STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF THE TENURE CHARGE OF INEFFICIENCY - against - URSULA WHITEHURST Respondent - filed by - STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, District/Petitioner AGENCY DOCKET NO. 282-9/14	OPINION AND DECISION ON MOTION TO DISMISS AND STAY PROCEEDINGS

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

Ramon E. Rivera, Esq., Scarinci, Hollenbeck, LLC, Of Counsel and On the brief
Christina M. Michelson, Esq., On the brief
Laura M. Miller, Esq., On the brief

FOR THE RESPONDENT

Jason E. Sokolowski, Esq.,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.

BACKGROUND

On or about August 27, 2014, tenure charges of Inefficiency were filed against Ursula Whitehurst, Respondent, by John B. Weinstein, Principal of Bard High School Early College 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. By letter dated September 25, 2014, this matter was subsequently transmitted to David C. Hespe, Acting Commissioner of Education at the New Jersey Department of Education, in accordance with N.J.S.A. 18A:6-17.3(c) to an arbitrator for a hearing.

The tenure charge of inefficiency was filed by the State District Superintendent , Ms. Cami Anderson ("District") pursuant to Section 25 of the Teachers Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3. This section provides for the filing of such charges based upon ratings of ineffective or partially ineffective during two consecutive annual summative evaluations. In the case of Ms. Whitehurst, the District's Statement of Evidence includes evaluations from the 2012-2013 and 2013-2014 school years "as well as numerous memoranda, emails and correspondence regarding the Respondent's performance as a tenured teacher." In the Respondent's Annual Evaluation Summary Form dated June 20, 2013, she received an "Ineffective" rating for 2012-2013. In the Respondent's Annual Evaluation Summary Form dated May 23, 2014, she received a "Partially Effective" rating.

The District maintains that it "complied with all requirements set forth in the 'Tenure Employees Hearing Law' N.J.S.A. 18A:6-10 et seq. when it served

the Respondent with the tenure charge. Pursuant to N.J.S.A. 18A:6-10, "a tenured teacher shall not be dismissed from his or her position or reduced in compensation 'except for inefficiency, incapacity, unbecoming conduct or other just cause.'"

The District maintains that "the tenure charges against the Respondent in this matter are based on inefficiency under both N.J.S.A. 18A:6-10 and TEACHNJ. The District properly adhered to statutory requirements in place in the 2012-2013 school year and the subsequent regulations promulgated in the 2013-2014 school year. Thus, Respondent's 2012-2013 evaluations satisfied the requirements in effect in 2012-2013. Respondent was rated ineffective/partially effective in two consecutive years and therefore, her dismissal is warranted."

By letter dated October 3, 2014, the law firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., on behalf of the Respondent, filed a Notice of Motion to Dismiss and Stay Proceedings.

The Respondent referred to "the authority of the Commissioner to decide this Motion as set forth in Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3" (and the implementing regulations), which provide, in relevant part, as follows:

> [u]pon receipt of a charge . . . 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.* (Emphasis added).

Since the law requires that the Commissioner not refer this matter to an arbitrator in the event the evaluation process was not followed by the District, the

Respondent notes that "the charges are based upon Ms. Whitehurst's evaluations for the 2012-13 and 2013-14 school years" and "as a matter of law, the 2012-13 evaluations cannot be used as one of the school years for measuring Ms. Whitehurst's performance under TEACHNJ."

Accordingly, the Respondent moved to dismiss the charges pursuant to N.J.A.C. 6A:3-5.3 and requested that "the Commissioner hold the charge in abeyance pending a determination on this application by the Commissioner under N.J.A.C. 6A:3-5.5." The regulation cited reads, in pertinent part, as follows:

> 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. *If the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly*... (Emphasis added).

By letter dated September 25, 2014, the law firm of Scarinci Hollenbeck, LLC, on behalf of Ms. Cami Anderson, State District Superintendent, transmitted the Notice of Inefficiency charges against Ms. Ursula Whitehurst, Respondent, to David C. Hespe, Acting Commissioner of Education. By letter dated October 3, 2014, the law firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C. filed a Motion to Dismiss the Inefficiency charge on behalf of the Respondent. On November 7, 2014, the District/Petitioner submitted its Opposition to Respondent's Motion to Dismiss and Stay of the Proceedings. On November 20, 2014, the Respondent submitted a Reply Brief to the Opposition Brief filed by the Newark Public Schools ("District") as well as to its October 31, 2014 correspondence regarding Respondent's Motion to Dismiss the Tenure Charge

alleging inefficiency, specifically correspondence sent to Ms. Charlotte Hitchcock, General Counsel of the District from Mr. Peter Shulman, Assistant Commissioner of the NJDOE. On December 5, 2014, the District submitted a sur-reply to the Respondent's Reply Brief. On December 16, 2014, the Respondent submitted a sur-sur. reply brief

By letter dated October 14, 2014, the undersigned was appointed as the arbitrator in the instant case by M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, Department of Education, State of New Jersey pursuant to P.L. 2012, C. 26 signed into by law by Governor Christie on August 6, 2012. The letter reads as follows:

> Please be advised that, following receipt of respondent's answer on October 6, 2014, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3e; upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Robert T. Simmelkjaer as required by the statute.

STATEMENT OF FACTS

Ms. Ursula Whitehurst ("Whitehurst") is a tenured teacher and has been employed by the State-Operated School District of the City of Newark for over twenty-four (24) years.

The tenure charge of inefficiency filed against the Respondent is based upon the annual summative evaluation ratings she received for the 2012-2013 and 2013-2014 school year pursuant to N.J.S.A. 18A:6-17.3 or Section 25 of TEACHNJ, N.J.S.A. Section 25 mandates the filing of an inefficiency charge by the Superintendent in instances where a teacher is "rated ineffective or partially

ineffective in an annual summative evaluation" for at least two years. N.J.S.A. 18A:6-17.3(1) and (2). Section 25 further precludes any discretion in the matter by mandating that an inefficiency charge be filed. Section 25 further provides, however, that "[t]he only evaluations that may be used for the 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.)." See N.J.S.A. 18A:6-17.3(d).

During the 2012-2013 school year, the Statement of Evidence indicates that Respondent received the following evaluations from her administrators:

- Formal Observation Form dated February 21, 2013;
- Formal Observation Form, dated June 13, 2013;
- Annual Evaluation Summary Form dated June 20, 2013 (Respondent received an Ineffective rating).

Neither of the formal observations was announced or involved a pre-observation conference.

During the 2013-2014 school year, the Statement of Evidence indicates that the Respondent received the following evaluations:

- Corrective Action Plan dated October 15, 2013;
- Long Observation Summary Form dated December 23, 2013;
- Annual Evaluation Summary Form dated May 23, 2014 (Respondent received a partially Effective rating);
- Long Observation Summary Form, dated May 23, 2014;
- Short Observation Summary Form dated May 28, 2014.

CONTENTIONS OF THE PARTIES

Respondent Position

The crux of the Respondent's position is that "Ms. Whitehurst's Annual Summative Evaluation pertaining to the 2012-13 school year may not be considered in connection with tenure charges brought pursuant to N.J.S.A. 18A:6-17.3." According to the Respondent, since the applicable regulations establishing guidelines and procedures for the timing and conduct of teacher evaluations pursuant to both TEACHNJ and Achieve NJ did not go into effect until the beginning of the 2013-14 school year, specifically in October 2013, "the District has not alleged viable tenure charges under N.J.S.A. 18A:6-17.3.

"Those regulations include, but are not limited to, provisions governing the content of evaluation rubrics and components, N.J.A.C. 6A:10-4.1, procedures on rubric approval by the Commissioner, N.J.A.C. 6A:10-5.1, and procedures concerning the timing, form, nature and number of Teacher evaluations and observations, N.J.A.C. 6A:10-4.4." (Resp. brief @ 4).

The law, according to the Respondent, "clearly provides that the utilization of the preliminary evaluation rubrics by no later than January 31, 2013 was merely a 'pilot program' to test and refine those evaluation rubrics, not the full implementation of them." See N.J.S.A. 18A:6-123. It states:

> "[b]eginning no later than January 31, 2013, a board of education shall implement a pilot program to *test and refine* the evaluation rubric. (Emphasis added)."

Furthermore, Respondent asserts, in reference to N.J.S.A. 18A:6-123(e), that the actual implementation of the approved rubrics following the pilot program was not scheduled to commence until the 2013-14 school year.

> "[b]eginning 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."

