

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

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IN THE MATTER OF THE ARBITRATION	::	DOE DOCKET NO. 266-9/14
OF THE TENURE CHARGE	::	
between	::	
STATE OPERATED SCHOOL DISTRICT,	::	OPINION & AWARD
CITY OF NEWARK,	::	ON
Petitioner,	::	MOTION TO DISMISS
-and-	::	
LINDA KELLY-GAMBLE,	::	
Respondent	::	
-----	::	

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATES OF ORAL ARGUMENT: November 6, 2014; January 5, 2015

DATE OF AWARD: January 30, 2015

APPEARANCES:

For the Petitioner:

Ramon E. Rivera, Esq., Of Counsel
Shana T. Don, Esq., (On the Motion to Dismiss Brief & 1/5/15 Oral Argument)

For the Respondent:

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

I. BACKGROUND CONSIDERATIONS

Linda Kelly-Gamble is a tenured and veteran instructor of 20 years with the State Operated School District City of Newark ("the Newark School District"). At

all times that should be considered relevant for the purposes of this case, Ms. Kelly-Gamble taught at the Alexander Street School. On August 22, 2014, Principal Maria Ortiz executed a NOTICE OF INEFFICIENCY CHARGES against the instructor. Paragraph 2 indicated that the tenure charges were being filed pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6a:3-5.1. CHARGE ONE: INEFFICIENCY thereafter submitted that “[d]uring the period from December 21, 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following: a. the Respondent was rated as ‘ineffective’ and/or ‘partially effective’ in 2 consecutive annual evaluations....”

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

Maria J. Ortiz, Principal, dated November 25, 2013; ¶ 29, A Short Observation Summary Form dated December 6, 2013, wherein Respondent was rated as 'Ineffective;' ¶ 45, A Long Observation Summary Form, dated May 9, 2014, wherein Respondent was rated 'Ineffective;' ¶ 47. A Short Observation Summary Form, dated May 15, 2014, wherein Respondent was rated 'Ineffective;' ¶ 49. An Annual Evaluation Summary Form dated May 15, 2014, wherein Respondent was rated 'Ineffective.'

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

Respondent Kelly-Gamble through Counsel Pickett filed an ANSWER TO TENURE CHARGES OF INEFFICIENCY on or about October 10, 2014, which was received by the DOE on October 14, 2014. This admitted that the District rated Respondent's performance "Partially Effective" on her 2012 - 2013 and "Ineffective" on her 2013 - 2014 annual summative evaluations, while denying that such was the case. Thirteen (13) affirmative defenses were also pled by Respondent, including: SECOND AFFIRMATIVE DEFENSE, "[t]he statutory and regulatory provisions of the TEACHNJ ACT were not in full force and effect prior to and/or during the 2012 - 13 School Year, and as such, Respondent Kelly-

Gamble's 2012 - 2013 summative annual evaluation is otherwise inaccurate, inadmissible and/or otherwise may not be considered by the Commissioner of Education and/or any duly assigned arbitrator for purposes of seeking her termination as a tenured teacher with the District;" THIRD AFFIRMATIVE DEFENSE, "[t]he implementation of the District's 2012 - 2013 Teacher Evaluation Guidelines and procedures related thereto were part and parcel of a 'pilot program' and, as such, summative evaluations relating to that school year may not be utilized by the District for [the] purpose of seeking or bringing tenure charges against District teachers, including respondent Kelly-Gamble."

On October 21, 2014, M. Kathleen Duncan, Director of DOE Controversies and Disputes notified the parties that following receipt of Respondent's answer on October 14, 2014, the tenure charges had been reviewed pursuant to N.J.S.A. 18A:6-17.3c and that upon full review the Commissioner is unable to determine that the evaluation process has not been followed and that accordingly, they had been referred to me as required by statute. A referral letter was also sent under separate cover.

On October 20, 2014, I forwarded a correspondence to counsel advising of the foregoing, and proposing potential dates for a conference call, as well as hearing(s). On October 22, 2014, Ramon E. Rivera, Esq., SCARINCI HOLLENBECK, counsel for Petitioner State Operated School District, City of Newark sent a correspondence to Director Duncan. This initially noted that on September 22, 2014, the District filed a Notice of Inefficiency Charges and

Statement of Evidence with the Commissioner and emphasized that by letter dated September 23, 2014, Ms. Duncan advised Respondent that she was required to file a written response to the charges within ten (10) days. Petitioner thereafter asserted that Respondent's "Certification of Mailing" attests to the fact that the answer was transmitted "on or about October 10, 2014, which was at least eight (8) days past the deadline to file an answer." See N.J.A.C. 6A:3-53; see also N.J.A.C. 6A:3-5.1(c)(5) ("Day means business day when the period specified is less than seven (7) days, and calendar day when the period specified is seven (7) days or more"). On this basis, Petitioner requested that the tenure charges be deemed admitted, with a default judgment entered per N.J.A.C. 6A:3-5.3.

A preliminary conference call in the case was held on October 30, 2014, with a briefing and oral argument schedule set down in order to entertain Petitioner's motion for a default judgment. This provided for Respondent filing her papers in opposition to the motion by November 5th, with Petitioner allowed the opportunity to submit a reply brief prior to the oral argument scheduled for November 6th.

