearly stated that:

> Please be advised that, following receipt of respondent's answer on April 15, 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,** are being referred to Arbitrator Michael J. Pecklers as he deems appropriate.

See, correspondence from M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, dated April 22, 2015. [*Emphasis Added*].

Also in regard to Respondent's position that the District's filing of the Amended Tenure Charge was untimely, the District again refers the Arbitrator to the opinion recently issued in I/M/O Tenure Hearing of Marie Ebert, Agency Docket No. 49-3/15, dated May 21, 2015. There, addressing the same issue Arbitrator Denenberg stated that:

> A review of the applicable statutes and regulations, along with the court's decision in Cowan [224 N.J. Super. 737 (App. Div. 1988)], demonstrates that: (1) once tenure charges are filed with the district, the tenured employee has 15 days to submit a written statement of position and evidence; and (2) upon receipt of the employee's statement of position and evidence, or upon expiration of the allotted 15-day time period, the district superintendent shall determine within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges are sufficient to warrant a dismissal or reduction in salary. Here, the record demonstrates that the determination of probable cause was made within 45 days of the respondent's response to the amended tenure charges. Accordingly, **I reject the respondent's claim and find that the filing of amended tenure charges was timely.**

See, Exhibit 1 to the Supplemental Certification of Shana T. Don Esq., the Opinion issued by Arbitrator Tia Schneider Denenberg I/M/O Tenure Hearing of Marie Ebert, Agency Docket No. 49-3/15, dated May 21, 2015, at *2 [*Emphasis*

Added].

The District urges the Arbitrator in this matter to reach the same and proper conclusion. As to this issue, the District also wholly disagrees with the Respondent's implication that, because the time periods under the law were "designed to protect the due process rights of educators subject to tenure revocation charges", *see* Respondent's brief at *5, her own due process rights have somehow been violated in any manner in this process. Respondent has now been aware of the charge and the evidence supporting the charge for many, many months. To suggest that Respondent's (unarticulated) due process rights were violated, or even that she has been in any manner prejudiced by the timing of the service of the tenure charges levied against her, is without basis in fact.

Further, pursuant to N.J.S.A. 18A:6-17.3, the Commissioner of Education ("Commissioner") is solely authorized to determine legal challenges to tenure charges. Pugliese v. State-Operated School District of the City of Newark, Docket. No. A-0857-13T2 and Chavez v. State-Operated School District of the City of Newark., Docket. No. A-1012-13T2 (App. Div. May 19, 2015). N.J.S.A. 18A:6-16, which governs this proceeding provides that the Commissioner has **the authority** to determine the sufficiency of a tenure charge "to warrant dismissal or reduction in salary of the person charged" and is required to refer the case to an arbitrator for further proceeding, if such a finding is made. *Id.* Further, the Commissioner is only prohibited from referring a matter to an arbitrator "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." *Id.*

The Commissioner determined that the charge was sufficient to warrant a penalty and transmitted it to the Arbitrator for a hearing. This vested authority has been recognized by arbitrators in tenure hearings under TEACHNJ. *See,* I/M/O the Tenure Hearing of Edward Newton, State Operated School District of the City of Newark, Essex County, Docket. No. 276-9/14 (March 2015) (An arbitrator recognized the Commissioner statutory authority and provided that "[b]ecause the charges have been deemed sufficient by the Commissioner, I find I need not determine whether or not the District complied with claimed controlling procedures and process, or whether the District was required to comply with a tiered evaluation system or other issue...").

Moreover, the role of an arbitrator in a tenure proceeding is set forth in N.J.S.A. 18A:6-17.1. Under TEACHNJ, tenure charges were no longer transmitted to the Office of Administrative Law and instead the charges are submitted to an arbitrator under strict time lines. *See,* Exhibit 2 to the Supplemental Certification of Shana T. Don Esq., Pugliese v. State-Operated School District of the City of Newark, Docket. No. A-0857-13T2 and Chavez v. State-Operated School District of the City of Newark, Docket. No. A-1012-13T2 (App. Div. May 19, 2015). Once a tenure charge is transmitted to an arbitrator pursuant to N.J.S.A. 18A:6-17.1 based on tenure charges alleging that the employee was inefficient an arbitrator is required to make a determination of fact. Here, the Respondent did not file a Motion for Summary Decision with the

Commissioner. Thus, the Respondent's Motion to Dismiss is not properly before the Arbitrator and this matter must proceed to a hearing.