In addition to the fact that the teacher evaluation and observation guidelines were not established by the Commissioner until October 2013, after the commencement of the 2013-14 school year, Respondent notes that "contrary to the applicable regulatory and statutory requirements, the District did not have a School Improvement Panel ('Panel') in place at Respondent's school during the 2012-13 school year." Both N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-3.1 require that each school within a District establish a Panel to conduct evaluations and oversee the mentoring program as follows:

> *[t]he 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. (Emphasis added). (N.J.S.A. 18A:6-120

Given the foregoing statutory and regulatory requirements, the Respondent contends that "the District's failure and/or inability to meet the standards of the regulatory scheme during the 2012-13 school year renders formal judgment on teacher's performance for that year through tenure removal proceedings inappropriate and unlawful."

Alluding to the Department of Education's own guidance entitled "Summary of Legal Requirements for Evaluation and Tenure cases," the Respondent cites the following excerpt:

> The TEACHNJ Act outlines a new process for filing inefficiency charges under the new evaluation system (AchieveNJ). This guide outlines *the actions required in law before bringing an inefficiency tenure charge* based on the new tenure revocation process. (Emphasis added).

"Among the 'actions required in law' required to comply with the regulatory scheme established by the Commissioner – and not adopted until October 2013 – are minimum observation requirements for tenured teachers, a mandatory summative evaluation process, minimum Corrective Action Plan requirements and the existence of a School Improvement Panel." Since these mandatory requirements were not satisfied by the District in 2012-13 and the NJDOE's own statutory and regulatory guidance for tenure cases precludes consideration of evaluations conducted prior to full implementation of both TEACHNJ and AchieveNJ, which occurred in the 2013-14 school year, not the 2012-13 school year, the Respondent argues that the charges are legally and procedurally defective.

As further evidence that the 2012-13 summative evaluation cannot be considered, the Respondent cites the regulatory guidance published by NJDOE providing that the 2012-13 evaluations conducted as part of a pilot program cannot be considered in conjunction with inefficiency charges. The particular FAQ addressing this issue reads:

> Q: <u>Will summative ratings "count" this year (2012-13) toward tenure decisions?</u>

> A: No – the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start.

In accord with the FAQ is the Evaluation Committee Final Report prepared by the Commissioner, in which the 2012-13 year is described as a "capacity building year" in anticipation of TEACHNJ and AchieveNJ scheduled to be implemented in 2013-14.

After reviewing Paterson Police PBA Local 1 v. City of Paterson, 433 N.J. Super 416 (App. Div. 2013), wherein the agency guidance was given substantial deference, the Respondent concludes that "the tenure charges filed against the Respondent conflict with the regulatory guidance issued by the Department of Education." Since 2012-13 "does not count," the District's Tenure Charge based on only one (1) year (2013-14) is "facially insufficient to sustain an inefficiency charge," which under N.J.S.A. requires two years of deficient performance.

The Respondent further maintains that dismissal of the charge is warranted because the District failed to provide Ms. Whitehurst with the observations mandated by N.J.A.C. 6A:10-4.4. Referring to N.J.S.A. 18A:6-17.3(c), specifically, "[t]he Commissioner shall examine the charge...and appoint an arbitrator to hear the case unless he determines that the evaluation process has not been followed," the Respondent argues that "the Commissioner is statutorily prohibited from forwarding (these) tenure charges to an arbitrator for resolution, and must dismiss the charges instead...Mere referral of this motion

for arbitral consideration would create an undue risk of inconsistent legal rulings which would ultimately cast doubt on the validity of any resulting rulings on an application to vacate an arbitration award and/or a subsequent appeal to the Appellate Division. As such, a stay of this proceeding and consideration of this application by the Commissioner, pursuant to N.J.A.C. 6A:3-5.5, is warranted."

To the extent the District argues that it was not bound by the regulatory requirements for observations and evaluation rubrics that were not in place in 2012-13, the Respondent responds that the applicable law and its implementing regulations were part of a comprehensive statutory scheme, including the provision of "well-defined, transparent and uniform observation and evaluation guidelines and procedures," in exchange for more the expeditious removal of deficient teachers, with more limited defenses available to them. As such, the Respondent contends that the District should not be allowed to benefit from some statutory requirements while omitting or circumventing others.

District Position

The District, in "Petitioner's Brief in Opposition to Respondent's Motion to Dismiss and Stay of the Proceedings," initially states that "the Commissioner of Education has sole authority to determine if the 'evaluation process' was followed properly by the District when it served its tenure charges" pursuant to N.J.S.A. 18A:6-17.3 and once the matter is referred to the arbitrator, the arbitrator is obligated to review the case on the merits and determine 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:6-17.3.

In the absence of a finding validating any of the foregoing deficiencies in the evaluation, the District maintains that the Respondent's Motion to Dismiss must be denied.

After reviewing the undisputed facts, including the requirements of TEACHNJ that all public school districts develop "evaluation rubrics" to assess the performance of their teachers, and to obtain approval for their "rubrics" from NJDOE by December 31, 2012, N.J.S.A. 18A:6-123(c), the District notes that it "adopted an evaluation rubric as part of the evaluation system known as the Newark Public Schools Framework for Effective Teaching ('Framework') to be implemented in the 2012-13 school year. The Framework described, inter alia, the new levels of performance for teachers, namely, "highly effective, effective, partially effective, and ineffective."

The District further notes that in October 2012, the District and the Newark Teachers Union ("NTU") entered into a Memorandum of Agreement ("MOA") for a successor CBA wherein a new evaluation process was incorporated into contract language. Specifically, the MOA states:

NPS will implement a new evaluation system beginning SY 2012-13. In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 *et seq.*, teachers will receive an annual

> summative evaluation rating that designates them as highly effective, effective, partially effective or ineffective. [Emphasis added.]

Moreover, Section II of the MOA, which pertains to compensation and benefits, stated that "NPS shall implement a new educator evaluation system with four rating criteria beginning in school year 2012-2013. The agreed-upon compensation system would be based on teacher performance as measured by the new evaluation framework."

Prior to the negotiated settlement of the MOA, seven (7) schools in the District in 2011-2012 had participated in a "pilot" of a new teacher evaluation system. The NJDOE approved the District's participation in the Pilot and "allowed the District to begin using a new framework" and the four prong rating system in the 2011-2012 school year. This framework and rating system was continued during the 2012-13 school year "following the passage of the MOA and TEACHNJ."

With respect to clarifying the NJDOE's intent set forth in its "Guide to the TEACHNJ Act" as well as the status of the District's evaluation rubric during the 2012-13 school year, on October 24, 2014, Assistant Commissioner Shulman, on behalf of the NJDOE, provided the following "clarification" of the agency's intent:

> [S]ince August 2012, the Department has published many resources meant to support school districts in the implementation of the Act. One such document was a response to questions regarding TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three year of employment . . . [many non-tenured teachers requested] the District to clarify how the law applied to their tenure acquisition and the Department responded accordingly:

> *No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where [sic] the statewide system will be in place, and the first year when summative rating "clock" . . . will start.*
>
> [S]uch clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher . . . In fact, the Department issued multiple publications notifying pilot school districts that any personnel consequences connected with evaluations were a matter of local decision and applicable State law . . . The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACHNJ Act . . . (Id.) (Emphasis added).

Pursuant to its legal argument that the District's evaluation of the Respondent for the 2012-2013 school year is valid as TEACHNJ was in effect and in full force in the 2012-2013 school year, the District acknowledges that TEACHNJ was enacted by the New Jersey Legislature ("Legislature") on August 6, 2012 and each statute thereafter established the procedure for adjudicating tenure charges, N.J.S.A. 18A:6-17.5 From this chronology of statutory enactments, the District concludes that "there is no question that the evaluations in the 2012-2013 school year were to be used toward determining if tenure charges were warranted."

The District, in addressing the Respondent's reliance on the NJDOE web page entitled "Educator Frequently Asked Questions," argues that "by its terms, this statement is irrelevant to any tenure charge, because it refers to only the acquisition of tenure by non-tenured teachers rather than the evaluation or dismissal of tenured teachers as follows:

Q. Will summative ratings "count" this year (2012-13) toward tenure decisions?

A. No – only the item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (*i.e.*: teachers needing to be rated at least effective for two of three years) will start.

From the "clarification" of the FAQ it received from Assistant Commissioner Shulman, the District asserts that "it has been unequivocally established that the term 'tenure decisions' does not refer to the determination to file tenure charges, rather it refers to the decision of whether to retain a teaching staff member past the date on which he or she will acquire tenure."

