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STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Plaintiff, vs. MICHAEL WILSON, Defendant.	SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION: ESSEX COUNTY DOCKET NO. **ORDER**

This matter having been opened to the Court pursuant to N.J.S.A. 18A:6-17.1(e), N.J.S.A. 2A:24-7 and R.4:67-1 *et seq.*, by Riker, Danzig, Scherer, Hyland and Perretti LLP, attorneys for plaintiff State-operated School District of the City of Newark, for an Order seeking to vacate the arbitration decision issued by Lewis R. Amis on December 12, 2015 in the arbitration entitled *I/M/O Tenure Hearing of Michael Wilson and the State Operated School District of the City of Newark, Essex County*, Agency Dkt. No. 302-10/15; and the Court having heard oral argument, and having considered all of the papers in support of the motion and any opposition thereto; and for good cause shown, and noting the objections of defendant to the form of the order

It is on this 25th day of May, 2016

ORDERED that the arbitration decision dated December 12, 2015 in *I/M/O Tenure Hearing of Michael Wilson and the State Operated School District of the City of Newark, Essex County*, Agency Dkt. No. 302-10/ is hereby vacated; and it is further

ORDERED that this matter be remanded to the Commissioner of Education for referral again to arbitration; and it is further

ORDERED that copies of this Order be served on all counsel within seven (7) days of the entry of this Order.

J.S.C.

X opposed

__ not opposed

SUPERIOR COURT OF NEW JERSEY
GENERAL EQUITY PART
ESSEX COUNTY
DOCKET NO.: C-61-16
A.D. #

STATE SCHOOL DISTRICT OF NEWARK,

Plaintiff,

vs.

MICHAEL WILSON,

Defendant.

TRANSCRIPT
OF
MOTION

Place: Wilentz Justice Complex
212 Washington Street
Newark, NJ 07102

Date: May 25, 2016

BEFORE:

HONORABLE THOMAS M. MOORE, J.S.C.

TRANSCRIPT ORDERED BY:

BRENDA C. LISS, ESQ., (Riker, Danzig, Scherer, Hyland and Peretti)

APPEARANCES:

BRENDA C. LISS, ESQ., (Riker, Danzig, Scherer, Hyland and Peretti)
Attorney for Plaintiff

NICK POBEREZHSKY, ESQ.
Attorney for Defendant

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Audio Recorded
Recording Opr:

I N D E X

THE COURT: Okay. We're on the record. The next case is the matter of the District of Newark v. Mr. Wilson. C61-16. First order of business will be appearances on behalf of the plaintiff.

MS. LISS: Brenda C. Liss. Riker, Danzig, Scherer, Hyland and Peretti on behalf of the Plaintiff, State Operated School District of the City of Newark.

THE COURT: Good morning, madam. Welcome.

MS. LISS: Good morning.

THE COURT: Sir?

MR. POBEREZHSKY: Good morning again, Your Honor. Nick Poberezhsky here representing the Defendant, Michael Wilson.

THE COURT: Good morning, sir. Welcome.

MR. POBEREZHSKY: Thanks.

THE COURT: My name is Judge Moore. I'm the Judge assigned to this case. This is the return date of the plaintiffs order to show cause. It's opposed by the defendant. The Court has reviewed all the papers submitted in support of and in opposition to the motion. With all that as our background I'll hear from both counsel as to any points you wish to highlight to me. I'll start with you Ms. Liss.

MS. LISS: Thank you, Your Honor. We appreciate that we have laid out our position in our

papers and that Your Honor has reviewed them. So, I will not repeat all of our arguments and certainly will not repeat all of the relevant facts. As you said we are here seeking to vacate a decision of an arbitrator pursuant to the -- New Jersey Arbitration Act which is incorporated into the statute which is colloquial referred to as Teach NJ, which was the statute adopted in 2012 by the legislature revising the process and the standards for inefficiency tenure charges against teachers in the public schools of New Jersey. The process calls for review by this Court of arbitrators decisions under the standards that are set forth in the arbitration act and the standard among those -- those that are available in the statute that we are -- that we are relying on is the reference to undue means. It is our position, as we've said in our brief that the arbitrators decision in this case was procured by undue means and that this Court should therefore vacate it.

The -- the -- the argument and -- and brief summary and I'd be happy to go in -- into any of these points further if you'd like. Our argument is that the arbitrator misconstrued the relevant provisions of the statute by inserting a specific time frame, time provision into the statutory provision that the legislature did not read into it. He read upon to

establish a certain deadline in other sections of the statute that are nearby that lay out the procedure to be followed. The legislature did provide for a specific date or a specific number of days by which some act need -- needed to have been taken either by the Commissioner, or by the employer, or by the arbitrator for the act that is at issue here, that is providing disclosures to the respondent. The legislature did not include any particular time frame by which that needed to be done. It used the word upon. It used the word upon in other sections of the statute itself. We believe all of that was deliberate. There's a certain amount of flexibility that's intended by the legislature for some things and -- and no flexibility that is permitted for other things. The arbitrator did -- failed to see that distinction apparently and found that even when the word upon was used a certain time limitation was imposed. And a time limitation that he imposed, our second claim of his mis-interpretation of the statute is that on the very day of referral he said the disclosures needed to be provided. That there was no wiggle room. He could have -- if he was going to read a certain deadline into the statute, we suggest that it certainly should not have been the very day of referral. And that I believe

was a clear error in interpretation of the statute.

