

PROCEDURAL BACKGROUND

On August 27, 2014, Lynn Irby-Jackson, Principal of Arts High School, in the State-Operated School District of the City of Newark, filed a Notice of Inefficiency, (tenure charges) against the Respondent. That Notice of Inefficiency included twenty-one (21) separate counts of an inability of the Respondent to “completely and responsibly execute her duties as a teacher” for the period of August 12, 201 to the present. Those charges were filed pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3, and N.J.A.C. 6A:3-5.1. On August 29, 2014, the above charges were served on the Respondent.

On September 16, 2014, the Respondent filed an answer to the Notice of Inefficiency Charges. On September 23, 2014, Cami Anderson, Superintendent of the State-Operated School District of the City of Newark, filed a Certification of Determination in support of the Tenure Charges filed by Principal Lynn Irby-Jackson. That Certification was filed in accordance with N.J.S.A. 18A:6-11. Superintendent Anderson also determined that, in accordance with N.J.S.A. 18A:7A-39 and N.J.S.A. 18A:6-14, the Respondent is to be suspended without pay for one hundred-twenty (120) days effective September 26, 2014.

On September 25, 2014, Ramon Rivera, counsel for the Petitioner, filed the tenure charges with David Hespe, then Acting Commissioner of Education. That filing included Notice of Charges, Statement of Evidence in Support of Charges, Supporting Documents, Certification of Determination and Proof of Service.

On October 6, 2014, the Respondent filed an answer to the tenure charges. On October, 14, 2014, M. Kathleen Duncan, Director of New Jersey Department of Education's Bureau of Controversies and Disputes, sent a letter to Mr. Rivera and Ms.

Oxford in which she indicated that the tenure charges and Respondent's answer were reviewed pursuant to N.J.S.A. 18A:6-17.3, and 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 Gerard G. Restaino as required by statute"*

On November 24, 2014, a preliminary hearing was held to establish a briefing schedule. On December 3, 2014, Respondent, with supporting letter memoranda, submitted a motion to the arbitrator seeking to have the tenure charges dismissed because they were brought prematurely. Additionally, under separate cover Ms. Oxford was sending to the undersigned copies of the following TEACHNJ, State-Operated School District of the City of Newark, arbitration decisions:

| Agency Docket | Respondent | Arbitrator |
|---------------|------------------|---------------|
| 272-9/12 | Felicia Pugliese | Daniel Brent |
| 269-9/12 | Edgard Chavez | Timothy Brown |
| 243-10/13 | Lawrence Hawkins | Carol Laskin |

The Carter award is for the City of Camden:

| | | |
|-----------|---------------|--------------------|
| 369-12/12 | Gerald Carter | Robert Simmelkjaer |
|-----------|---------------|--------------------|

On December 18, 2014, the Petitioner submitted a thirty-four (34) page brief in Opposition to the Respondent's Motion to Dismiss accompanied with one hundred seventy-nine (179) pages of supporting exhibits.

Respondent requested an extension until January 9, 2015, to submit a response to the Petitioner's brief. The extension was granted. On January 9, 2015, Respondent sent a letter to the arbitrator indicating that all of her arguments were *"thoroughly*

addressed in the brief to Dismiss as well as the arbitration decisions provided”.

Therefore, Respondent will not submit a reply to the Petitioner’s brief.

POSITIONS OF THE PARTIES

For the Petitioner

Petitioner argues that the Commissioner of Education has determined that the District followed the evaluation process in accordance with N.J.S.A. 18A:6-17.3, and the arbitrator has no statutory authority to consider Respondent’s motion to dismiss.

Furthermore, Petitioner asserts that “*the role of an arbitrator in a tenure proceeding is set forth in N.J.S.A. 18A:6-17.1.” The practical imperative of the Respondent’s Motion to Dismiss is that to take such an action the arbitrator is required to hear evidence and then determine if the evaluation procedure was properly implemented or if it was flawed.*

Most importantly, Respondent’s Motion to Dismiss fails to cite any authority under which it was made. Moreover, the Respondent did not file the Motion to Dismiss in lieu of an answer. Petitioner also contends the evaluations of Respondent for the 2012-10213 school year are valid as TEACHNJ was in effect and in full force in the 2012-2013 school year, and the collateral estoppel doctrine does not bar the arbitrator from considering Petitioner’s arguments in this regard. In fact, collateral estoppel is inapplicable in the matter at bar because there has been no final judgment on the following State-Operated School District of the City of Newark, arbitration decisions:

| Agency Docket | Respondent | Arbitrator |
|---------------|-----------------|--------------------|
| 226-8/14 | Sandra Cheatham | Stephen Bluth |
| 244-9/14 | Neil Thomas | Robert Simmelkjaer |

The Petitioner strongly argues that arbitration decisions are not binding and the Respondent's reliance on the Cheatham and Thomas awards is misplaced,

In support of that argument the Petitioner contends that the time has not yet passed for it to appeal the Cheatham and Thomas awards. If those decisions are appealed, there exists the possibility that the awards will be vacated on one (1) of more of the bases set forth in N.J.S.A. 2A:24-8.