The District further argues that "even if the Department had intended its FAQ to serve as guidance on whether 2012-2013 evaluations should "count" for purposes of inefficiency charges against tenured teachers, such guidance would have no regulatory force. In that case, the FAQ would constitute invalid *de facto* rulemaking. Where an agency issues guidance without utilizing formal rulemaking procedures, the guidance may be disregarded as invalid '*de facto* rulemaking' if it meets the test set forth in Metro Media, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984)." The District cites the Appellate Division decision in Besler & Co., Inc. v. Bradley, 361 N.J. Super @ 171, where the Metromedia six factors are weighed to determine whether the APA rulemaking process should have been utilized.

Reviewing the chronology of requirements set forth in TEACHNJ, among which were that school districts "institute pilot programs to test their new

evaluation rubrics by, January 31, 2013 at the latest, implement their evaluation rubrics by the beginning of the 2013-14 school year at the latest, and '[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved adopted evaluation rubric...' (emphasis added), the District discerns nothing in TEACHNJ or its regulations 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 the purpose of triggering tenure charges under N.J.S.A. 18A:6-17.3.

In its second point, the District argues that the District followed the evaluation process in accordance with N.J.S.A. 18A:6-17.3 because the Commissioner, who is solely authorized to determine if the District properly followed the evaluation process, referred the matter to the undersigned Arbitrator for further proceeding. N.J.S.A. 18A:6-17.3(c) provides the following:

> c. Notwithstanding the provisions of N.J.S.A. 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. (Emphasis added).

Since N.J.S.A. 18A:6-16 similarly provides that the Commissioner has the authority to determine the sufficiency of a tenure charge "to warrant dismissal or reduction in the salary of the person charged" and is "only prohibited from referring a matter to an arbitrator 'when a motion for a summary decision has been made prior to that time,' the Commissioner may retain the matter for

purposes of deciding the motion." The Commissioner's transmission of the inefficiency charge to the arbitrator is deemed evidence of its procedural validity.

As illustrative of the process, the District cites I/M/O the Tenure Hearing of Edgard Chavez, State-Operated School District of the City of Newark, DKT, No. 269-9/12 (February 6, 2013) where ("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...'"). In the Chavez case, the Commissioner exercised his authority pursuant to N.J.S.A. 18A:6-17.3(c) when he issued his October 8, 2014 correspondence to the parties and Arbitrator Joyce M. Klein as follows:

> Please be advised that following receipt of respondent's answer on October 1, 2014, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3c; upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Joyce M. Klein as required by the Statute. (Emphasis added).

By denying the Respondent's Motion to Dismiss and transmitting the matter to an arbitrator, the District argues that the Commissioner issued his Final Administrative Decision, necessitating that the matter proceed to a hearing on the merits. After reviewing the standard for a Motion to Dismiss before the Commissioner set forth in N.J.A.C. 6A:3-1.10, the Commissioner's decision to refer the charges to the undersigned Arbitrator as opposed to dismissing the pleadings is deemed tantamount to establishing that the Respondent failed to

prove that the "District's tenure charge fails to advance a cause of action, lack jurisdiction, failure to prosecute or other good reason."

The District argues that "the Arbitrator has jurisdiction to decide this matter for inefficiency under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act." The Arbitrator refers to the decision of the Arbitrator in Chavez supra, as follows:

> TEACHNJ provides more broad authority for arbitrator review of tenure charges than that narrowly provided in Section 23 [Now N.J.S.A. 18A:6-16]. Section 22 of the Act [Now N.J.S.A. 18A:6-17.1] provides, among other things, for the establishment of an arbitrator panel, rules for exchange of information by the parties, timelines for arbitration, use of the American Arbitration Association labor arbitration rules, and, importantly the issue of authority granted arbitrators by the statute, that; 'The Commissioner of Education shall maintain a panel of 25 permanent arbitrators *to hear matters pursuant to N.J.S. 18A:6-16*.' The plain meaning of such language supports a conclusion that the Act grants authority to arbitrators to consider all types of tenure charges, including efficiency charges beyond merely those governed by Section 23."

The District cites I/M/O Tenure Hearing of Dr. Andrew Cuff, Cumberland Regional School District, DKT. No. 71-3/14 (June 26, 2014) for its finding that inefficiency charges initiated before the new procedures of TEACHNJ had been fully implemented "must be decided upon the old standard."

The District maintains that the instant inefficiency charges have been plead under both sections pursuant to N.J.S.A. 18A:6-17.3, which provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effective, and N.J.S.A. 18A:6-16, which provides for the adjudication of inefficiency charges on other non-mandatory grounds such as

insubordination. "This matter was plead under both sections." (See Miller Cert. Exhibit A).

The District distinguishes the decision of Arbitrator Bluth, I/M/O the Tenure Hearing of Sandra Cheatham, State-Operated School District of the City of Newark, Essex County, Dkt. No. 420-14 (October 16, 2014). "There the Arbitrator over-stepped his authority in making a decision as to the appropriateness of the District's evaluation process, a matter expressly left to the Commissioner pursuant to N.J.S.A. 18A:6-10 and 17.3." Finally, the District argues as follows:

> 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 charge against Respondent should not be dismissed. Instead, the charge must be evaluated under N.J.S.A. 18A:6-16, and, thus, the case should proceed to hearing.

Respondent's Reply to the District's Opposition to the Motion to Dismiss

The Respondent, in her Reply, asserts that the District has "turn[ed] a blind eye to the clear mandate of the law and the recent decision on the exact same issues presented herein rendered by Arbitrator Bluth in I/M/O Cheatham and the Newark Public Schools," supra.

Notwithstanding the Shulman letter, Respondent contends "the law is clear that the 2012-13 school year was deemed by law, regulation, and the Department of Education's own advisory committees, and the Department of Education itself to be a 'pilot' year. An arbitrator, in considering this precise issue has so ruled recently, and did so persuasively, as discussed in detail *infra*." (Resp. Reply brief @ 3).

Insofar as the District's reliance on its MOA with the NTU is concerned, the Respondent notes that tenure is a statutory right unaffected by any reference to the new evaluation rating system scheduled to begin in 2012-13 in the parties' MOA and therefore any claim that the parties and Respondent were "bound to the implementation of a law that did not even exist in 2012-13 must be rejected."

The Respondent further notes: "In the first place, the MOA does not mention tenure at all. Second, in order to waive a statutory right, a waiver must be clear and explicit. Third, the TEACH NJ Act has a preemptive effect, and that statutory mandate cannot be waived." Fourth, the Respondent takes issue with the District's contention that transmittal of the charges and the motion to dismiss to the arbitrator was tantamount to a Commissioner "determination that the District complied with the many strict standards imposed by the evaluation process pursuant to N.J.S.A. 18A:6-17.3 because the Commissioner expressly directed the Arbitrator to decide the motion."

The Respondent further rejects the District's assertion that the Arbitrator can "transform the charges brought under one specific section of the law into a different type of charge altogether." Moreover, it dismisses the District's reliance on inefficiency charges brought prior to the effective date of TEACHNJ "in support of the general proposition that it cannot be foreclosed from proceeding against Respondent..."

The Respondent argues that the District's attempt to rely on evaluations it conducted in 2012-13 because it conducted its own pilot program in 2011-12 "completely ignores the TEACHNJ Act, its implementing regulations, the

voluminous Department of Education issued guidance, as well fundamental principles governing waiver of statutory rights, and the Department's multiple and consistent statements explaining how TEACH NJ was to be implemented."

The Respondent notes that the District's attempt to buttress its position that because the law was adopted in August 2012, in the 2012-13 school year, "it automatically applied during the 2012-13 school year. Since the 2012-13 school year represents a date that precedes the full effective implementation date of the revised Tenure Act...the charge of inefficiency brought against Respondent based on evaluations issued in 2012-13 and 2013-14 are fatally flawed and are ripe for dismissal under the statute."

The Respondent considers the Cheatham decision to be "sound and consistent with the TEACHNJ Act" and entitled to "substantially greater weight than the District's recent attempts at including a document obtained on an ex parte basis as a result of its dissatisfaction with Mr. Bluth's decision."

Referring to N.J.S.A. 18A:6-123(d) and (e), the Respondent notes that although the Act was adopted on August 6, 2012, "it provides for different implementation dates – a common practice." In the Respondent's view, the effect of the implementation dates was to convey the intent that the 2012-13 school year "was to serve as a test run year for purposes of all tenure related issues – not only criteria for attaining tenure, but also for completing evaluations and observations under the new evaluation procedures and rubrics, and revocation of tenure." The Respondent deems "inconsequential" the fact that the District "opted into a pilot program in the prior year (2011-12)." Whereas

"N.J.S.A. 18A:123 provides that a District will implement a pilot program to 'test and refine the evaluation rubric' by no later than January 2013 – approximately 5 months into the 2012-13 school year -- [i]t was not until the start of the 2013-14 school year that implementation of the evaluation rubrics was mandated...This begs the question how the District could comply in 2012-13 with regulations that did not exist until 3/4 of the way through the 2012-13 school year and not implemented until 2013-14?"