He did it moreover, without looking at all at whether or not the delay had caused any prejudice to the respondent. There was no finding of prejudice. There was not even any discussion of whether there was prejudice to the respondent in the arbitrators decision. There was no evidence in the record that would have supported a finding of prejudice in any event. There was not even a claim by the respondent that there was any prejudice suffered as a result of the delay, if you want to refer to it as a delay.

In other arbitrators decisions that we've cited where similar issues have come up, the -- of course the decisions are not binding on this Court but, we offer them as examples of what kind of analysis should have taken place. That, when there is a claim that disclosures should have been made sooner, the arbitrator applying the statute should look at whether or not the intent of the legislature and inefficiency tenure charges has been met by allowing a certain amount of flexibility, and whether or not the respondent suffered from any prejudice as a result of the alleged delay in the disclosures. In both those cases that analysis was done. The two arbitrators reached different decisions based on the facts that

were presented to them. The arbitrator here didn't do that analysis at all and we believe the statute required him to do that.

The only other thing that -- well, sorry two things. Two other things I wanted to point out. One is that we cited a case in our reply brief which -- which I believe is very important, Dorr v. The Bedminster Board of Education (phonetic) in which the Appellate Division found that where the legislature does not authorize the penalty of dismissal as a result of a procedural error by a board of education or here a school district. The commissioner there was not authorized to impose that penalty. Here where it's the arbitrator rather than the commissioner we think the same reasoning would apply. And that's what the Court should find is that where the legislature does not allow for the penalty of dismissal, the arbitrator certainly is not authorized to do that on his own.

THE COURT: Ms. Liss, do you see any distinction between the materials that were disclosed? I believe it was November 6th. Those additional couple of documents as opposed to the other ones which I know you argue were -- were disclosed back in September.

MS. LISS: Absolutely. And that was the last point that I was going to get to. The -- the main

evidence of this case, and really all the evidence that was vitally necessary for the respondent to know what he was being charged with and what would -- what the employer would rely upon at the hearing, all of that was provided more than once as early as September 1st. The few documents, six documents that were provided on November 6th you know, if we had not provided them at all the case would have gone forward, the hearing would have been conducted and maybe or maybe not the employer would have prevailed and the charge against the employee -- those additional documents were offered and would have been -- offered on November 6th and would have been offered at the hearing as background to provide elucidation for the arbitrator for him to understand the evaluation instrument, the evaluation frame work in the Newark Public Schools and the calendar of the school district. Again, the general background --

THE COURT: Not necessarily specific to this gentlemen?

MS. LISS: Not at all specific to the respondent. And those just incidently are documents that had been offered by the school district in other similar cases again by way of general background. It was our experience in other cases that arbitrators ask

questions, general background questions in arbitration hearings and that it would be helpful to provide those documents to be able to have the arbitrator understand what the case was about and how honestly the -- the evaluation process under Teach NJ is complex. And understanding the evaluation instrument and how the evaluators arrive at the ratings that are given to employees requires some testimony and requires some explanation at an arbitration hearing. We found that it was helpful. However, we did not provide all that stuff initially with the statement of evidence because it was not specific to the respondent. It was not specifically the evidence that had been relied upon by the evaluators to reach the ratings that they did and the conclusion that tenure charges were warranted.

So, you know having received those few additional documents after the case was referred to arbitration, not immediately upon referral to arbitration I submit could not have led to any prejudice to this employee. There -- there was -- there could not have been any surprise. There could not have been any prejudice to the respondent by not having received those documents sooner.

THE COURT: And if I remember, the arbitrator didn't make any distinction in his opinion regarding

those documents and the other documents.

MS. LISS: If you read his decision it's -- it's based entirely on the date on which the documents were produced. No discussion of prejudice at all. No discussion of the fact that they were additional documents.

THE COURT: Okay. Fair enough. Thank you, Ms. Liss.

MS. LISS: Thank you.

THE COURT: Sir?

MR. POBEREZHSKY: Thank you, Your Honor and thank you for hearing this matter today. The first thing that I definitely wanted to touch upon and stress is that the arbitrators decision was absolutely one hundred percent correct and it followed the law to the T. The statute is extremely clear at Teach NJ, that upon referral of a case to arbitration the district is required to provide the respondent with its entire record of evidence so that the respondent is put on notice as to what exactly will be introduced at the hearing, and will also very importantly know what will not be introduced at the hearing. So, the respondent doesn't have to guess in terms of what is -- in its preparation of the case. And the statute also provides that any evidence that's not provided upon referral to

the case to arbitration may not be used on a later date. In this particular case it's -- cannot even be argued that no evidence was provided by the district upon referral of the case to arbitration. What was provided as exhibits to tenure charges does not count. That does not constitute compliance with the disclosure obligations. And because the district did not provide any evidence to the respondent when the case was referred to arbitration in a timely manner, and we're not talking one -- the day of, we're not talking the next day, we're not talking even them not having notice because, I did sent out notice just in case the commissioners letter didn't come through, but we're talking about two weeks later. And the statute is clear that the district would be prohibited from presenting any evidence that it did not provide at that time, and if that was applied which I believe it was here district would have no case. It would not be able to present evidence.