The material facts cited by Petitioner were not disputed by Respondent, with counsel acknowledging he failed to file the answer on behalf of Ms. Kelly-Gamble within the ten (10) day window. Rather, Mr. Pickett cited a conversation with an unnamed source within the Bureau of Controversies and Disputes on October 1, 2014 about the filing date and deadline. Phone pen records were also

attached to his CERTIFICATION, which demonstrated that a call was made to the DOE that date. In a November 24, 2014 ORDER denying Petitioner's application, I determined:

* * *

There are a number of factors, however, which militate against the entry of the default judgment sought by the Petitioner in this instance. Initially, while the Newark District maintains that the *Newton* case is *on all fours* with the case at bar, the plain language of the same indicates that there was no answer filed at all by either respondent or his attorney, which caused the Commissioner to determine the tenure charges were admitted — '[d]eeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against him, the Commissioner finds that the District has demonstrated that respondent is guilty of inefficiency, warranting dismissal from his tenured position.' It is noteworthy that in the instant case, such action did not take place. Instead, as counsel for Kelly-Gamble has emphasized, '[t]he Petition and Answer of the Respondent was reviewed and assessed by the Director of the Division of Controversies and Disputes, the Hon. Katherine Duncan, for completeness and forwarded to the designated Arbitrator herein, Michael J. Pecklers, Esq., without any indication that the 'filed' Answer was 'defective' or 'late' in any way.'

The case law submitted by Petitioner while admittedly standing for the proposition that tenure timelines should be strictly construed, is however inapposite as it is factually distinguishable. *See generally, Kaprow v. Board of Education of Berkeley Township*, 131 N.J. 572, 587 (1993) (appeal filed more than 5 months after learning of the failure to be afforded post RIF rights or 2 months after the expiration of the 90 day filing deadline); *Kous v. Board of Education Township of Old Bridge, Middlesex County*, Agency Docket No. 26-2/12 (March 2, 2012) (petitioner did not respond to the insubordination tenure charges either at the Board of Education or the Commissioner level, leading to the disposal of the matter in summary fashion in July 2009); *I/M/O The Tenure Hearing of Cemran Biricik, School District of Jersey City, Hudson County*, 2014 N.J. Super. Unpub. LEXUS 2640 (November 7, 2014) (respondent failed to respond to tenure charges or ask for an adjournment in light of accidental disability application filed with T.P.A.F. which was later denied); *Portee v. Board of Education of*

the City of Newark, Essex County, OAL Docket No. EDU 5855-93 (April 14, 1994) (petitioner's complaint in Superior Court, within the jurisdiction of the Commissioner of Education, was filed 248 days (and not within 90 days) after the notice of termination by the Board).

The record establishes that Respondent has been employed as a teacher with the Newark School District for 20 years. It is well settled that our tenure laws were originally enacted and designed to establish a competent and efficient school system, and to protect teaching and other staff members from dismissal for unfounded, flimsy or political reasons. The statutory status of a tenured individual should accordingly not be lightly removed. *See generally, Viemeister v. Prospect Park Board of Education*, 5 N.J. Super. 215, 218 (App. Div. 1949); *Spiewak v. Rutherford Board of Education*, 90 N.J. 63 (1982); *see also, In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District*, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 28, 2009). As such, Respondent has a significant property interest in her position, and is entitled to have the charges determined on the merits notwithstanding the intransigence of her counsel. Any other result is at odds with the fair and efficient administration of justice, as our judiciary has recognized in connection with *R. 4:50* default proceedings. *See, e.g. Professional Stone, Stucco & Siding Applications, Inc. v. Jim Carter*, 409 N.J. Super. 64 (App. Div. 2009).

Noting that the Courts have on occasion utilized *R. 4:50-1* to determine the suitability of vacating a final agency order, the Appellate Division in *Biricik* indicated that it was mindful that the Rule was "designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." *citing, Lee v. W.S. Steel Warehousing*, 205 N.J. Super. 153, (1985); *U.S. Bank National Association v. Guillaume*, 209 N.J. 330, 334 (1993).

The record further demonstrates that Respondent has thoroughly contested the tenure charges both at the Board and Commissioner level. On September 15, 2014, a 14 page WRITTEN RESPONSE IN OPPOSITION TO THE PROPOSED TENURE CHARGES was submitted to the Board of Education prior to its certification of the charges, which challenged the same on both a procedural and substantive bases. *See also, CORRESPONDENCE TO BOARD COUNSEL & SUPERINTENDENT*, dated September 15, 2014. The

ANSWER filed with the Commissioner likewise pleads 13 affirmative defenses and renews the contentions previously made. Particularly with respect to the utilization of evaluations from 2012 – 2013 in the subject tenure charges these appear meritorious, given recent arbitral rulings dismissing tenure charges which included the same.

I am mindful of the fact that based upon this ruling, the Respondent will be permitted to file a MOTION TO DISMISS with respect to the fact that the District considered evaluations from the 2012-2013 School Year. Even in the event that application is denied, the Petitioner has properly argued that it will be prejudiced in prosecuting its case by the expedited time frames of the TEACHNJ ACT. For this reason, I have this date applied to M. Kathleen Duncan, the Director of Controversies and Disputes, for an extension of the initial 45 day period within which to hold a hearing until JANUARY 5, 2015. Assuming this is granted, the District will have sufficient time to prepare its case, and Respondent her defense. Based upon the totality of the foregoing findings of fact, Petitioner's motion for a default judgment pursuant to N.J.A.C. 6A:3-5.3 is **DENIED**. The case will accordingly proceed on the merits. In light of this ruling, Respondent's MOTION FOR EXTENSION OF TIME TO FILE AN ANSWER NUNC PRO TUNC has not been reached. IT IS SO ORDERED.