Notwithstanding the Shulman letter, the Respondent alludes to voluminous publications issued by NJDOE, as well as various Committee Reports issued in anticipation of the Act, "including an FAQ published by the Department, which cites in multiple parts, that 2013-14 was the first 'live' year for purposes of making tenure decisions of all kinds." With respect to the Shulman letter, Respondent writes:

> Respectfully, Mr. Shulman's letter represents little more than an admission that the District possesses absolutely no legal support for its claim that evaluation outcomes from the "pilot" 2012-13 school year count for purposes of tenure decisions, including tenure revocation. The letter, which entirely ignores all other references to the intent of the legislature, and communications from the Department of Education, claims that the FAQ that speaks to the "pilot year" was not intended to address tenure revocation timing, but, rather, timing for tenure acquisition. After posting the FAQ to the public for approximately two (2) years, and to now try to clarify that which is already clear to most everyone but the District, and just days after the Cheatham decision was issued, is circumspect at best. And for this reason alone, the letter should not be considered.

In its review of the sequence of events which culminated in the Shulman letter, the timing of which the Respondent deems "telling and suspicious to put it mildly," specifically its issuance a week after the Cheatham decision dated

October 16, 2014, the Respondent asserts that the District "coordinated with the Commissioner's office a belated attempt at a desperate get-out-of-jail free card concerning the meaning of the FAQ in question." Prior to the Shulman letter "that section of the FAQ in question makes no reference to acquisition or revocation but rather to tenure decisions..." That the Commissioner's office, having determined that the tenure charges should be decided by an arbitrator, would provide any comment in this matter, and then revise one section of a 15-page comprehensive document, including the FAQ that had been available to the public for at least the past two years, is considered problematic.

"Additionally, Mr. Shulman ignores the remainder of the very same comprehensive and authoritative FAQ, which unequivocally supports Respondent's position, on multiple pages, that 2012-13 was a capacity building year of development and that the teacher evaluation system would be implemented in 2013-14 and no sooner. Thus, not only is the letter not appropriate for consideration, the contrast between it and all of the prior communications from the Commissioner's office requires the conclusion that it is bogus." (Resp. brief @ 15).

Further evidence that 2013-14 was the first year in which the new evaluation system would count is provided in a memo dated January 7, 2014 to all Chief School Administrators et al. by NJDOE Assistant Commissioner and Chief Performance Officer Shulman as follows:

> "As districts implement AchieveNJ for the first time in 2013-2014, NJ SMART is preparing for a modified data collection to capture the multiple measures of educator practice and student growth that are aligned to AchieveNJ. In July 2014, we will conduct a separate

> Staff Evaluation Submission through NJ SMART and subsequently will sunset the evaluation data elements that are part of other NJ SMART submissions. In the first year of this collection, coordination will be necessary between each district's data management, personnel and administrators in charge of evaluation. Today, we are sharing information about the submission to provide districts with ample time to prepare to submit in July."

Until the Shulman letter, the Respondent contends that "Shulman himself" had announced to all Chief School Administrators, including Ms. Cami Anderson, that 2013-14 would be the first year for full implementation of the new teacher evaluation section as follows: "We have designated 2012-13 as a planning and capacity-building year. During this time, districts must engage in one of two options: participate in a second cohort of our pilot program, or build capacity through a defined series of steps for implementing the new system in 2013-14."

Also in his July 30, 2012 Memorandum, Shulman announced:

> "[a]s we prepare for statewide rollout of an improve educator evaluation system in 2013-14, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs. The first of these requirements is to form a District Evaluation Advisory Committee (DEAC) to ensure stakeholder engagement in evaluation reform. We strongly advise these committees be formed as soon as possible, as they will help to drive decision making for all other parts of the process. To that end, we have provided an overview of the required membership of the DEAC (Appendix B) and a sample communications plan that DEACs may use to guide their initial meetings and plans for the 2012-13 school year (Appendix C). We will continue to provide information and resources for next year's capacity building activities as they become available." (Emphasis added).

The Respondent further argues that "[i]n the now infamous FAQ issued by the Department of Education, entitled '*Excellent Educators for New Jersey*" (See

Certification of Counsel dated November 20, 2014, Exhibit 4*), the Department explicitly sets forth the 2011-12 pilots in which the District participated, the 2012-13 statewide pilots and the then anticipated implementation of both TEACH NJ and its implementing regulations for the 2013-14 school year."

In summation, the Respondent maintains that "[t]hese FAQs, guidelines, summaries and reports are entitled to and must be given due diligence" as per Paterson, supra.

The Respondent disputes the District's contention that if it failed to comply with N.J.S.A. 18A:6-17.3, it may nonetheless proceed under the inefficiency alternative set forth in N.J.S.A. 18A:6-16. However, "their charge cites no alternate basis for proceeding against this Respondent" unless "the District wishes to pursue tenure charges against Respondent, based on only one (1) year of deficient performance during that time, then they are required to reinstate the Respondent and go back to the proverbial drawing board and in accordance with the applicable statutory and regulatory procedure."

"Although the District now seeks to proceed under Section 8 of TEACH NJ, the charges are grounded specifically on alleged inefficiency pursuant to Section 25 of the TEACH NJ Act, N.J.S.A. 18A:6-17.3, and can only be based upon that provision. Further, and pursuant to Section 25, the District must abide by the statutory and regulatory requirements set forth therein – namely that they

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* For example, this FAQ indicates that the new teacher and principal evaluation system will be implemented in 2013-14 (p. 1); that summative ratings would not count until 2013-14 (p. 4); that certain milestones had to be met to "prepare to implement new teacher and principal evaluations in 2013-14." (p. 6); that "the pilot would use the information for full implementation in 2013-14." (p. 8, 9); that "beginning in 2013-14, growth data for all qualifying teachers...will be a part of educator evaluations." (p. 14).

undergo a specific review procedure for procedural compliance, and that if this review process reveals non-compliance, the charges cannot move forward in the filing process. Nor can they proceed to arbitration. These laws constitute a statutory (and regulatory) imposed prerequisite to tenure charges, and, permitting the District to proceed under another section based on a year that the statute and administrative guidance deemed experimental and not to be used in pursuing tenure charges would render the requirements of Section 25 meaningless."

If the Legislature had intended for "deficient" inefficiency charges to proceed to arbitration via Section 8 of the Act, it would have so stated. Instead, it specifically imposed an obligation for each deciding entity, or its "designee" in the case of the Commissioner, to review the charges for procedural compliance. In the absence of procedural compliance, the Legislature chose to prohibit such charges from proceeding to an arbitration hearing as a matter of law. And lest there be any doubt that this was the intention of the Legislature, the Department of Education explicitly advised districts that at a minimum, "[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency tenure charge" and that "[f]ailure to adhere to these requirements can result in the tenure charge being dismissed." See Certification of Counsel, Exhibit 10, p. 1.

The District reiterates its position that by transmitting the case to the arbitrator for determination, "the Commissioner did not make any decision, findings, factual or legal."

The Respondent argues that "the parties' MOA does not and cannot authorize the District to file tenure charges based on the 2012-2013 evaluations." Despite the District's adoption of the four summative ratings, and the evaluation rubric developed by the Board in its MOA, "the MOA does not mention tenure at all. The parties' MOA makes absolutely no reference to the substantive processions of tenure charges for the 2012-13 school year, nor did the parties agree to any such terms in the MOA."

Moreover, the Respondent cites State v. State Supervisor Employees Assn., 78 N.J. 54, 80-81 (1978) and its progeny for the proposition that "where, as here, a statute or regulation establishes a term and conclusion of employment, the statute preempts the negotiated term." Insofar as the waiver of a statutory mandate or right is concerned, "it must be plain and unambiguous." Red Bank Regional Ed. Assn. v. Red Bank Regional High School District, 78 N.J. 122, 140 (1978).

In the Respondent's view, "if the District wishes to proceed against Respondent on statutory grounds other than 'inefficiency' such as 'incapacity,' 'unbecoming conduct,' or 'other just cause,' it is free to do so by filing such charges against Respondent in accordance with the requirements of Section 8 of the Act. What it cannot do is file (obviously) deficient inefficiency charges pursuant to Section 25 of the Act, and when they are rightfully judged to be deficient and subject to dismissal, attempt to argue in the alternative that they are not 'really' inefficiency charges and therefore should proceed to arbitration in accordance with Section 8 of the Act."