Now, one of the arguments that has been strenuously put forward is that there was no evidence of prejudice. I mean the arbitrator did find that there was prejudice. I believe that prejudice can be infirmed (sic) under the circumstances. Inferred, excuse me, under the circumstances. But, there has

been specific prejudice and I know this because I handled the underlying tenure case. For example, my letter on October 23rd which I included as part of my certification, I indicated that I you know, I've obviously alerted the -- the -- the district and the arbitrator to the fact that this is the date that the case was referred to arbitration. They are required to provide us with their record of evidence, and I was intending on filing the motion for summary decision. Not on this point, that became later added on. But, because -- it's not so relevant here at this time, but becuase there was no SGO scores that comprised of his evaluation which we would argue is required under the law. But, I wasn't able to prepare that motion and we're talking forty five days before the hearing was set to commence because I didn't know if I was going to get documents proving that SGO scores were used. And just so you know, I mean SGO scores are student growth objectives, which are essentially objective measures that have to be factored in, or I would argue would have to be factored in to -- evaluation score. We did not get that in this case, so that was predominately what my motion was based on. But, because the district did not provide us with any evidence at that time, I wasn't able to work on it. Again, we were left to

guess in terms of what specific witnesses it would call. Sure, we could infer that the people listed on the -- but, we don't know that for sure. And I like to prepare for example, cross examine questions in advance of the hearing.

The -- the key component which I also tried to -- to bring up in my -- in my brief is that districts have an unlimited amount of time to prepare the tenure charges under the law; okay? They can have everything -- they have all the time they need to prepare witnesses, to gather witnesses, to provide us with the complete record of evidence before, after and during. And you know, to be honest with you if attached to the tenure charges was the complete record of evidence with a statement saying that we're not going to introduce anything else, I wouldn't have a problem with it because then I would know that there was nothing else that could come down that I wasn't expecting and that what we were limited with is what we could go on. And then I could prepare my case that way. But, because I wasn't provided with that information I wasn't able to do it. And what makes this a particularly egregious case and why I believe it was ultimately resulted in the dismissal with prejudice is because there was just a complete disregard for

these statutory requirements for absolutely no reason. If this evidence was so immaterial and so easy to -- to obtain, and so obvious that it was going to be used, why not send it to us? I mean I wouldn't have filed this motion if say let's say a day later, two days later we received this information but, we didn't. It took two weeks for no reason. And only after I sent the second notice this time indicating that we will be filing the motion for summary dismissal. At this point I had no choice. Hearing was only about a month away.

So, again this is all -- these are all things that prejudiced my ability to represent the case and again, the other important thing I wanted to stress is that the law provides that this is a -- really the -- the arbitrators function is not to make substantive determinations. He cannot determine whether the classroom performance was adequate, or whether the teacher truly was ineffective. It's all about the procedure and -- and making sure that the district followed the process that it was supposed to follow. So, he's obviously entitled to dismiss the case for procedural defect and I would also point, which I did in my brief to the Labor Arbitration Rules where if there's -- if the -- not clear, if there's nothing specifically mandated that they would -- those rules

would apply and those rules essentially give broad discretion to the arbitrator to deal with discovery production of evidence issues and to impose the penalties as he sees fit. And I think that under these circumstances the penalty was appropriate. I think the arbitrator correctly dismissed the charge with prejudice and there's really no basis, valid basis in my opinion to -- to vacate the order. I think that's just absurd.

THE COURT: Thank you, sir.

MR. POBEREZHSKY: Thank you.

THE COURT: Ms. Liss?

MS. LISS: If I may, Your Honor? A few things that I think require response. The defendant apparently argues now that something that I hadn't understood him to argue in his papers, or even before the arbitrator which is that even evidence that is provided with a statement, the documents that are produced with a statement of evidence when the charge is initially served, and again served when it's filed with the commissioner. Even those documents could not be used at the arbitration hearing unless they are produced again on referral to the arbitrator. That really is an overstatement and mis-construction of the statute. That would mean that all of the evidence

previously produced has to be -- literally re-produced, photocopied again, produced again and if we fail to do that we will not be able to use that evidence. There's nothing in the statute, there's nothing in any legislative history and there's nothing in any other decision suggesting that that interpretation has been given to the disclosure requirement anywhere. That surely would be an overly strict interpretation. And I would say, require needless photocopying and -- and over production of documents to suggest that that's what the statute requires.

Defendants counsel also suggests that prejudice can be inferred. Well, you know there was no evidence produced of prejudice. There was no discussion in the arbitrators decision of whether or not any evidence had been shown. To suggest now that it should be inferred either read into the arbitrators decision or inferred from the arguments made by counsel really is -- you know, that's not the way we do things, frankly. We look for evidence, not for whether or not prejudice can be inferred.