Due to the protracted nature of the motion practice, that same date a letter was sent to Ms. Duncan requesting an extension of time to hold the first hearing until January 5, 2015. This request was graciously granted in a December 1, 2014 correspondence from Ms. Duncan, transmitted to me via facsimile. Respondent's MOTION TO DISMISS was then filed on December 4, 2014, with a December 19, 2014 Reply. Petitioner for its part, submitted a brief IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS on December 12, 2014, and Sur-Reply on December 31, 2014. Oral argument on the motion proceeded as scheduled on January 5, 2015, with the instant AWARD dismissing the tenure charges subsequently issued.

II. RELEVANT STATUTORY & REGULATORY LANGUAGE

NEW JERSEY STATUTES ANNOTATED TITLE 18A

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

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

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

* * *

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

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any

involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

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

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

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

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

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

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

18A:6-17.3. Evaluation process, determination of charges. a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of the law to the contrary, in the case of a teacher, principal, assistant principal, and vice principal:

(1) The superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

* * *

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner, The commissioner shall within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed,

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

* * *

18A:6-120 School improvement panel. A. In order to ensure the effectiveness of its teachers, each school shall convene a school improvement panel. A panel shall include the principal, or his designee, an assistant or vice-principal, and a

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

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

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

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

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

* * *

18A:6-122 Annual submission of evaluation rubrics. a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of teachers, principals, assistant principals, and vice-principals and all other teaching staff members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

b. Notwithstanding the provisions of subsection a. of this section, a school district may choose to use the model evaluation rubric established by the

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

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

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

* * *

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

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

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

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

* * *

NEW JERSEY ADMINISTRATIVE CODE, TITLE 6A EDUCATION

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6A:3-1.5 Filing and service of answer

* * *

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

* * *

6A:3-1.10 Dismissal or transfer of petition

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true for lack of jurisdiction, failure to prosecute or other good reason.

* * *

6A:3-1.12 Summary decision

(a) At any time concurrent with or subsequent to the filing of an answer, but prior to transmittal of a matter to the OAL, any party may apply to the Commissioner for summary decision by way of a motion with proof of service on each other party. The Commissioner may decide the motion directly or transmit it to the OAL for disposition.

* * *

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

* * *

(c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following timelines and procedures shall be observed:

* * *

5. Upon receipt of the charge, the Commissioner or his designee shall examine the charge. The charge shall be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charge. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

* * *

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

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

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

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

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

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III. CONTENTIONS OF THE PARTIES

Respondent Linda Kelly-Gamble

Respondent Kelly-Gamble is a tenured teacher employed by the Petitioner State Operated School District of the City of Newark ("District") for twenty (20) years. The within tenure charges of "inefficiency" were submitted

1/ As previously discussed, there was extensive motion practice in the case. The CONTENTIONS OF THE PARTIES summary includes positions advanced in the original MOTION, ANSWER, REPLY AND SURREPLY.

by the District pursuant to Section 25 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ" or "Act"), N.J.S.A. 18A: 6-17.3(a)(2), to the Commissioner of Education on or about September 22, 2014. This section provides for the filing of such charges based upon ratings of "Ineffective" or "Partially Effective" during two consecutive annual evaluations. N.J.S.A. 18A: 6-17.3(a)(2).

In the case of Respondent Kelly-Gamble, the tenure charges of "inefficiency" are based upon a "Partially Effective" rating which she received on her annual summative evaluation for the 2012 - 2013 School Year and an "Ineffective" rating she received on her annual summative evaluation for the 2013 - 2014 School Year. It is respectively submitted that these charges are legally, procedurally and factually defective, unwarranted, arbitrary and capricious and must be dismissed, as they do not comply with the standards imposed by TEACHNJ, P.L. 2012, and c.26.

The material facts necessary to resolve this application are undisputed. It is undisputed that the tenure charges filed against Respondent by the District are based solely upon summative/annual evaluation ratings she received for the 2012 - 2013 and 2013 - 2014 School Years pursuant to N.J.S.A. 18A: 6-17.3 (See Petitioner's *Charge One: Inefficiency* paragraph "a" and *Statement of Evidence* in proceeding paragraphs 17 & 49 which reflect two summary/annual evaluations which rated the Respondent "Partially Effective" for the 2012 - 2013 School Year and "Ineffective" for the 2013 - 2014 School Year.) (See Exhibit A).

As discussed below, pursuant to the applicable statutory provisions, as well as guidance from the Office of the Commissioner (See attached Guidance from the Commissioner's Office & Department of Education attached hereto as Exhibit C), the 2012 - 2013 School Year served only as a "pilot" year for purposes of allowing school districts in New Jersey, including the Petitioner District, to develop, enhance and refine their observations and evaluation forms, procedures, training, guidance and rubrics for their tenured teachers with the intention that this evaluation process would go into effect in the 2013-2014 school year.

Those statutory and regulatory provisions allowing for removal of a tenured teacher for alleged "Ineffective" and/or "Partially Effective" performance in two (2) consecutive school years were not intended to and, as a matter of law, did not go into effect until the commencement of the 2013 - 2014 School Year. See N.J.S.A. 18A: 6-120 (e) & N.J.A.C. 6A: 10-4.1 et seq. As such, consideration of Respondent Kelly-Gamble's 2012 - 2013 annual summative/annual evaluation in connection with the instant charges, despite the defects in the assessment and evaluations that are contrary to applicable law, renders the filed tenure charges facially and legally deficient and subject to dismissal by the Commissioner or the assigned Arbitrator.