Finally, the Respondent contends that the District's interpretation of the law finds no support in the arbitration awards it has relied upon. The tenure charges at issue in both I/M/O Tenure Hearing of Lawrence E. Hawkins and I/M/O Tenure Hearing of Gerald Carter are distinguishable in that they allege unbecoming conduct and/or insubordination in addition to inefficiency, pursuant to Section 8 of the Act. "The charges in instant matter only allege inefficiency, which must proceed, if at all, in accordance with Section 25 of the Act."

In addition, the cases of Pugliese and Chavez are distinguishable as they were filed after the effective date of the TEACHNJ Act but prior to the implementation of its substantive provisions in 2012-13. Given the filing of these charges in the interim period between August 6, 2012 and September 2012, an issue arose as to "what substantive law to apply." TEACHNJ provided that its substantive provisions did not take effect until the 2013-2014 school year.

District's Sur-Reply

The District denies that any ex parte communication took place between Assistant Commissioner Shulman and Charlotte Hitchcock, its General Counsel, "that violated the Respondent's rights in this matter...The correspondence from Ms. Hitchcock specifically related to the Cheatham matter. The teacher in the Cheatham [case] was not a party to this separate Tenure charge."

The District notes that it is a "State-Operated School District under full intervention of the State, principally, the District is an arm of the State. To allege that it improperly communicated with or sought clarification from the State is clearly wrong."

The District objects to the Respondent's inclusion of twelve (12) new documents. The District asserts that "it is undisputed that TEACHNJ went into effect prior to the beginning of the 2012-13 school year and its enactment occurred on August 6, 2012. The District finds nothing in the Respondent's additional documents that "explicitly say that the 2012-13 school year does not count toward in efficiency."

With respect to the implementation of evaluation rubrics, the District notes that "[t]he 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 its 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."

According to the District, "the Respondent improperly relied on the Department of Education's Answer as a means to defer the tenure charge to the 2013-14 school year." It reiterates portions of the Shulman Clarification letter, emphasizing:

> Through this guidance, the department sought to clarify when summative ratings would count towards *earning* tenure. As mentioned above, such clarification did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher.

The District maintains that the Respondent's reliance on the Cheatham and Thomas cases is misplaced. "These issues are controlled by statute, not regulations." It distinguishes Thomas from the instant case since "this matter was initially plead under both sections." (See Exhibit A of Miller Cert.). Moreover, the District notes that neither Cheatham nor Thomas is precedential in this Tenure Charge." It cites the case of I/M/O Tenure Charge Against Edward Newton, Dkt. No. 286-9/14 where the District sought to terminate Newton based on an Inefficiency Charge pursuant to N.J.S.A. 18A:6-17.3 and the Commissioner, once Newton failed to timely respond, upheld his termination.

Respondent's Sur-sur Reply

The Respondent reiterates that 2012-13 was a pilot year and that once the TEACHNJ was enacted the evaluation criteria and procedures "dramatically changed."

The Respondent relies again on the Cheatham decision, supplemented by the Thomas decision. "Additionally, the Arbitrator found that the District, in filing tenure inefficiency charges, failed to follow the requisite evaluation process set forth in N.J.A.C. 18A:10-4.4, and presented no evidence that it was somehow exonerated from the Act."

The Respondent maintains that neither Assistant Commissioner Shulman nor NJDOE is the arbiter of the tenure charges. It disputes the District's contention that the District is the "arm of the State, and the two entities are ostensibly one, and may therefore communicate ex parte." This "completely ignores the simple fact that this is a contested legal action, in which both parties

are represented by counsel, and any dialogue between the government agency and the District during ongoing litigation – especially the nature of Mr. Shulman's and Ms. Hitchcock's communique – are entirely improper. And, notably, the law is well settled that a State Operated School District, such as Newark, remains a separate entity while under State control. See, N.J.S.A. 18A:7A-37. To accept the District's position, the District and Commissioner's office could communicate for any reason at any time, ex parte. The procedure for processing tenure charges simply does not contemplate this proposition. Indeed, if the District's position is accepted, in cases where the Commissioner decided to act himself, the District could communicate ex parte with the Commissioner without the Respondent's knowledge or input."

It further disputes the District's conclusion that the Motion to Dismiss is entirely reliant on the FAQ but rather "based upon the plain language of N.J.S.A. 18A:6-123."

The Respondent takes issue with the District's claim that Cheatham and Thomas are "anomalies," absent access to other tenure case decisions in the State.

The Respondent argues that "the District never filed under Section 8 of TEACHNJ, N.J.S.A. 18A:6-16, but under N.J.S.A. 18A:6-17.3 and N.J.S.A. 18A:6-10, the latter of which provides generally that a tenured teacher 'shall not be dismissed or reduced in compensation.' It also distinguishes the Newton and Pulliam-Newell cases where the Respondents failed to respond to the charges and the charges were therefore deemed admitted." In addition to Cheatham and

Thomas, the Respondent cites the recent I/M/O Tenure Charges Against Elena Brady, State-Operated School District for the City of Newark for its clarification of the distinction between Section 25 and Section 8 inefficiency charges.

DISCUSSION

A. Arbitrator's Authority re: Procedural Issues

In its filing of the Notice of Inefficiency charges pursuant to N.J.S.A.18A:17.3, N.J.S.A.18A:6-10, N.J.S.A.18A:6-11 and N.J.S.A.6A:3-5.1, the District has argued that since the Commissioner of Education has "the sole authority to determine if the 'evaluation process' was followed," the referral of those charges to the undersigned arbitrator was tantamount to a determination by the Commissioner that the District had complied with the requirements of the "evaluation process" and "[a]s such, the Respondent's Motion to Dismiss must be denied and the Arbitrator must render a decision on the merits as prescribed by statute."

Notwithstanding the contention of the District, it is clear that from the appointment of the Arbitrator, while the Commissioner of Education had the authority to decide the Motion to Dismiss, he was "unable to determine that the evaluation process has not been followed and accordingly on this date, the case is being referred to Arbitrator Robert T. Simmelkjaer as required by statute." Following the Commissioner's review of the case pursuant to N.J.S.A.18A:6-17.3e, and N.J.S.A.6-17.3(c), with the latter provision stating that "the Commissioner shall examine the charge," the statute states that the Commissioner "shall...refer the case to an arbitrator and appoint an arbitrator to

hear the case, unless he determines the evaluation process has not been followed."

Given the Commissioner's referral of the Inefficiency Charge to the Arbitrator, without ruling on whether the District complied with the evaluation process, the Arbitrator maintains that as the "designee" of the Commissioner pursuant to N.J.A.C. 6A:3-5.1(c)(5) he, as arbitrator, "shall examine the charge" and ascertain whether the charges constitute "a charge of Inefficiency," pursuant to N.J.S.A.18A:6-17.3 aka Section 25 of the TEACHNJ Act.

The District's assertion that the only authority vested in the Arbitrator is limited under N.J.S.A.18A:6-17.3 to determining whether or not one of four evaluative criteria were met is misplaced. These criteria, such as "the employee's evaluation failed to adhere substantially to the evaluation process including but not limited to providing a correction act plan" pertain only after a hearing on the merits has been conducted. As such, any reference to these criteria by the District is premature pending the Arbitrator's ruling on the Motion to Dismiss. The language cited by the District is contained in Section 23 of TEACHNJ, N.J.S.A.18A:6-17.2, namely, "materially affected the outcome of the evaluation in the relevant school year" under the Section entitled "considerations of the Arbitrator in rendering decision." Inasmuch as the criteria pertain to the post-hearing phase of an inefficiency charge, they have no bearing on the pre-hearing procedural issues set forth in the Respondent's Motion to Dismiss.

In the Arbitrator's opinion, the legal prerequisite to the arbitration of the Inefficiency charges pursuant to Section 25 of TEACHNJ is compliance with the

evaluation procedures. The Commissioner's ruling on the sufficiency of the charge was supplanted by his referral of the inefficiency charge to the Arbitrator to decide the Motion to Dismiss, including the Respondent's procedural claims. The appointment of an arbitrator does not constitute a substantive decision on the merits. As Respondent correctly notes, for a decision of the Commissioner to be valid, it must be included in a written decision that sets forth findings of fact and conclusions of law sufficient for a reviewing court to understand the basis for the decision.

N.J.A.C. 6A:3-5.5(a) provides further authority for the Commissioner to delegate the Motion to Dismiss to the Arbitrator. This referral is consistent with the Commissioner's authority to appoint a "designee" to examine the charge as provided in N.J.A.C. 6A:3-5.1(c)(5).