With respect to the bringing of charges pursuant to Section 8, versus Section 25, for tenure charges based in part on evaluations in the 2012-2013 school year, the District draws to the Arbitrator's attention the conclusion on this issue by an arbitrator in another tenure matter:

> In this instance, however, the tenure dispute arose during the transition to Section 25 as the designated procedure for resolving a charge of inefficiency, and the charge was originally based on both Section 25 and Section 8. **Although a charge involving 2012-2013 evaluations may not be brought under Section 25, no similar impediment prevents the district from seeking removal according to the requirements of Section 8.**

See, Exhibit 1 to the Supplemental Certification of Shana T. Don Esq., the Opinion issued by Arbitrator Tia Schneider Denenberg I/M/O Tenure Hearing of Marie Ebert, Agency Docket No. 49-3/15, dated May 21, 2015, at *3. [*Emphasis Added].*

Here, as in the Ebert matter, the tenure dispute arose during the transition to Section 25 and the District's initial tenure charge was based on both Section 25 and Section 8. Simply because Section 25 may have been found to be procedurally unavailable as the vehicle in which to analyze 2012-2013 evaluations, there is no impediment to the District seeking removal of the Respondent under the legislative scheme of Section 8.

In light of the accelerating trend of Arbitration Decisions under the TEACHNJ Act, the District anticipated that the tenure charges in the prior

proceeding would be dismissed, and began proceeding to amend the tenure charges to cure the defect ultimately cited by the Arbitrator in dismissing the charges in his January 30, 2015 Opinion and Award. Further, in accordance with the Arbitrator's instruction, Amended Tenure Charges were perfected before the Department of Education adding the comprehensive and preexisting charge of "inefficiency" to be assessed on a "preponderance of the evidence" standard rather than the more limited two annual evaluations of the TEACHNJ Act.

For all of the foregoing reasons, the State-Operated School District for the City of Newark respectfully requests that the Respondent's Motion to Dismiss be denied in its entirety and the matter proceed to hearing on the merits.

IV. STATEMENT OF THE CASE

Petitioner preliminarily urges that the instant motion is procedurally defective, as Respondent filed the same late after failing to perfect Ms. Kelly-Gamble's answer to the amended tenure charges in timely fashion. This argument was previously raised before the commissioner in an April 21, 2015 MOTION FOR DEFAULT JUDGMENT and denied in an April 22, 2015 correspondence from Director Duncan indicating that she was forwarding the file including the motion to me for resolution. On this basis, a finding is made that the motion is properly before me.

As the moving party and the proponent of this affirmative defense which as a practical matter operates as a threshold consideration, Respondent Kelly-

Gamble assumes the burden of making a *prima facie* showing by a preponderance of the credible evidence. If that is satisfied, the burden of persuasion shifts to the Petitioner to attempt to rebut this prefatory showing through its affirmative defenses. Following a careful analysis of the respective positions and case citation, and with any facts in dispute viewed in a light most favorable to the non-moving party District, I find that the subject amended tenure charge of inefficiency must be **DISMISSED WITH PREJUDICE,** as the District has been unable to rebut Respondent's *prima facie* presentation.

I note at the outset that as Respondent has correctly submitted there is no procedure set forth in TEACHNJ or the enabling regulations that were subsequently promulgated that provides for the amendment of tenure charges. Petitioner has in fact failed to cite any authority for this legal fiction, and relies upon the identical STATEMENT OF EVIDENCE and exhibits which Principal Ortiz proffered in support of the District's prior N.J.S.A. 6:17.3 charge of inefficiency, which was dismissed with prejudice on January 30, 2015.