Defendants counsel also suggests that the school district is required to let the respondent know we are not relying on anything else. If we don't explicitly say that then I don't know, I guess he's

saying that if we don't explicitly say that then we can't offer any additional elucidating documents like we did here. Maybe he's even arguing that if we don't say that we can't produce any evidence, or rely any evidence at the hearing. I'm not sure how far he would go with that. But, again there's nothing in the statute that says you must say, the school district must include a disclaimer or some kind of line at the end of its pleadings saying, and we will not rely on anything else. All of that is reading more into the statute than has ever been read into it by anybody else whose been handling Teach NJ cases since the statute was adopted. And there's nothing in the legislative history that suggests that's what was intended. Really the -- the intent of the law in allowing arbitrators to hear these cases is for them to review the evidence that's presented, do it as expeditiously as reasonably possible, take less time than previously had been taken before the law was adopted when cases were heard by administrative law Judges given the calendar at the Office of Administrative Law, and do it in a way which respects the Rights of the respondents and also carries out the intent of the statute, which was to remove teachers who had been found by their employers to be failing to meet the standards imposed by those

employers. Not to play got you. Not to impose technical requirements that the legislature had not written into the law. And not to allow arbitrators to say as a result of some delay there's an automatic dismissal of the case. The automatic aspect of the arbitrators decision is what we believe caused it to have been procured by undue means under the standard that's established by the New Jersey Arbitration Act which we've briefed in our papers. The level of deference that's given to an arbitrator does not extend as far as allowing him to read into the statute something that simply doesn't exist. And to allow for dismissal with prejudice of a charge as a result of you know, the kind of the facts that we have in the record here without -- without belaboring what they are. Thank you.

THE COURT: Okay. Thank you. Initially, I want to thank both counsel for your presentations in this case. This case reminds me why the assignment as the General Equity Judge in any county is the most coveted assignment because you see lawyering at a very high level. You see interesting issues. They're well briefed. The arguments are at a high level. As we we're mentioning off the record, I had this job as a law clerk thirty six years ago, it seemed like all of

the cases back then, maybe it was my newness to the bar were this type of a case. I, unfortunately don't see a lot of that anymore or enough of it. But, this case certainly meets that criteria. But, that -- so thank you for that. And it's an interesting case.

The plaintiff seeks an order of this Court to vacate the arbitration decision dated December 12th, 2015 and to remand this matter to the Commissioner of Education for referral again to arbitration. The application is opposed by the defense. I don't think there's any real dispute about the facts, to be honest with you. Plaintiff in this case is the State Operated School District of Newark, refer to that entity as the plaintiff in my opinion. And is responsible for the operation of the public schools in the City of Newark, refer to them as either the City or the District.

Michael Wilson is a tenured teacher in the district. Mr. Wilson had been a teacher in the district for over eighteen years. The first sixteen of which he taught math. In his seventeenth year he was transferred to a different school and was assigned to teach science and social studies. In his two years at -- at such positions he received the performance ratings of "partially effective" and "ineffective". Since he received reviews which were below effective

for two consecutive years the District was required to file a tenure charge of inefficiency against Mr. Wilson which they did on September 2, 2015.

Defendant was served at that time with a notice of tenure charge of inefficiency and I think important in the analysis that I'm going to be giving supporting statement of evidence. The statement of evidence served upon defendant contained twenty three exhibits including defendants formal observation reports, annual performance evaluations and the names of the observers and evaluators who had authored the aforementioned documents. September 16th Mr. Wilson served a response to the tenure charge. September 30th of 15 of course, the District filed a tenure charge to the Commissioner of Education and again served defendant with the same notice of tenure charge and statement of evidence consisting of those exhibits. October 23 defendant finally filed a timely answer to the charge pursuant to N.J.S.A. 18-6.17.2. The Commissioner, Ms. Duncan (phonetic) determined that the charge was sufficient if true to warrant dismissal and referred the matter to arbitration.

On October 14th, 2015 the arbitrator assigned to the case reached out to the parties legal representatives for the purpose of scheduling hearings.

Counsels certification exhibit A. On October 23 the Commissioner formally referred the matter to Arbitrator, Lewis, L-E-W-I-S R. Amis, A-M-I-S. Both parties appear to agree that October 23 is the date of the formal referral to arbitration. Under the statute there must be a hearing within forty five days of October 23. On that date counsel for the defendant emailed the arbitrator, copied Ms. Moore (phonetic) the counsel for the plaintiff, on the email to inform him that the district had not yet produced its evidentiary disclosures and reserved its Right to file a motion to dismiss. There may be a slight question, which I don't deem to be relevant if the defendant believed the date was October 14th and not the 23rd. But, regardless based upon what the arbitrator responded I think the 23rd is the date that the matter was referred.

On November 5th defendant requested a briefing schedule to address the motion to dismiss, counsel just argued. The following day, November 6th the District produced formally its witness list with summary of testimony along with certain additional documents which I asked Ms. Liss about, certain evaluation manuals and district calendars.

Now, defendant moved to dismiss the charge arguing that the clear language of N.J.S.A. 18:6.17.1b3

required the District to produce to defendant, and here's the word, the phrase I have to interpret, upon referral, of the matter to arbitration its evidence, including a witness list with a summary of their testimony. The District opposed the motion arguing among other things defendant had this evidence, not once, but twice from the previous disclosures and the evidence turned over months before the actual referral to arbitration is the same evidence that constituted what was supposed to be the evidentiary disclosure and therefore, no prejudice to defendant. The arbitrator in an opinion determined the District failed to produce all of its evidence upon referral and that its failure to do so without any excuse warranted a dismissal of the charge without -- with prejudice. It's exhibit G to Ms. Moore's certification.

It's essentially what's -- before me, I'll summarize the arguments and then I'll give my decision. Because again, I fully expect that one or both parties may take an appeal.