The Petitioner School District claims, without any legal support for its posture and assessment, that its participation in a "pilot program" during the 2011 - 2012 School Year somehow exempts it from the mandates of the TEACHNJ Act and its regulations. The obvious flaw in that argument is that this so-called 2011 -

2012 pilot program actually occurred prior to the passage of TEACHNJ, which was signed into law on August 6, 2012 by Governor Chris Christie. It is therefore meaningless under the law. In fact, it is obvious that the purpose of the 2011 – 2012 School Year pilot program was to assist in the development of what later became and was ultimately passed as the TEACHNJ Act. No matter how much it may protest, the Petitioner remains subject to that Act and its implementing regulations.

Instead of citing any applicable law in support of its position, the District actually throws out a series of distractions. It claims that somehow a collective bargaining agreement, memorialized as a Memorandum of Agreement (“MOA”) between the Respondent’s Union, the Newark Teachers Union Local 481 (“NTU”) and the Petitioner District, allows it to utilize the 2012 – 2013 School Year for purposes of bringing Inefficiency Charges. Of course, the Petitioner cannot cite any language in the MOA which supports that proposition and ridiculous conclusion. Besides, even if it could, the MOA would not trump the applicable law which would preempt the terms of the MOA. See, State v. State Supervisory Employees’ Assn., 78 N.J. 54, 80-81 (1978).

Although the MOA references using ratings of “Highly Effective” or “Effective” for evaluations received during the 2012 – 2013 School Year, these ratings are only used with regard to the award of performance bonuses or other salary decisions — which are properly governed by the parties collective negotiations — not with regard to the revocation of teaching staff members’

statutory tenure rights. In fact, the MOA does not mention tenure at all. Accordingly, the MOA cannot possibly provide the basis to file tenure charges based upon the 2012 – 2013 School Year evaluations. See, In the Matter of Sandra Cheatham, Agency Docket No. 226-8/14 (Bluth, 2014); In the Matter of Neil Thomas, Agency Docket No. 244-9/14 (Simmelkjaer, 2014) and In the Matter of Elena Brady, Agency Docket No. 270-9/14 (Klein, 2014).

The Petitioner School District has not, and cannot cite any alternative basis for proceeding against the Respondent. If the District wishes to pursue tenure charges against a seasoned educator who, prior to the 2012 – 2013 School Year had received nothing but exemplary evaluations, based on only one (1) year of allegedly deficient performance, then it is required to reinstate Respondent and go back to the proverbial drawing board by properly noticing the Respondent of any new charges in accordance with the applicable statutory and regulatory procedure.

And contrary to the District's argument about the transmittal of the charges and the motion to the Arbitrator, this did not constitute a 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. Likewise, the District cannot now simply request that the Arbitrator magically transform the charges brought under one (1) specific section of the law into a different type of charge altogether (N.J.S.A. 18A:6-16) as suggested by Petitioner District, simply because it is fearful that its house of cards will crumble using the flawed designs it chose to

build it upon.

Finally, the District's reliance on arbitration decisions decided prior to the effective date of TEACHNJ, in support of the general proposition that it cannot be foreclosed from proceeding against Respondent are of no significance as all of these decisions precede the implementation date of the TEACHNJ Act. Instead, as the law and the evidence reveals, the District's claims are nothing more than an attempt to obfuscate a clear statutory mandate, which demands that the matter be dismissed in its entirety.

Pursuant to N.J.A.C. 6A: 3-5.5, the Commissioner is authorized to dismiss a charge of inefficiency. The regulation provides in relevant part:

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 of salary. **If the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly** [*emphasis added*].

As detailed below, because the District's charges of inefficiency are woefully deficient, the Commissioner and his designated Arbitrator are authorized to and should dismiss the charges as a matter of law as permitted by the aforementioned statute as well as N.J.S.A. 18A:6-17.3(c) which authorizes the assigned Arbitrator to make that same assessment and decision.

The Arbitrator is vested with full and complete authority to rule on the instant application and to dismiss the instant tenure charges prior to hearing. The

TEACHNJ Act and the regulations promulgated by the Department of Education in connection with the Act, set forth a detailed procedure for the filing of tenure revocation charges alleging inefficiency. Built into this filing procedure is a comprehensive review process to ensure that school districts filing Inefficiency Charges have complied with the evaluation procedures required by law. See, N.J.A.C. 6A:3-5.1 (c) and N.J.S.A.18A:6-17.3.

Notably, this review process requires a determination of compliance with evaluation procedures at each stage of the filing process and prevents such tenure charges from proceeding to arbitration “if the evaluation process has not been followed.” See, N.J.A.C. 6A:3-5.1 (c). The TEACHNJ Act contains identical language, which also provides that a board of education and/or the Commissioner shall forward the charges “unless [they] determine that the evaluation process has not been followed.” N.J.S.A. 18A:6-17.3 (b) and (c). Indeed, and as confirmed by the DOE in its regulatory guidance document: “[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency charge. Failure to adhere to these requirements can result in the tenure charge being dismissed.”

The District’s contention that a tenure charge cannot be dismissed absent a determination that its failure to follow the mandated evaluation process “materially affected the outcome of the evaluation in the relevant school year” finds absolutely no basis in law or reality. N.J.A.C. 6A:3-1 (c) is clearly devoid of any such requirement, and dictates that any failure to abide by the evaluation

procedure prohibits the movement of the tenure charges to the next stage of the filing process, including an arbitration proceeding.