The District initially advances an equitable argument, insisting that if the amended tenure charge is not permitted to proceed on the merits, it would be unable to bring tenure charges against Ms. Kelly-Gamble or any other instructors for that matter, based upon their poor evaluations for the 2012–2013 School Year. Such a suggestion of course, ignores the fact that Petitioner was fully able to plead and proceed under alternative Section 8 grounds when the initial tenure charges were filed. *See e.g.,* I/M/O Tenure Hearing of Yarborough, Agency

Docket No. 509-14 (Gerber, December 2014); I/M/O/ Tenure Hearing of Williams, Agency Docket No. 501-14 (Gregory, December 2014); I/M/O/ Tenure Hearing of Brady, Agency Docket No. 478-14 (Klein, December 2014); I/M/O/ Tenure Hearing of Henchey, Agency Docket No. 9-15 (Licata, January 2015); I/M/O/ Tenure Hearing of Pugliese, Agency Docket No. 272-9/12, confirmed, Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C84-13 (September 16, 2013), appeal pending, Docket No. A-000857-13. While the District staunchly maintained that it had pled both inefficiency statutes in the first case, I discounted that claim at page 55 of my AWARD, finding that:

> Petitioner's contention that it has pled an alternative statutory basis under N.J.S.A. 18A:6-16 to entitle a hearing on the sufficiency of the inefficiency charges under the 'old' tenure law is also unpersuasive. Rather, a cursory reference in a pleading does not obviate the fact that the solitary tenure charge of INEFFICIENCY and the accompanying STATEMENT OF EVIDENCE make it abundantly clear the instant charges were brought under N.J.S.A. 18A:6-17.3.

And while Petitioner has seized upon my stray comment regarding the filing of new tenure charges, this was taken out of context and referred to those that were non-efficiency based. It must also be seen that Principal Ortiz's filing of the purported "amended tenure charge" preceded my AWARD by roughly two (2) weeks. It is then not possible that the District was merely relying upon my directive when it filed this charge.

These facts undercut any notion that ineffective teachers have been afforded a "free pass" for 2012 – 2013 substandard evaluations, as the District

posits. Moreover, Section 8 inefficiency charges based upon evaluations conducted before the effective date of TEACHNJ may be heard under the *preponderance of the evidence* standard. *See generally*, I/M/O the Tenure Charge between State-Operated School District, City of Newark and Owen Newson, Agency Docket No. 276-12 (Pecklers, 2013). Subsequent inefficiency charges based upon evaluations performed in accordance with a rubric adopted by a board and approved by the commissioner per N.J.S.A. 18A:6-17.3(d) arising during the 2013–2014 School Year when the TEACHNJ Act was fully implemented and thereafter, are then heard under N.J.S.A. 18A:17.3, with the arbitral considerations of N.J.S.A. 18A:17.2 applied.

In so finding, I categorically reject for a second time the District's repackaged argument that nothing in TEACHNJ or any regulation provides that evaluations performed in 2012–2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013–2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3. Rather, and without repeating all my prior findings on this issue, such a conclusion overlooks the clear guidance provided by DOE itself (which indicated *inter alia* that all teaching staff members must be trained on the district's evaluation rubric by July 1, 2013) and ignores the procedural and other due process safeguards guaranteed under the Act, *e.g.* the School Improvement Panel, which was not in place during the 2012 – 2013 School Year.

From my perspective, what clearly may not happen therefore, is for

Petitioner to have its premature N.J.S.A. 18A:6-17.3 inefficiency charges dismissed with prejudice, then turn around and "amend" the original inefficiency charges to include the statutory cause of action that should have been brought in the first place, in an attempt to "cure" this fatal defect. In so finding, I do not believe that it is a material consideration that the DOE docketed this under a new number, or that Director Duncan counseled in her July 15, 2015 clarification correspondence that any charges not dismissed were to be heard under the preponderance of the evidence standard.

Nor has the Petitioner provided any evidence based upon the legislative history of the TEACHNJ Act or its plain language, for its position that once a matter is transmitted to an arbitrator by the commissioner, that arbitrator must proceed to a hearing on the merits of the charge. Rather, such a notion is at odds with the avalanche of awards by Panel arbitrators dismissing inefficiency charges filed by this District under N.J.S.A. 18A:6-17.3, which relied in part upon summative evaluations conducted during the 2012–2013 School Year.