Following the arbitrators decision the District filed this order to show cause seeking the vacator of the award. Plaintiff argues the arbitrators decision was procured through undue means, and therefore must be vacated under 2A:24-8 because it

fails to follow substantive law and because it conflicted with the public policy behind the statute. First, the plaintiff argues that the arbitrator failed to follow substantive law because, "he ignored the reality" that defendant had been in possession of the evidentiary materials for at least three months prior to moving to dismiss. Thus, they argue when you compare what was produced in September with what was ultimately produced in November, it's the same item, same names, no new names, no new evidence, other than those generic documents which we've already had a discussion about, not specific to Mr. Wilson. But, just giving background to the arbitrator based upon their experience in doing these arbitrations. And that's what they say in their papers, additional documents supplied on November 6th were not employee specific and only intended to aide the arbitrator in understanding the Districts performance evaluation system. Further arguing that defendant on notice of the evidence because he had received the reviews of below effective for consecutive years. In sum, the argument is that only an extremely draconian interpretation of the statutory phrase upon referral or an over alliance on a few documents in question, those so called non-employee specific documents could lead to

a finding of a violation or prejudice.

With respect to public policy, an issue the Court has to consider, plaintiff argues the legislative intent of the statute Teach NJ is to improve student health achieve to improve education to students by improving teacher effectiveness, and to provide a mechanism for streamlining the tenure process. They insist the arbitrators literal reading of the statute undermines that purpose because requiring districts to make disclosures on the actual date of referral places an impractical and undue burden on districts. They offer some hypothetical situations where an attorney may be out of an office on a day of referral when the charge was referred to arbitration and no immediate disclosures were made, that could lead to this result based upon this arbitrators decision.

Finally, plaintiff argues that the statutory remedy for failing to provide evidence upon referral is not dismissal, but should be that the employing board of education should be precluded from presenting any additional evidence at a hearing except for the purposes of impeachment of witnesses. Quoting N.J.S.A. 18-C, 18-6, 17.1B(2)

Defendant opposes first, highlights the extensive body of case law regarding the deference

afforded to an arbitrators decision. Points out that mistake of law is not one of the enumerated grounds for vacator under 2A:24-8.

Next, responding to plaintiffs undue means argument defendant insists immediately that the position is simply deficient as a legal matter. They argue that 18A:6.17.3b clearly requires disclosure upon referral. Two, that there is no dispute that plaintiff failed to produce its entire witness list and summary, and complete record of evidence until well after the matter had been referred to arbitration, those two weeks. And three, that the District offered no excuse for failing to timely comply. There was also a comment made by counsel, which I don't think is in the papers, which I'll consider. The SGO scores were going to be the basis of some motion to dismiss but, regardless I -- I think I understand what he's saying with that.

The arbitrator heard their argument that defendant had notice of the evidence in a general sense and denied that argument. Instead, they argue the arbitrator properly noted that the expedited nature of tenure proceedings under Teach NJ means that disclosures must occur in a timely fashion in order to avoid prejudicing either party. Further, defendant argues not only was the arbitrators decision well

reasoned, it was the proper one. They insist that the argument regarding defendants -- referral disclosure put defendant on notice is belied by the fact that the disclosures were never stated that they were meant to serve as the statutory disclosures. And that even if they did that would have left defendant to wonder what else was coming? What else remained outstanding?

They further argue that plaintiffs argument about their burden placed on districts by requiring disclosure upon referral ignores the fact that school districts have unlimited amount of time to prepare tenure charges before serving them on employees. With respect to the specific facts of the case, while the Commissioner's letter stated a referral date of October 23, the arbitrator noted the parties, nine days earlier that the matter had been assigned to him, correspondence about scheduling and he tacked out forty five days as the statute requires setting the hearing dates accordingly. So, points out on October 23 defense counsel notified the arbitrator that he had not received the disclosure and plaintiff waited another fourteen days, November 6 before supplying formally same.

Next, defendant insists that the award is entirely consistent with public policy where courts

have vacated awards which contravenes clear mandate of public policy. Defendant argues they should never do so where the correctness of the award is reasonably debatable. Citing the Weiss v. Carpenter, Bennett & Morrissey case 143 NJ 420 at 430, 1996. My old firm. I always smile when I see that case. A lot of interesting stories about the underlying arbitration. In this regard, defendant insists that the arbitrators decision requiring timely compliance with disclosure time lines actually advances the public policy of streamlining the tenure process.

Additionally, defendant argues that the plaintiff position ignores the due process Rights of tenured employees which are certainty favored by public policy. Defendant maintains that due process Rights are especially important in an effectiveness case where arbitrators are barred from making substantive determinations.

Finally, defendant argues the plaintiffs opposition that the arbitrators should have simply precluded the district from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses would have led to essentially the same result since it would have prevented the plaintiff from presenting any witnesses. At the

hearing they have nothing to rebut or to defend against.

And of course the plaintiff as their Right is had a Right to reply. First, they argue that contrary to the position of the defendant the reasonably debatable standard just doesn't apply here. Where an arbitrator is performing compulsory arbitration in accordance with statutory requirements as opposed to interpreting a contract with authority from the contracting parties. Cites to Hillsdale the PBA case, 137 NJ 71. The Supreme Court 1994. In such instances plaintiff insists that a heightened review is applied by Courts. Here then, plaintiff argues that no reported decision has yet addressed the specifics -- in review of a decision by an arbitrator appointed under Teach NJ. However, like the Employer/Employer Relations Act dealt with by the Court in the Hillsdale PBA Teach NJ provides for compulsory arbitration and should likewise be subjected to this heightened standard. Reply at seven and eight.