Finally, the Petitioner contends that *"even if the arbitrator here concludes, notwithstanding the facts and arguments presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charges against Respondent should not be dismissed. Instead, the charge must be evaluated under N.J.S.A. 18A:6-16, and the case should proceed to hearing."*

For the Respondent

The Respondent strenuously argues that the tenure charges are premature and must be dismissed. Moreover, the *"issue of whether tenure charges of inefficiency brought pursuant to TEACHNJ can be brought after the conclusion of the 2013-2014 school year has already been decided against the State-Operated school District of the City of Newark by two arbitrators.¹"*

The Cheatham and Thomas awards establish that *"tenure charges of inefficiency brought pursuant to the provisions of TEACHNJ cannot be brought until after the conclusion of the 2014-2015 school year."* Each arbitrator dismissed the tenure charge and ordered the Respondent reinstated with all lost pay and benefits.

¹ Since receipt of Respondent's brief, there have been at least four (4) arbitration awards in the State-Operated School district, City of Newark, support of Cheatham and Thomas.

The Respondent contends that the Cheatham and Thomas decisions support its position that the tenure charges against her are premature and must be dismissed.

Furthermore, the Respondent argues that the tenure charges cannot be converted into something else. The decisions in *"Pugliese and Chavaz deal with charges that were filed after the effective date of TEACHNJ, but prior to the commencement of the 2012-2013 school year"* Arbitrator Simmelkjaer determined that those two (2) awards have no applicability in Thomas, because the tenure charges in Thomas were filed at the start of the 2014-2015 school year. The Respondent contends the same must apply here.

Additionally, the Respondent asserts that the decisions in Hawkins and Carter *"make it clear that the charges of inefficiency can be brought against a teaching staff member prior to the conclusion of the 2014-2015 school year by bringing those charges under the tenure statute, without specifying that they are inefficiency as set forth in N.J.S.A. 18a:6-17.2."*

Also in Thomas, Arbitrator Simmelkjaer determined that the State-Operated School District, City of Newark, could not *"pursue two (2) types of inefficiency charges at the same time."* Moreover, he determined that the New Jersey Legislature did not provide the appropriate statutory language to allow the District the authority to file charges under Section 8 and, if not successful, file those same charges under Section 25.

Most importantly, the respondent contends that collateral estoppel is controlling in the matter at bar and the *"Petitioner has to accept the Cheatham and Thomas awards, or in the alternative, file a motion in court to have those awards set aside."* The

Respondent asks that the Motion to Dismiss be upheld and she be returned to work with full back pay and benefits.

DISCUSSION AND OPINION

As previously indicated, since the submission of the Respondent's Motion to Dismiss, there have been four (4) more TEACHNJ awards in the State-Operated School District, City of Newark as set forth below:

| Agency Docket | Respondent | Arbitrator |
|---------------|--------------------|---------------|
| 270-9/14 | Elena Brady | Joyce Klein |
| 255-9/14 | Lorraine Williams | David Gregory |
| 268-9/14 | Leonard Yarborough | Edmund Gerber |
| 235-8/14 | Sandra Brienza | Ernest Weiss |

Arbitrators Gregory, Gerber and Weiss sustained the Respondent's position and returned them to work with full back pay and benefits. Their decisions were based upon the Cheatham, Thomas and Brady determinations.

Nothing has been presented to me that would require me to set aside those decisions. Collateral estoppel is alive and controlling in the matter before me and as such must be given its full weight and authority. Olivieri v. Y.M.F. Carpet, Inc., 186, N.J. 511, 521, 897 A.2d 1003 (2006)

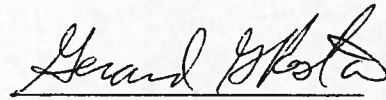
There is no question that the issues before me have already been addressed, and I might add quite extensively, by arbitrators Simmelkjaer and Klein.

Having reviewed all of the voluminous documents submitted in post hearing briefs, as well as the TEACHNJ awards referenced previously, I Award the following:

AWARD

The Respondent's Motion to Dismiss the tenure charges in their entirety is granted in accordance with N.J.S.A. 18A:6-17.3 (c) and N.J.A.C. 6a:3-5.1(c). The Respondent, Toni Lenz, shall be reinstated to her teaching position with full back pay and benefits.

Dated: January 17, 2015



Gerard G. Restaino

State of Pennsylvania)

County of Wayne) ss:

On this 17th day of January, 2015, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.



Judith K. Restaino

Notary Public

Lake Twp., Wayne County

My Commission expires on November 10, 2017