N.J.S.A.18A:6-16, which provides the Commissioner with the discretion to refer a summary judgment motion to arbitrator, can be equated with the Commissioner's authority "when a motion for summary decision has been made prior to that time, the Commissioner may retain that matter for the purposes of deciding the motion." (Emphasis added).

Finally, on this point, were the parties required to engage in extensive litigation up to the point of the Commissioner's decision, or during a motion for summary judgment pursuant to N.J.S.A.18A:6-16 prior to referring the matter to an arbitrator, the expeditious resolution of Inefficiency charges under TEACHNJ would be undermined.

B. NPS/NTU Memorandum of Agreement

The District has relied on a MOA with the Newark Teachers Union ("NTU) that the parties negotiated in October 2012 as a basis for included the 2102-2013 school year in its inefficiency charges. The MOA refers to the implementation of "a new evaluation system beginning SY 2012-13." It further states that "teachers will receive an annual summative evaluation rating that designates them as highly effective, effective, partially effective or ineffective." In addition, the District notes that Section 11 of the MOA links teacher compensation to teacher performance based as measured by the new evaluation framework.

Although the District adopted an evaluation rubric as part of the evaluation system known as the "Framework" and utilized the four-tier rating system in accordance with its MOA, the MOA did not address the issue of tenure, let alone the removal of a tenured teacher on efficiency grounds. Assuming arguendo that the MOA had addressed this subject, it would have been preempted by the TEACHNJ statute enacted on August 6, 2012. With respect to "Conflicts with collective bargaining agreements," N.J.S.A.18A:6-126 states: "21. No collective bargaining agreement or other contract entered into by a school after July 1, 2013 shall conflict with the educator evaluation system established pursuant to P.L. 2012 c.36 (C. 18A: 6-17 et al.)." Despite the fact the parties' MOA was negotiated before the effective date of the above provision, the Arbitrator maintains that the principle contained in this language should apply to the NPS/NTU MOA.

As the Respondent correctly notes, in reference to the District's pilot program, "[i]t is fundamental that where, as here, a statute or regulation establishes a term and condition of employment, that statute preempts the negotiated term. See, State v. Supervisory Employee Assn., 78 N.J. 54, 80-81 (1978).

Assuming arguendo that the NTU could waive an individual statutory benefit on behalf of a Union member, it is well-established that such wavier must be clear, unmistakable and unambiguous. The U.S. Supreme Court held in 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009), that "an arbitration clause contained in a CBA, freely negotiated by a union and an employer, which clearly and unmistakable waived the Union members' right to a judicial forum for their statutory discrimination claims was enforceable." See also, Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998).

New Jersey law on the waiver of statutory rights is in accord. In Red Bank Regional Ed. Assn. vs. Red Bank Regional High School District, 78 N.J. 122, 140 (1978), the Court held that "when a specific statute sets a term or condition of public employment, a negotiated agreement in contravention of that statute is not authorized by the Employer-Employee Relations Act."

In the instant case, the Arbitrator discerns no indication that the NTU in agreeing to adopt the four summative ratings that an employee could receive consistent with the Act and in accepting the District's evaluation rubric ipso facto waived teacher's rights and protections under TEACHNJ. In the absence of any specific reference in the MOA to the "substantive processing of tenure

inefficiency charges for the 2012-13 school year" or even a general reference to tenure acquisition or revocation, the District's reliance on the language in its MOA to file inefficiency charges against the Respondent including 2012-13 lacks legal sanction. It constitutes a quantum leap on the District's part to equate the movement of teachers on the salary scale based on its new evaluation system as tantamount to the Respondent's waiver of her statutory rights under TEACHNJ. The fact that the terms of the MOA to which the District contends the Respondent is bound contains no language addressing tenure inefficiency charges or tenure removal reinforces its inapplicability.

In conclusion, the Arbitrator finds that the parties' MOA neither authorized the District to include the Respondent's 2012-13 evaluations to support the District's tenure efficiency charges nor did it waive the Respondent's tenure rights under the TEACHNJ statute. The Arbitrator discerns no basis to deviate from his decision regarding the MOA in I/M/O Neil Thomas, supra, or the preceding decision of Arbitrator Bluth in Cheatham, supra.

C. The 2012-2013 Evaluation of the Respondent

The District has argued, inter alia, that the enactment of TEACHNJ on August 6, 2012 made it effective during the 2012-2013 school year. Although the District acknowledges that the "pilot" program of its proposed new evaluation system, which began in the 2011-2012 school year, did not "count" for official purposes, the District maintains that "the experience of that pilot program informed the development of the teacher evaluation process adopted, approved and implemented in 2012-2013."

According to the District, the Legislature, by purposefully adopting and approving TEACHNJ on "August 6, 2012 in the 2012-2013 school year" intended that there be "no question that the evaluations in the 2012-2013 school year were to be used towards determining if tenure charges were warranted."

The District further contends that statutory language in TEACHNJ requiring school districts to institute pilot programs to test their 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...") and requiring school districts to implement their evaluation rubrics by the beginning of the 2013-14 school year at the latest. 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..."), "did not require school districts to treat 2012-13, and only 2012-2013 as a 'pilot' year. Nothing in TEACHNJ or its 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.

In the Arbitrator's opinion, the District's utilization of 2011-2012 as a pilot year in seven NPS schools did not transform 2012-13 into a year where the evaluation rubrics and related procedures could be used to file inefficiency tenure charges. Whereas the District clearly benefitted from its 2011-12 pilot program, the fact that the evaluation procedures remained incomplete in 2012-13,

particularly their utilization for the purpose of filing inefficiency charges, negates 2012-13 as a year where the Respondent's evaluation could count.

A reasonable interpretation of the TEACHNJ language persuades the Arbitrator that the 2012-13 school year, irrespective of the enactment of the statute on August 6, 2012, was intended as a test year in preparation for the 2013-14 school year wherein all tenure related issues, including the establishment of the criteria for completing evaluations and observations under the new evaluation procedures and its teacher practice rubrics would be implemented.

Given the fact that the instant inefficiency charge is based on one count of inefficiency, encompassing the 2012-13 and 2013-14 school years, the statutory language indicates that it was not until the start of the 2013-14 school year that the implementation of the evaluation rubrics was mandated, namely "[b]eginning with the 2013-14 school year a board of education shall ensure implementation of the approved, adopted evaluation rubric..." Also, the first set of regulations implementing TEACHNJ became effective on March 4, 2013, including, inter alia, the establishment of a School Improvement Panel ("Panel") in each school. Moreover, it was not until October 2013 that the NJDOE promulgated a second set of regulations, including the requirement that all tenured teachers be observed at least three times per school year and that teachers with a Corrective Action Plan such as the Respondent receive one additional observation, and that at least one observation for a teacher with a CAP be announced, with a pre-observation conference.

As Respondent correctly notes, the foregoing statutory provisions are reinforced by regulations that "include, but are not limited to provisions governing the content of evaluation rubrics and components, N.J.A.C. 6A:10-4.1, procedures on rubric approval by the Commissioner, N.J.A.C. 6A:10-5.1, and procedures concerning the timing, form, nature and number of Teacher evaluations and observations, N.J.A.C. 6A:10-4.4." (Resp. brief @ 4).

Evidence in the Statement of Evidence that indicates that the District relied on two formal observations conducted in Respondent's class in February and June 2013, during the 2012-13 school year, before the second set of regulations in October 2013 were announced by NJDOE, including the requirement that at least one observation for a teacher with a CAP (which Whitehurst did not receive until October 2013) be announced, with a pre-observation conference. See, N.J.A.C. 6A:10-4.4. This deficiency combined with the unavailability of a Panel in Respondent's school during the 2012-13 school year, convinces the Arbitrator that the District could not and did not meet the standards set forth in TEACHNJ for rendering formal judgment on the Respondent's performance for that year pursuant to N.J.S.A. 18A:6-17.3.

A plain reading of the statutory scheme set forth in TEACHNJ reflects the Legislature's intent that, although the statute was enacted on August 6, 2012, an evolving set of standards would be developed during 2012-13 with deadlines, delineated and reinforced by NJDOE regulations, in anticipation of implementation in 2013-14. The fact that rubrics were not required until no later than December 31, 2012 and pilot programs were not required to be adopted

until January 31, 2013 – both in the midst of the 2012-13 school year – persuades the Arbitrator of the Legislature's unequivocal intent to treat 2012-13 as a work in progress. These 2012-13 interim "at the latest" deadlines are distinguishable from the mandatory statutory language providing that '[b]eginning with the 2013-2014 school year a board of education shall ensure implementation of the approved, adopted evaluation rubric..."