Next, the plaintiff addresses the construction of the relevant statutory provisions adopted by both, the arbitrator and the defendant. More specifically, they argue that the interpretation of the word upon which I think is critical to this

decision in this case to mean a specific time is unreasonable and that the legislative intent was to use the word, upon when detailing a specific time is simply not practicable. In support of this position plaintiff points to other provisions in the Act where specific deadlines are put forth, within forty five days, within ten days. Legislature decided not to do that here. Plaintiff suggests the -- the use of the word upon in lieu of a specific date reveals the legislatures recognition that some flexibility is needed and warranted.

Additionally, as stated in their original brief plaintiff argues that even if the arbitrators decision was correct, the decision to dismiss with prejudice was improper. Cause the statute implies the remedy for late disclosure is a preclusion of those materials except for impeachment and because where a statute does not provide a penalty for a school districts failure to follow prescribed procedures the Commissioner of Education has no authority to impose such a consequence.

Finally, there's further argument on that position that defendant has not demonstrated that he was actually -- had not demonstrated that he actually suffered any prejudice as a result of these purportedly

late disclosures.

In argument today, I think both counsel adequately addressed those. Ms. Liss emphasizing her undue means and upon referral. The necessity of a certain amount of flexibility upon referral. Emphasizing the view on prejudice. Defense counsel adequately addressed that regarding his view of prejudice that can be inferred. That's what I have before me.

So, I'll start by recognizing the role of the Court's in reviewing arbitrations which are generally very limited. You can go to United Steel Workers, which is always a good place to start, v. Warrior and Gulf, US Supreme Court, 1960 case 363 US 574 at 582. Arbitration awards are always favored by the Courts and are typically presumed valid. I could cite a dozen Supreme Court cases but, I'll just cite County College of Morris v. County College. 100 NJ 383, 1985. Only if judicial interference with the arbitration process is minimized, stated the Court in Barcon Associates v. Tri-County 86 NJ 178, can arbitration attain its goal of providing final, speedy, and inexpensive settlement of disputes. Arbitration is after all -- I love this phrase -- meant to be a substitute for and not a spring board to litigation. Consistent with that the Supreme

Court in Tretina Printing v. Fitzpatrick made clear that basically arbitration awards may be vacated only for fraud, corruption, or similar wrong doings in the part of arbitrators. 135 349 at 358.

Now, we look to the statute for the standards to vacate consistent with that law which states that the party to an arbitration may within three months of the award delivered to them, unless the parties extend which they didn't have to here, in writing commence a summary action and the Court for confirmation of the award or its vacator. Modification of correction, such confirmation shall be granted unless the award is vacated, modified or corrected. Both parties concede the matter in which plaintiff has brought this matter before the Court is proper. Summary adjudication is appropriate by this Court.

2A:24-8 tells the Court that you can vacate an arbitration award upon motion in one of four conditions. The award was procured by corruption, fraud or undue means. Either evident partiality or corruption in the arbitrators, certainly not the case here. Or the arbitrator has been guilty of mis-conduct in refusing to postpone the hearing. Not the case here. Or where the arbitrators exceeded or so imperfectly executed their powers that a mutual final

and definitive award upon the subject matter was not made. Not the case here.

Again, that's why the good lawyering. We're narrowing what we have to decide which is undue means. Was this award procured by undue means?

In the relevant statutory provision of N -- of Teach NJ dealt with in this case found that 18A:6.17.1b3 which states in part the following; upon referral, those words, upon referral of the case for arbitration the employing Board of Education shall provide all evidence including but not limited to documents, electronic evidence, statements of witnesses and a list of witnesses with a complete summary of their testimony to the employee or the employees representative. The employing Board of Education shall be precluded from presenting any additional evidence at the hearing except for the purpose of impeachment of witnesses. 18A:6.17.1b3 plaintiff submits its motion on the issue of whether the arbitrators opinion was procured by undue means because he interpreted the phrase upon referral to mean that the District should have immediately produced the witness, the evidence it intended to rely on at the hearing and because he improperly dismissed the case with prejudice without determining whether the actually delayed production

formally even caused any actual harm or prejudice to defendant. And I've -- carefully thought about this. I appreciate all of the arguments of defendant. I find the vacator of the award in favor of hearing on the merits is appropriate. The Court's going to grant the motion to vacate the award.

I agree with the plaintiffs argument that an arbitrators failure to follow the substantive law may constitute undue means and require the award to be vacated under 2A:24-8A. Jersey City Education Association v. Board of Education 218 NJ SUPER 177 at 188. The factor to consider in that analysis, public sector arbitrator is obligated to consider the prevailing law in entering any award. The Weiss case again. 143 NJ at 431.

Accordingly then, the criteria of 20 -- of 2A:24-8A, an arbitrators failure to follow the substantive law may constitute undue means which would require the award to be vacated. In re: City of Camden 429 NJ SUPER 309 App. Div. 213. In Camden case the Court vacated an award where the arbitrators action in declining to be guided by a 40A:10-21.1, a statute that he recognized was in effect inapplicable at the time of the award was clearly contrary to the law. Plaintiff points out where a public sector arbitrator is called

on not to interpret contractual language in a collective bargaining agreement but, to perform a compulsory arbitration in accordance with statutory obligations. Courts have generally reviewed such awards with heightened scrutiny. It's the Hillside case again. 137 NJ at 82.