The language quoted by the School District is actually derived from Section 23 of the TEACHNJ Act (N.J.S.A. 18A:6-17.2). That section entitled “Considerations for Arbitrator in rendering decision,” limits the issues that an arbitrator can consider, and in turn, the defenses an employee can raise at an arbitration hearing. One of those defenses is whether “the employee’s evaluation failed to adhere substantially to the evaluation process. . .” It is readily apparent, however, that the restrictions set forth in N.J.S.A. 18A:6-17.2 only apply to decisions on the substantive merits of a tenure charge which occur only after an arbitration hearing has concluded. Thus, N.J.S.A. 18A:6-17.2 has no bearing on a pre-hearing motion to dismiss, which seeks a ruling on a procedural arbitrability issue. To conclude otherwise would render the review provisions set forth in N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 (c) a nullity.

Accordingly, Respondent’s motion is properly before the Arbitrator for resolution, as he is vested with the authority to enforce school laws once a “controversy and dispute” has been transferred to him, including ruling on procedural and substantive motions before, during and after a substantive hearing. This is consistent with the Commissioner’s authority to appoint an “Arbitrator” to examine the charges and conduct an appropriate hearing provided in N.J.A.C. 6A:3-5 (c)(5).

The District has unequivocally stated that these tenure charges of inefficiency have been filed against Respondent Kelly-Gamble pursuant to Section 25 of TEACHNJ Act. N.J.S.A. 18A: 6-17.3, which mandates the filing of an inefficiency charge in instances where a teacher is “rated ineffective or partially ineffective in an annual summative evaluation” for at least two years. See N.J.S.A. 18A-6-17.3(a) (1) and (2). Where that prerequisite is met, Section 25 effectively divests school superintendents of any discretion in filing tenure charges against a tenured teacher by mandating that “inefficiency” charges be filed against the teacher. Section 25 of TEACHNJ further provides, however, that “. . . [t]he only evaluations that may be used for the purpose 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 also N.J.S.A. 18A: 6-17.3(d).

It is undisputed that the Petitioner District’s evaluation/observations form and rubric for 2012 - 2013 School Year had not been approved and authorized by the Commissioner, especially since the use and authorization of the new evaluation process and approved rubrics would not begin until the fall of 2013-2014 School Year. Because Section 25 created a new type of “inefficiency” charge, one that is mandatory if a teacher is rated sufficiently poorly under the new evaluation rubrics established by Section 16 of the TEACHNJ, N.J.S.A. 18A: 6-122, over a specific period of time (at least 2 years – N.J.S.A. 18A: 6-17.3(a)(1) & (2)), it is essential that the only evaluations utilized be those which are

conducted under the new evaluation rubrics which did not begin until the 2013-2014 School Year. Indeed, it is important to note that N.J.S.A. 18A: 6-17.3(d) clearly states that “[t]he only evaluations which may be used for purposes of this section [filing of tenure charges for inefficiency] 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.)”.

In the absence of a showing that the Commissioner had approved or authorized the observation and evaluation form & rubrics by the Petitioner District, the utilization of an annual summative evaluation for the 2012 - 2013 School Year by Petitioner School District is plainly inappropriate pursuant to applicable law and the Commissioner’s issued Guidance to Districts (See Exhibit C attached hereto) and renders these tenure charges filed against Respondent Kelly-Gamble by the District fatally flawed. It is undisputed that the applicable regulations establishing the guidelines and procedures for the timing and conduct of teacher evaluations and observations pursuant to both TEACHNJ and *AchieveNJ* – and thus the full implementation of TEACHNJ did not go into effect until the beginning of the 2013-2014 school year, in October 2013. See N.J.S.A. 18A: 6-120 (e) & N.J.A.C. 6A: 109-1.1 et seq.

These 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 critically the development of procedures concerning the timing, form, nature and number of

teacher evaluations and observations required (N.J.A.C. 6A: 10-4.4) among other requirements. While TEACHNJ allowed for the adoption of evaluation rubrics by School Districts, including the Petitioner District, as of December 31, 2012 (about midway through the 2012 - 2013 School Year), it does not follow that utilization of evaluations conducted under those rubrics for tenure charges was sanctioned, approved, authorized, warranted or appropriate. See N.J.S.A. 18A: 6-17.3(d). N.J.S.A. 18A: 6-123 (d) provides that the "Beginning no later than January 31, 2013, a board of education **shall implement a pilot program** to test and refine the evaluation rubric." [*emphasis added*]. N.J.S.A. 18A: 6-123 (d).

In fact, utilization of the preliminary evaluation rubrics (by no later than January 31, 2013) was merely developed as a "pilot program" to test and refine those evaluation rubrics – not full implementation of it. N.J.S.A. 18A: 6-123(e) specifically provides that the implementation does not occur until the 2013 - 2014 School Year by indicating that: "Beginning with the 2013 - 2014 School Year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district". Therefore, it is quite clear that the evaluation rubric used to assess the Respondent Kelly-Gamble's teaching performance during the 2012 - 2013 School Year was simply a "pilot program" not yet authorized or approved by the Commissioner and thus cannot be used in filing tenure charges against her.