Considering the "actions required in law before bringing an inefficiency tenure charge based on the new tenure revocation process" under TEACHNJ, the District's inability to satisfy these requirements during the 2012-13 school year – a year that preceded the intended full implementation in 2013-14 – renders the inefficiency charge brought against the Respondent encompassing her annual summative evaluation for the 2012-13 school year violative of both TEACHNJ and Achieve NJ as well as legally and procedurally defective.

D. Section 25 of TEACHNJ/Shulman Letter

It is undisputed that the Tenure Charge of Inefficiency against Ms. Whitehurst was filed pursuant to Section 25 of the statute. N.J.S.A. 18A:6-17.3. The District's claim that it alternatively filed under N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-10 will be addressed infra. Section 25 mandates the filing of Inefficiency charges if a teacher has been rated ineffective or partially ineffective during two consecutive annual summative evaluations. The District's Statement of Evidence relies on the summative evaluations for 2012-13 and 2013-14, inter alia, to file the Inefficiency Charge and declare that Respondent's "dismissal is warranted."

A pivotal issue in the instant case as well as similarly situated Respondents in Brady and Thomas has been the District's reliance on a letter from Assistant Commissioner Peter Shulman dated October 24, 2014 "clarifying" the intent of NJDOE regarding a Department publication entitled "Excellent Educators for New Jersey: Educator Evaluation Frequently Asked Questions (FAQs)." To buttress its contention that not only was TEACHNJ in full force and effect during the 2012-13 school year, but additionally "there is no question that the evaluations in the 2012-2013 school year were to be used toward determining if tenure charges were warranted," the District sought "clarification" of the contested FAQ with respect to the Agency's intent. The excerpt cited by Arbitrator Bluth in the Cheatham decision dated October 16, 2014, and relied upon by the Respondent herein reads:

Q. Will summative ratings "count" this year (2012-13) toward tenure decisions?

A. No – only the item "on the clock" in the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start.

The "clarification" provided by Assistant Commissioner Peter Shulman dated October 24, 2014 reads as follows:

Dear Ms. Hitchcock:

"Pursuant to your request, the Department of Education (Department) is providing clarification on factual issues arising in the context of a recent arbitration decision. Specifically, the Department hopes to clarify its intent in the "Guide to the TEACHNJ Act," as well as the status of the Newark Public Schools (Newark) evaluation rubric during the 2012-2013 school year.

I. "Guide to TEACHNJ Act"

The Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act was approved and effective on August 6, 2012. This Act established a new educator evaluation system, and revised the process for the acquisition and revocation of tenure. As such, since August 2012, the Department has published many resources meant to support school districts in the implementation of the Act. One such document was a Frequently Asked Questions (FAQs) regarding TEACHNJ (noted in the above-referenced decision as the "Guide to TEACHNJ Act")[1]. Included within this FAQ document was a response to questions regarding TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three years of employment. Understandably, many nontenured teachers from school districts throughout the State reached out to the Department to clarify how the law applied to their tenure acquisition and the Department responded accordingly.

> No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where [*sic*] the statewide system will be in place, and the first year when summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start.

Through this guidance, the Department sought to clarify when summative ratings would count towards *earning* tenure. As mentioned above, such clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher...

II. Status of Newark's Evaluation Rubric for the 2012-2013 school year

In regards to the status of Newark's evaluation rubrics during the 2012-2013 school year, please note that, on October 26, 2012, members of the Department met with Newark representatives to review and discuss the Newark Evaluation Rubric and the associated policies that would be put into place for the 2012-13 school year. At that time, the Commissioner's representatives found that the Evaluation Rubric met the intent of the recently

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[1] This document is no longer available on the Department website as some of its content is outdated.

> adopted TEACHNJ Act and were directionally aligned with the proposed regulations, which would be effective in March of 2013.
>
> I trust that this response has clarified the Department's positions in regard to these two issues. Please let me know if you have any additional questions."

Given Mr. Shulman's "clarification," the District argues that the FAQ at issue "by its terms...is irrelevant to any tenure charge because it refers only to the acquisition of tenure by non-tenured teachers rather than the evaluation or dismissal of tenured teachers...Thus it has been unequivocally established that the term 'tenure decisions' does not refer to the determination of whether to retain a teaching staff member past the date on which he or she will acquire tenure."

The Arbitrator, given the problematic timing of the Schulman letter and multiple references in the FAQ at issue, including communication from Shulman himself, that the new teacher evaluation system was scheduled to be implemented in 2013-14, is disinclined to accord the "clarification" any evidentiary weight. That Mr. Schulman would issue his October 24, 2014 "clarification" after the Cheatham decision on October 16, 2014 while several Inefficiency cases involving the Newark School District were pending and pursuant to an ex parte communication with Ms. Hitchcock, the NPS General Counsel, lends credence to the Respondent's assertion that letter lacks probative value.

In this regard, the Respondent raises several valid points that in the aggregate diminish the letter's consideration in the instant case. First, the letter was apparently written in response to a request by the Office of the Newark School District's General Counsel after the Cheatham decision was issued. The

letter has the ostensible intent of clarifying the FAQ upon which Arbitrator Bluth relied, in part, to rule in favor of the Respondent. The fact that the NJDOE, having appointed arbitrators to adjudicate several Inefficiency cases involving the NPS, would selectively clarify one FAQ within a comprehensive document permits an inference of inappropriate communication.

Notwithstanding the District's claim that as an "arm" of the State the District and NJDOE are inseparable entities, given the role of the Department in administering the statute and that of the Newark School District in bringing inefficiency charges pursuant to the statute, in the Arbitrator's opinion, for the purposes of the instant case, they are legally separate and distinct. Clearly, the District, in order to avoid the claim that it has engaged in "collusion" with the Office of the Commissioner, should have disclosed its interactions *vis-à-vis* the Commissioner's Office to the Respondent as she is entitled to an arm's length relationship between the charging party and the adjudicative entity – namely the Commissioner's Office -- which delegated the decision to the undersigned. The Arbitrator concurs with the Respondent in her assertion that as parties to an ongoing litigation, "the nature of Mr. Shulman's and Ms. Hitchcock's communique – are entirely improper."

Second, the Shulman letter is contradicted not only by other information contained in the FAQ but also by memoranda authorized by Mr. Shulman regarding the same subject matter. For example, the same FAQ indicates that "the new teacher and principal evaluation systems will be implemented in 2013"

(p. 1), "that summative ratings would not count until 2013-14" (p. 4), and "that the pilot would use the information for full implementation in 2013-14."

Moreover, on January 7, 2014, in a memo to all Chief State School Administrators, District Web User Administrators et al., Shulman advised that "As districts implement Achieve NJ for the first time in 2013-14, NJ SMART is preparing for modified data collection..." Previously, in his March 2012 Memo, Shulman announced to all Chief State Administrators, including Ms. Cami Anderson, Newark Superintendent, that "we have designated 2012-13 as a planning and capacity building year...through a defined series of steps for implementing the new system in 2013-14." In addition, in his July 30, 2012 Memorandum, Shulman announced that "[a]s we prepare for statewide rollout of an improved educator evaluation system in 2013-14, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs."

Third, the distinctions made between tenure acquisition and tenure revocation in the Shulman letter, strictly limiting summative ratings to tenure acquisition, is inconsistent with the NJDOE's "Guide to the TEACHNJ Act," which addresses tenure decisions holistically, while indicating that the 2012-13 school year evaluations "do not count" for tenure revocation purposes. As the Respondent reasonably inquires, "if the 2012-13 evaluations were a work in progress or not reliable enough to form the basis for tenure acquisition, how could they reasonably be relied upon for tenure revocation purposes?" In fact, the summative evaluations are relied upon for both purposes. The Arbitrator is

compelled to conclude that the Shulman letter, addressing one FAQ out of an extensive document with several FAQs, shortly after the Cheatham decision, without notice to Respondent, is indicative of a concerted effort to impact decision making in the instant case and similarly situated cases.. As the Respondent argues, the FAQ publication, which was available to the public for two years until recently removed from the NJDOE website "lacks transparency and objectivity between the District and Commissioner's Office..."

On balance, the Arbitrator discerns no basis to credit the Shulman letter as dispositive evidence regarding whether the 2012-13 annual summative evaluation of the Respondent could be used by the District to support Inefficiency charges. The weight of the documentary evidence submitted by the parties persuades the Arbitrator that 2012-13 did not count for tenure revocation purposes, despite the belated and problematic Shulman letter.