Judicial scrutiny in public interest arbitration is more stringent than in general arbitration. The reason for the more intensive review of public interest arbitration is that such arbitration is statutorily mandated and public funds are at stake. And I think it goes down to the interpretation of upon referral in the statute. Which I agree with the plaintiff, require -- to require the District to immediately on the date of referral turn over all of its evidence to the opposing party or face dismissal with prejudice without consideration of the extent to which the complaining delay actually caused prejudice to the defendant is improper. Really, in two meaningful ways, under the facts of this case which -- which warrants the vacation of the award.

First, the interpretation of the phrase upon referral to connote immediate, same day disclosure I think is incorrect. And I know defense backed off of that a little bit here today. But, that's what the

arbitrator did because the award doesn't cite any specific prejudice. As plaintiff adequately addressed in their reply, the use of the phrase upon referral when viewed in the larger context of the statute, which you have to, you're interpreting the statute, implies a degree of flexibility instead of strict immediacy. This is primarily because in numerous instances throughout the use of Teach NJ the drafters outlined specific deadlines. Exact numbers of days. Which the parties are required to honor strictly. Tellingly however, in the case of 18A:6.17.1b3 they relied on a vaguer definition, stating only that disclosure must occur upon referral. Notably then, the phrase upon is used -- as also used in 18A:6.16 where the statute requires the Commissioner to examine tenure charges upon receipt of such a charge. The plaintiff points out a strict reading of the word upon in this provision would mean that the commissioner must examine every charge submitted on the very day it's received or risk non-compliance with the statute. I just think that's an unreasonable interpretation or reading of the statute and it's demonstrative of the fact that upon does not necessarily mean to any reasonable person on the exact same day as.

Further, it's notable that the use of the

word upon in 18A:6.17.1b3 lacks any further temporal modification that is, instead of requiring for instance, disclosure to occur immediately upon referral, the statute employs the vaguer unmodified phrase, upon referral. Has to be some certain sense of discretion.

Finally, a view of the statute which strictly construes the phrase upon to require a same day disclosure is just not reasonable. I think it could create a hyper-technical potentially arbitrary hurdle to an ability of the district to exercise its Rights under the statute, Teach NJ. Punishing districts by dismissing a tenure charge with prejudice for any delay in disclosure without meaningful consideration of actual prejudice is not reasonable. It presents an illogical and unreasonable result. In light of the proceeding, arbitrators finding the language, upon referral in this Court's view under the statute obligated the district to produce its evidence formally, which leads me to the second issue. On October 23, the very date of referral is incorrect.

As stated above an interpretation of the statute which requires same day as referral disclosures is an unreasonable and incorrect view of the law. While however, same day disclosure is not the standard

it is none the less clear that given the abbreviated nature of these proceedings and the legislatures desire as Ms. Liss recognized during her argument to maintain strict adherence to the deadlines set forth in the statute, 18A:6.17.1f, a districts time to comply is not unlimited. Absent any precise statutory time lines for disclosure in consideration of reasonableness and fairness must be applied in order to determine whether a disclosure was untimely. In the present case the arbitrator noted that the district delayed presenting certain evidence until fourteen days after referral and held that any significant delay in the presentation of salient evidence by one party prejudices the other parties ability to present -- represent its clients, arbitrators opinion at seven.

There's nothing in my view inherently problematic with the principle upon which the decision was grounded. But, while the arbitrator recognized that a significant delay will prejudice the other parties ability to present his case, he offered no analysis of whether the delay in this case was significant nor whether there was any meaningful prejudice caused by the delay. It is certainly plausible that a fourteen day delay under certain circumstances could constitute a significant delay,

especially considering this abbreviated nature of the proceeding under Teach NJ.

However, such a finding would necessarily be related to consideration of whether such delay actually prejudiced the defendant in some way under the circumstances presented in this case. However, the arbitrators determination that the delay was significant and warranted dismissal without any thoughtful consideration of whether it actually prejudiced the defendant was incorrect. As both parties agree the defendant on multiple occasions prior to referral had supplied the identical evidence upon which plaintiff had relied to bring the tenure charge. It was not formally presented in the manner required by the statute until November 6th when the District explicitly stated that it intended to rely upon the previously disclosed evidence and witnesses at the hearing. This delay in the Court's view could not have meaningfully prejudiced defendants ability to present its case. We were still a month away from an arbitration hearing. I'll address the issue raised in argument in a second, which was not in the papers but, I -- I will still consider it.

The real issue is defendant was in possession of and had full knowledge of the world and the relevant

evidence. There's nothing different other than these generic documents from what was presented on September 2nd, from what was presented on November 6th. No new witnesses. No new employee specific documents. Those are the -- that would be the prejudice. If you got new documents two weeks late in this compacted time phrase. It's the same stuff. Given the -- basis for bringing a tenure charge that world of evidence was necessarily limited. Defendant must have understood that the witnesses to be presented at the hearing would be those same people identified in the documents already named in the statement of evidence, who had authorized the relevant observation and performance review. The evidence to be relied upon was no secret to the defendant in this case and was in fact already in his possession since -- September 2nd. Considering the extent of the District's previous disclosures this November 6th disclosure was practically a ceremonial act whereby the District formally stated that the defendant already knew the evidence they would rely on the hearing was the same evidence that they had relied upon to bring the charge. If they tried to bring out a new witness, a new evaluation there would be actual prejudice. I don't see this here. Thus, I find the arbitrators decision to dismiss the case with prejudice

based on what was best a purely technical failure by the District inflicting in the Court's view no harm to defendant was clearly incorrect.