Indeed, as noted above, the entire teacher evaluation and observation guidelines and process was not established and approved by the

Commissioner until October 2013, after the commencement of the 2013 - 2014 School Year nor did the District have in place, as required by N.J.S.A. 18A: 6-120 and N.J.A.C. 6A: 10-3.1, a School Improvement Panel at Respondent Kelly-Gamble's school during the 2012 - 2013 School Year. The absence of a duly created School Improvement Panel is a critical deficiency in the Petitioner District's tenure charge proceeding in its failure to establish that Panel pursuant to both N.J.S.A. 18A: 6-120 and N.J.A.C. 6A: 10-3.1 to assist and enhance teaching effectiveness.

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 School Improvement Panel that conducts evaluations and oversees the mentoring program. Specifically, N.J.S.A. 18A: 6-120 provides, in relevant part, that "[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." How can a School Improvement Panel be responsible for the conduct of evaluations and implementation of TEACHNJ during the 2012-2013 school year when the Panel was nonexistent during the 2012-2013 school year and did not come into existence until late in 2014? The answer is quite simple: It cannot.

As to the Respondent Kelly-Gamble, there is no evidence produced by the Petitioner District that the School Improvement Panel at her school had been in

existence in the 2012 - 2013 school year (the pilot year) created as required by statute or even met with Respondent Kelly-Gamble at any time in the 2012 - 2013 and 2013 - 2014 School Year (See Exhibit B Respondent Kelly-Gamble's Response to the tenure charges dated September 15, 2014 /Answer to Notice of Tenure Charge of Inefficiency).

Thus, the statutory and regulatory evaluation and observation process implemented by school districts in the 2012 - 2013 School Year was merely a preview of the "new" process intended to bring both teachers and evaluators up-to-speed on the new evaluation system and its requirements for the upcoming 2013-2014 school year, with formal implementation of those requirements commencing at the beginning of the 2013 - 2014 school year. It, therefore, stands to reason that the Petitioner District's failure and/or inability to meet the standards of the new statutory and regulatory evaluation and assessment process during the 2012 - 2013 School Year renders formal judgment of Respondent Kelly-Gamble's teaching performance for that year, through the "new" tenure removal proceedings, inappropriate, unlawful, *de facto* arbitrary and capricious.

This is supported by information and guidance disseminated by the Department of Education outlining and explaining the new evaluation process for filing inefficiency charges under TEACHNJ and the new evaluation system (*AchieveNJ*), which provides that a district's evaluations and observations for purposes of commencing tenure charges must comply with all applicable

statutory or regulatory requirements. A copy of this guide entitled "Summary of Legal Requirements for Evaluation and Tenure Cases" is attached hereto as Exhibit C. It provides, in part, that:

'[t]he 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*].

The plain meaning of the statute tells us that the 2012 – 2013 School Year was intended to serve as a test run 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. Pursuant to the nature of the testing phase during the 2012 – 2013 School Year under the statute, it was not until the start of the 2013 – 2014 School Year that the revised evaluation law and regulations went into effect. That the District may have opted into a pilot program in the prior year 2011 – 2012 is inconsequential.

Further evidence that the 2012 – 2013 School Year was intended to serve as a test run is found in the voluminous publications issued by the DOE itself, as well as the reports issued by the various committees that were convened by the DOE in anticipation of the implementation of the new law in 2013 – 2014. For example, in a guidance document issued by the Department of Education and entitled "Excellent Educators for New Jersey," the Department explicitly set forth the 2011 – 2012 pilots in which the District participated; the 2012 – 2013

statewide pilots and the then anticipated implementation of both TEACHNJ and its implementing regulations for the 2013 – 2014 School Year. Throughout this document, the State makes clear that the new evaluation system would not be implemented until the 2013 – 2014 School Year.

Moreover, the DOE's 2012 *Evaluation Pilot Advisory Committee EPAC Interim Report*, which was issued by the Committee appointed by the Department of Education to oversee the pilot program, declared its mission quite clearly, stating in the Executive Summary that "New Jersey is preparing to implement a statewide educator evaluation system in the 2013 – 2014 School Year. That same report provides a plethora of evidence that the 2012 – 2013 School Year was used as a year to prepare for the implementation of the new evaluation system.

While it is undisputed that Petitioner School District did participate in that pilot, it must be made clear that its participation was extremely limited. As detailed in the report and the District's recent submission in opposition to the Motion, only seven (7) Newark public schools participated in the pilot. Based on a review of the Petitioner's website, there are approximately sixty-five (65) schools in Newark. Thus, barely 10% of the Newark schools actually participated in the 2011 – 2012 pilot program. More importantly, the 2012 EPAC Report repeatedly indicates that "[t]here is still a great deal of work to be done... More clarity is needed... And that the decision to push back full implementation to 2013 – 2014 was met with universal acclaim by EPAC members." All are signs that the law

was not then in effect anywhere, and was not intended to be in effect.

The 2013 *Evaluation Pilot Advisory Committee Final Report* similarly explains in great detail, not only the purpose of expanding the pilot to include the 2012 – 2013 School Year, but also the results of that pilot year, with an eye again to implementation of the law for the 2013 – 2014 School Year. The EPAC Report in 2013 stated that extending the pilot for a second year “was critical to many of [its] policy decisions... and provided for districts to learn about SGOs (Student Growth Objectives) and prepare for implementation in the 2013 – 2014 School Year.” Notably, the Petitioner School District also participated in the second year of the pilot program for principal and teacher evaluation systems concurrently with the official state evaluation pilot and shared information with the Department during both years of the pilot program.