Parenthetically, I credit the position of my colleague Arbitrator Tia Schneider Denenberg, that "[n]othing in the relevant statutory provisions limits an arbitrator's ability to resolve motions before holding a hearing. Indeed, demanding a full evidentiary hearing before ruling on potentially dispositive motions could unnecessarily prolong tenure disputes, ignoring the express desire of the Legislature to expedite them." *See,* I/M/O the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County,

Agency Docket No. 267-9/14 (January, 2015).

In so finding, I respectfully but firmly disagree with the contrary ruling of my colleague Arbitrator Brown in I/M/O/ the Tenure Hearing of Edward Newton, State-Operated School District of the City of Newark, Essex County, Agency Docket No.276-9/14 (Brown, March 2015) which Petitioner has cited, as it relies upon an unduly narrow interpretation of N.J.S.A. 18A:6-17.2 & N.J.S.A. 18A:6-17.3; *see also*, I/M/O the Tenure Hearing of LaRhonda Ragland, State-Operated School District of the City of Newark, Essex County, Agency Docket No. 285-9/14 (Brown, February 2015).

It is also simply not true as the District argues, that the commissioner has upheld N.J.S.A. 18A:6-17.3 inefficiency tenure charges based on evaluations conducted during the 2012–2013 School Year. Instead, that case was disposed of by a default judgment after respondent failed to file an answer in opposition to the tenure charge and not on the merits. *See,* I/M/O the Tenure Hearing of Renee Pulliman-Newell, State-Operated School District of the City of Newark, Agency Docket No. 276-9/14.

In conclusion, the foregoing considerations stand for the cumulative proposition that all inefficiency charges filed against New Jersey educators as a result of evaluations performed during the 2013–2014 School Year and beyond must be brought under N.J.S.A. 18A:6-17.3, which operates as the exclusive means of doing so and not concurrently under N.J.S.A. 18A:6-16. At page 55 of

my previous Kelly-Gamble Award, I stated:

> [i]nstead, as Arbitrator Simmelkjaer reasoned at page 51 of his Award in I.M.O. the Tenure Charge of Inefficiency against Neil Thomas, *supra* Agency Docket No. 244-9/14:
>
> > [i]n the Arbitrator's opinion, had the legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially effective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with Section 25 of TEACHNJ and the other consistent with Section 8, N.J.S.A. 18A:6-16 – it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charges.

See also, I/M/O the Tenure Charge of Inefficiency against Ursula Whitehurst filed by State-Operated School District of the City of Newark, Agency Docket No. 282-9/14 (Simmelkjaer, January, 2015); I/M/O the Tenure Charge of Jodi Thompson, Agency Docket No. 240-8/14 (Brent, June 2015).

Accordingly, based upon the totality of the foregoing considerations, Respondent has presented an un-rebutted *prima facie case* that the subject amended inefficiency tenure charge should be **DISMISSED WITH PREJUDICE**. IT IS SO ORDERED. In light of this finding, Respondent's arguments related to the law of the case, collateral estoppel and res judicata need not be reached.

V. CONCLUSION

Respondent Kelly-Gamble has demonstrated by a preponderance of the credible evidence that the instant MOTION TO DISMISS must be granted.

AWARD

THE INSTANT AMENDED TENURE CHARGE IS DISMISSED WITH PREJUDICE. MS. KELLY-GAMBLE SHALL BE IMMEDIATELY REINSTATED TO HER TEACHING POSITION WITH FULL BACK PAY AND SENIORITY, MINUS INTERIM EARNINGS AND OTHER APPROPRIATE OFFSETS, AND MADE WHOLE FOR THE LOSS OF ANY CONTRACTUAL OR STATUTORY BENEFITS DURING THE INTERVENING PERIOD.

Dated: August 24, 2015
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 24TH DAY OF AUGUST, 2015, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

CARMEN J. GONZALEZ
Notary Public of New Jersey
ID. No. 29319
Commission Expires: Oct 7, 17