The SGO score issue. I wasn't aware of that but, I'll accept defendants counsel position that that's something he was thinking about. He'll still have a Right to do that now because the case is not over. Tenure charge is not proven yet. If the Court is ultimately going to remand the case back for another hearing there's no doubt what the world of evidence is now. If he thinks the SGO scores are fatally -- draw a fatal blow to the tenure charge, he has a Right to make that motion before the arbitrator. And that ultimately goes, I guess to some of the policy issues that both sides discussed.

The Court's public wants to have cases decided on the merits. Was this teacher truly inefficient and ineffective? Or was he not? That's what this, I think the rationale behind the statute, due process, fairness to the teacher. I just think too much relies by the arbitrator on the phrase upon referral, which leads to a result that the Court has to vacate. And I don't think this -- so called generic evidence that we've been discussing is of such a nature that would prejudice the defendant and I'll accept the

representation that in other cases it's helpful to the arbitrator. The arbitrator may consider it, may not consider it. But, I don't think that should be stricken because one of the remedies that I would have -- what the arbitrator would have is to exclude that evidence. I -- I just don't see that here since it's not employee specific to benefit anyone quite frankly. For an arbitrator to make a meaningful review of everything they probably need the calendars and the standards to evaluate what all this means. I certainly don't understand it. But, I leave that to the arbitrator.

So, for the reasons stated above I'm going to vacate the arbitrators decision. The matter should be returned to the arbitrator for a hearing on the merits as provided for in the statutory provisions. I think I have an order that accomplishes that.

MS. LISS: We did submit an order, Your Honor. I believe the remand that we suggested was back to the Commissioner for re-referral to arbitration.

THE COURT: Yea. I think that's appropriate. I'm not going to get involved with the process. I'm not going to select the arbitrator. I think the Commissioner will do that. So, Jake is my law clerk. Sir, if you have any objections to the form of that you

know, just let me know and I guess we can try to work that out.

MR. POBEREZHSKY: If I may? Well --

THE COURT: Sure.

MR. POBEREZHSKY: So, how -- how would you like me to let you know?

THE COURT: Ms. Liss do you have -- I just have all the papers here. I'm not sure if we have the order.

MS. LISS: If I may approach the bench?

THE COURT: Well, why don't you share it with him? See -- take a minute. Go over it. If you don't agree maybe we can sort of resolve it now. I don't want to keep it for five days.

MR. POBEREZHSKY: Yea. I --

THE COURT: Unless you want more time.

MR. POBEREZHSKY: Yea. Well, just a really quick point. Maybe counsel will -- will agree with this. Is that the arbitrators are selected randomly --

THE COURT: Right.

MR. POBEREZHSKY: You know, it's randomly drawn and I just don't think it would be fair to potentially have this go to a different arbitrator. So, I would just request that it be transferred back to the same arbitrator because that's who was assigned to

-- to hear the case. And -- and -- and just I mean the arbitrators, the way they're -- they're appointed is that you know, the teachers union appoints about a third of them and the districts, and then the administration and you know, whichever -- first of all, I don't know who appointed this particular arbitrator, but whichever arbitrator we get is kind of who you get and you know, sometimes he can be for you or against you. But, I think that it would be just appropriate to have the same arbitrator because --

THE COURT: Some familiarity with the case?

MR. POBEREZHSKY: It doesn't give them -- some familiarity and it doesn't give you know a second bite at the apple to perhaps get a you know, an arbitrator that's more favorable to the district.

THE COURT: Ms. Liss?

MS. LISS: One of the reasons that we provided in the proposed order that the remand should go to the Commissioner rather than to this arbitrator is that it is the statutory function of the Commissioner to assign arbitrators and to choose which arbitrator should hear a particular case. I can tell you in other cases where there has been a remand, not exactly in the same procedurally context as this where the Commissioner has assigned the case to the same

arbitrator that has been challenged and that issue actually is in the Appellate Division right now. I'm not asking you to address that issue now. I'm just saying I believe it is the Commissioner's discretion to decide whether it should be the same arbitrator or not.

THE COURT: Yea. I think I appreciate the objection and I don't know this arbitrator. I really don't. I don't know -- I disagree with this ruling. I'm going to have to refer to the Commissioner to make that decision to refer it. If it goes to the same arbitrator I'm not going to interfere with it. If it goes to another arbitrator, similarly I'm not going to interfere with it. So, if you can hand up your order to Jake I'll -- I'll -- I'll note your objection sir but, I'll -- I'll just refer it back to the Commissioner.

MR. POBEREZHSKY: Thank you, Your Honor.

THE COURT: But, again thank you both for your excellent presentation. I enjoyed working on the case and I wish you both good luck.

MS. LISS: Thank you very much, Your Honor.

MR. POBEREZHSKY: Thank you, Your Honor.

(HEARING CONCLUDED)

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Certification

I, Kerry Lang, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CD No. 1, from index number 9:58:24 to 10:56:16, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

/s/ Kerry Lang Date 5-29-16
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