In addition, the “*Summary of Legal Requirements for Evaluation and Tenure Cases*” definitively frames the minimum requirements for bringing the instant tenure charges, including specific compliance with N.J.A.C. 6A:10- 2.4, 4.4, 4.5 etc., which did not exist during the 2012 – 2013 School Year. Finally, the Department of Education issued *Frequently Asked Questions (FAQs)*, which provided as follows:

- Q. Will summative ratings ‘count’ this year (2012 – 2013) toward tenure decisions?
- A. No the only item ‘on the clock’ is the mentorship year for new teachers. No evaluation outcomes in the 2012 – 2013 school year will impact tenure decisions. 2013 – 2014 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.

Among the “actions required in law” is the regulatory scheme established by the Commissioner – and not adopted until October 2013 – providing for minimum observation requirements for tenured teachers, a mandatory summative evaluation process, minimum Corrective Action Plan requirements and the existence of a School Improvement Panel, among other mandates. Simply stated, the Department of Education’s own statutory and regulatory guidance for tenure cases precludes consideration of evaluations conducted prior to full implementation of both the TEACHNJ Act and *AchieveNJ* for the 2013 - 2014 School Year.

The District, in an attempt at polite subterfuge and confusion, asserts that it conducted its own pilot program during the 2011 – 2012 school year preceding the enactment of TEACHNJ and was thereafter officially authorized to fully implement its own teacher evaluation program during the 2012 – 2013 school year. Thus, the Petitioner School District maintains that it can proceed with the filing of Inefficiency Charges pursuant to N.J.S.A. 18A:6-17.3. This position, however, completely ignores the express language of the TEACHNJ Act and its implementing regulations; the voluminous DOE issued *Guidance Directives*, as well as the fundamental principles governing the waiver of statutory rights and the deference that is regularly accorded administrative agencies in interpreting their own regulations.

In conclusion, the District is unable to cite any legal authority or exhibits that would permit the Arbitrator to simply ignore the plain and unambiguous language of the relevant statute and regulations. The District's compliance with evaluation procedures is a prerequisite to proceeding with Inefficiency Charges referred to arbitration. This is a matter of procedural arbitrability and cannot be ignored. Because Respondent Kelly-Gamble's 2012 - 2013 annual summative evaluation is precluded from consideration by the Commissioner or the assigned Arbitrator, the District lacks the required two consecutive deficient performance evaluations necessary to bring tenure charges against Respondent Kelly-Gamble pursuant to N.J.S.A. 18A:6-17.3(a) (1) & (2). As a result, these tenure charges must be dismissed.

Petitioner State Operated School District City of Newark

TEACHNJ required all New Jersey public school districts to develop "evaluation rubrics" to assess the performance of their teachers, and to obtain approval for their "rubrics" from the New Jersey Department of Education ("DOE") by December 31, 2012. N.J.S.A. 18A:6-123(c). To comply with that mandate, the District adopted an evaluation rubric as part of a performance evaluation system known as the Newark Public Schools Framework for Effective Teaching ("Framework"), to be implemented beginning in the 2012 - 13 School Year. To inform its teachers and school administrators of the new Framework and to provide guidance on its implementation, the District published a

Guidebook to the Framework for use in 2012 - 2013. *Id.* The Framework clearly describes the new “levels of performance” as highly effective, effective, partially effective and ineffective. *Id.*

In October 2012, the District and the Newark Teachers Union (“NTU”) (the exclusive bargaining representative for the District’s teachers, among other employees) entered into a Memorandum of Agreement (“MOA”) for a successor collective bargaining agreement. The MOA provided that a new evaluation process would be implemented beginning in the 2012 - 2013 School Year. *Id.* In particular, Section I.A. of the MOA states:

NPS WILL IMPLEMENT A NEW EVALUATION SYSTEM BEGINNING SY 2012-2013. 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 in original*].

Section II of the MOA pertains to compensation and benefits. *Id.* Section II.A.4 states again that “NPS [the District] shall implement a new educator evaluation system with four (4) summative rating categories beginning in school year 2012 - 2013.” This section further provides that the entire agreed-upon compensation system would be based on teacher performance as measured by the new evaluation framework. As such, the NTU specifically agreed to a new evaluation system to be used in the MOA.

Moreover, the District had implemented four (4) summative rating

categories beginning in the 2011 - 2012 School Year. During the 2011-2012 school year, seven (7) of the District's schools participated in a "pilot" of a new teacher evaluation system ("2011 - 2012 Pilot Program"). The District's 2011-2012 Pilot program was part of the Department's Excellent Educators for New Jersey ("EE4NJ") teacher evaluation pilot in which eleven (11) school districts participated, including the District. The Department of Education approved the District's participation in the pilot program and allowed the District to begin using the new framework and new rating system in the 2011 - 2012 School Year. This framework and new rating system was then used throughout the entire district in the 2012 - 2013 School Year following the adoption of the MOA and the passage of TEACHNJ.

On October 24, 2014, the State of New Jersey Department of Education ("DOE") responded to the District's request for clarification of the DOE's intent in the "Guide to the TEACHNJ Act," as well as the status of the District's evaluation rubric during the 2012 - 2013 School Year. The DOE provided the following clarification with respect to its intent in the "Guide to the TEACHNJ ACT":

[s]ince August 2012, the Department has published many resources meant to support 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 years of employment. . . [many non-tenured teachers requested] that the District clarify how the law applied to their tenure acquisition and the Department responded accordingly:

No evaluation outcomes in the 2012-2013 school year will impact tenure decisions, 2013-2014 is the first year where the

statewide system will be in place, and the first year when the 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 non-tenured 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 supplied in original document].