E. Section 25 versus Section 8 of TEACHNJ

The District undoubtedly filed Inefficiency charges against the Respondent pursuant to N.J.S.A. 18A:6-17.3(c) and N.J.A.C. 6A:3-5.1(c)(6). The District has maintained that "[t]he tenure charges against the Respondent in this matter are based on inefficiency under both N.J.S.A. 18A:6-10 and TEACHNJ." In serving the Respondent with the Notice of Inefficiency and Statement of Evidence on or about August 29, 2014, the District provided Whitehurst with her annual summative evaluations for 2012-13 and 2013-14 as well as related documentation, including formal observations. (See, Miller Cert.).

While the District has correctly noted that the Commissioner has impaneled 25 permanent arbitrators "to hear matters pursuant to N.J.S.A. 18A:6-16 as well as Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3, the Arbitrator, other than acknowledging that both sections of the statute were cited in the Notice of Inefficiency, discerns no evidence that the charges were pleaded in the alternative. 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.

The Arbitrator cannot concur with the District that the charge of Inefficiency it filed under Section 25, which has been found non-compliant with the requisite evaluation procedures that are a prerequisite to an arbitration hearing on the merits and warrant dismissal "if the charges are determined insufficient" [N.J.A.C. 6A:3-5.5(a)], should now proceed to arbitration pursuant to Section 8 of TEACHNJ.

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.

The District has cited no Legislative deliberations or statutory language that support an intent for "deficient" inefficiency charges filed under Section 25, as in the instant case, to proceed to a Section 8 hearing tantamount to a default position. The NJDOE, as Respondent notes, has explicitly advised Districts that "[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency tenure charge" and that "[f]ailure to adhere to these requirements can result in the tenure charge being dismissed." (See, Sokolowski Cert. @10).

Absent statutory support in the TEACHNJ Legislation for resort to Section 8 in the event Section 25 Inefficiency Charges are deemed insufficient, the District may not "write in an additional qualification which the Legislature has pointedly omitted in drafting its own enactment or 'engage in conjecture or surmise which will circumvent the plain meaning of the act.'" Id. (quoting Cratser v. 3d. of Comm'rs of Newark, 9 N.J. 225, 230 (1952) and In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980)). (Resp. brief @ 33).

The Arbitrator further maintains that assuming arguendo the District intended to file Section 8 tenure charges or other grounds such as incapacity, conduct unbecoming and/or insubordination, it did not allege such charges ab initio. Since the sole charge is inefficiency and TEACHNJ "dictates that all inefficiency charges must be filed, if at all, pursuant to the requirements set forth in Section 25," the Arbitrator cannot sustain the District's unsupported construction of the statutory language.

It 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 cannot 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 on this basis. Clearly, had the Legislature in enacting TEACHNJ intended this outcome, it would have written the appropriate language.

In the Arbitrator's opinion, the evaluation procedures set forth in Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3, pursuant to the filing of an inefficiency charge where the Respondent teacher has been rated "partially effective" and "ineffective" in two (2) consecutive years, have not been satisfied in the instant case. The statutory language, along with the implementing regulations, which were not in full force and effect during the 2012-13 year (See, N.J.A.C. 6A:10-1.1 et seq.), notwithstanding the District's assertions regarding its compliance with the requirements for inefficiency tenure charges under Section 25, convince the Arbitrator that the charge is "insufficient" and should be dismissed.

In the Arbitrator's opinion, had the Legislature intended that a teacher charged with inefficiency for two consecutive years, with 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 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.

The arbitration awards cited by the District in support of its Section 8 alternative are of no avail. In proposing that the inefficiency charge be considered on alternative grounds, the District has cited several arbitration awards where the standard of proof was "whether the evidence in the record supported the charge" by a preponderance of the evidence.

In contrast to the Cheatham decision of Arbitrator Bluth, which the District has challenged on the ground that the Arbitrator "overstepped his authority," the District deems relevant to the instant case several arbitration awards filed under Section 8, including I/M/O Tenure Hearing of Lawrence E. Hawkins, Agency Dkt. No. 243-10/13 (March 10, 2014) and I/M/O Tenure Hearing of Gerald Carter (Agency Dkt. No. 269-12/12 (July 18, 2013). Since the charges in these cases were filed pursuant to Section 8, as opposed to Section 25, the Arbitrator concludes they have no bearing on the instant case. As the Arbitrator in Carter, I note that the Respondent was terminated for inefficiency, specifically grounded in conduct unbecoming as well as insubordination.

The District has further cited I/M/O Tenure Hearing of Felicia Pugliese, Agency Dkt. No. 272 9/12 (February 15, 2013) and I/M/O Tenure Hearing of Chavez, Agency Dkt. No. 269-9/12 (February 6, 2013) as providing an alternative basis to proceed with Section 8 inefficiency charges in the instant case should the Section 25 filing be deemed deficient. However, as the Respondent has correctly pointed out, both of these cases are similarly distinguishable. "The charges in these cases were filed after the effective date of the TEACHNJ Act, but prior to the commencement of the 2012-2013 school year." Given the filing of

these charges in the interim period between August 6, 2012 and September 2012, an issue arose with respect to "what substantive law should apply." Since the District's filing of inefficiency charges against Ms. Whitehurst occurred on or about August 29, 2014, well after the commencement of the 2012-2013 school year, this fact renders comparison between Pugliese and Chavez unnecessary.

The District has also cited I/M/O Tenure Charge Against Edward Newton, Agency Dkt. No. 276-9/14, I/M/O Tenure Hearing of Renee Pulliam-Newell, Agency Dkt. No. 296-10/14 and I/M/O Tenure Hearing of Dr. Audrey Cuff, Cumberland Regional School District Board of Education, Agency Dkt. No. 71-3/14 as supportive of its position. In both Newton and Pulliam-Newell, the Respondents failed to respond to the charges and therefore the charges were deemed admitted. Although the inefficiency charge of inefficiency alleged against Pulliam-Newell, for example, included the 2012-13 and 2013-14 school years and two consecutive "partially ineffective/ineffective" annual summative ratings, the summary decision granted to the District sheds no light on whether the inefficiency charge would have been dismissed on other procedural grounds or would have proceeded to a hearing on the merits.

Finally, the Cuff case is distinguishable because, unlike the instant case where the District filed an inefficiency charge under Section 25, Arbitrator Gerber found in Cuff that arbitrators have authority "to hear matters pursuant to N.J.S.A. 18A:6-16" and that "inefficiency cases must be decided upon the old standard." Clearly, if inefficiency had been alleged on grounds other than two consecutive years of ineffective and/or partially ineffective ratings, or filed prior to the effective

date of TEACHNJ, Section 25, the old Section 8 standard could have been applicable. This was not the case for Ms. Whitehurst. The distinction between Section 25 and Section 8 has been addressed by Arbitrator Klein in I/M/O Tenure Charges Against Elena Brady, State-Operated School District for the City of Newark, Dkt. No. 270-9/14 as follows:

> 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.
>
> The Arbitrator dismissed the charges and reinstated Ms. Brady.

Conclusion

The Arbitrator finds that the Respondent's Motion to Dismiss the Inefficiency Charges is properly before me as the Commissioner's "designee." Considering the submissions of the parties, the Arbitrator further finds that the weight and probative value of the documentation provided by the Respondent is sufficient to sustain the Motion to Dismiss the tenure inefficiency charges against her.. Accordingly, the Respondent's Motion to Dismiss the tenure inefficiency charges filed against Ms. Ursula Whitehurst by the State-Operated School District of Newark under N.J.S.A. 18A:6-17.3 is granted. The District improperly relied on the Respondent's 2012-13 annual summative evaluation for the purpose of tenure revocation. The District's Charge of Inefficiency does not

include a basis for considering the tenure inefficiency charge under N.J.S.A. 18A:6-16. Based on the foregoing, I hereby issue the following:

AWARD

The Tenure Inefficiency Charge brought against the Respondent, Ms. Ursula Whitehurst, is dismissed in accordance with N.J.S.A. 18A:6-17.3(c), and N.J.A.C. 6A:3-5.1(c). The Arbitrator, in finding that "the evaluation process has not been followed," orders the dismissal of the instant charge. Respondent shall be reinstated, effective immediately, to her teaching position with the State-Operated School District of Newark with full back pay, benefits and seniority, and any other benefits commensurate with her employment.

January 5, 2015

Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS:

On the 5th day of January 2015, before me personally came and appeared Robert T. Simmelkjaer to me known to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same as his Award.

January 5, 2015

Notary Public

Edward L. Craviolo
Notary Public, State of New Jersey
No. 2387644
Qualified in Bergen County
Commission expires 7/31 2019