Accordingly, the tenure charges filed against the Respondent are valid and should proceed to hearing.

Contrary to Respondent's bald assertion, it is not undisputed that the tenure charges are based on only the Respondent's Annual Summative Evaluation for School Years 2012 - 2013 and 2013 - 2014. Respondent's characterization of the facts in this matter as "undisputed" is simply not a true statement. The Notice of Inefficiency Charges states that: "I hereby file charges based upon inefficiency, pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 (See, Exhibit A to Certification of Shana T. Don, Esq., hereinafter "Don Cert."). These charges were filed based upon both the "new" inefficiency standard of TEACHNJ's N.J.S.A. 18A:6-17.3 encompassing two consecutive annual evaluations for poor performance and the "old" inefficiency [standard] of N.J.S.A. 18A:6-16. *Id.* [emphasis supplied in original]

The Charges, again contrary to Respondent's assertion, list nineteen (19)

separate bases for the Charge of Inefficiency of which the Annual Summative Evaluations for School Years 2012 - 2013 and 2013 – 2014 are only two (2). The Statement of Evidence appended to the Notice of Inefficiency is comprised of twenty-seven (27) exhibits, again of which the Annual Summative Evaluations for School Years 2012 – 2013 and 2013 – 2014 again comprise only two (2). The remainder of Respondent's brief is factually inaccurate. Without belaboring the factual discrepancies between Respondent's allegations and the filed Tenure Charges, the litany of disputed facts demonstrates the necessity of holding a hearing in this matter. Should the Respondent wish to raise an argument concerning the District's filing of tenure charges of inefficiency against Respondent, the proper mechanism is to elicit evidence to support any such contention at a hearing, in accordance with N.J.S.A. 18A:6-17.2(3) and (4). Moreover, neither statute cited by Respondent, N.J.S.A. 18A:6-17.2 nor N.J.A.C. 6A:3-5.3 provide for summary disposition of tenure charges. Therefore, disposing of this matter prior to a hearing on the merits is inappropriate and the Motion to Dismiss should be denied.

Additionally, Respondent's intertwined argument that the inefficiency charges cannot be brought until after the conclusion of the 2014 – 2015 School Year pursuant to the TEACHNJ Act, N.J.S.A. 18A:6-117 *et seq.* is also not properly before the Arbitrator. As a threshold matter – and as Respondent herself notes repeatedly – it is the Commissioner of Education who is solely authorized to determine the sufficiency of the evaluation process and resulting tenure

charges. N.J.S.A. 18A:6-16. Thus, a dispositive motion by a teacher subject to tenure charges based upon the failure of a board of education to follow the evaluation process may only be made to the Commissioner prior to the referral to an arbitrator.

The role of an arbitrator in a tenure proceeding is set forth in N.J.S.A. 18A:6-17.1. Under TEACHNJ, tenure charges are no longer transmitted to the Office of Administrative Law and are instead submitted to an arbitrator to be evaluated under specific criteria and under strict time lines. Once it is found that the tenure charges are sufficient, based upon appropriate criteria and a referral is made to an arbitrator, an arbitrator's authority is confined to a determination of the following: (a) whether or not the employee's evaluation failed to adhere substantially to the evaluation process; (b) whether there was a mistake of fact in the evaluation; (c) whether the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination, or (d) whether the board of education's actions were arbitrary and capricious. N.J.S.A. 18A:6-17.2.

Therefore, whether the District acted in compliance with law in filing charges based upon the 2012 – 2013 school year has been answered in the affirmative by the Commissioner of Education and is outside the scope of the arbitrator's authority. This vested authority has been recognized by arbitrators in tenure hearings under TEACHNJ. See, I.M.O. the Tenure Hearing of Edgar Chavez, State Operated School District of the City of Newark, Essex County,

Docket No. 269-9/12 (February 6, 2013) (an arbitrator recognized the Commissioner's 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"). *Id.* Thus, the Respondent's Motion should be denied on its face as the Commissioner has deemed these charges sufficient to proceed to hearing and indeed directed that a hearing be held on the merits of the case.

Here, the Respondent is arguing *inter alia*, that the evaluation process was not followed because the filing of the tenure charges was premature pursuant to the Act. N.J.A.C. 6A:3-5.3(a)(1), the relevant regulation governing a Motion to Dismiss under TEACHNJ provides that an individual who was served with tenure charges is not precluded from filing a motion to dismiss in lieu of an answer to the charges. This provision is consistent with N.J.A.C. 6A:3-1.5(g), which allows a motion to dismiss to be filed in lieu of an answer in response to petitions filed with the Commissioner. The Respondent did not, however, properly file her Motion to Dismiss with the Commissioner prior to the referral to the Arbitrator. Thus, the motion must be denied as a matter of law.

Contrary to Respondent's argument relating to prematurity, the Act was enacted on August 6, 2012, and went into effect prior to the commencement of the 2012 – 2013 school year. The effective date of the Act is provided after each section of the Act and the statutes that established the procedure for adjudicating

tenure charges. See, N.J.S.A. 18A:6-117 to 129 and N.J.S.A. 18A:6-16 through 17.5 respectively. It is therefore indisputable that evaluations conducted in the 2012 – 2013 school year may be used in tenure charges of inefficiency and the charges against the Respondent are not premature.

Further, this conclusion was clearly expressed by the New Jersey State [Department] of Education (“DOE”) on October 24, 2014, in correspondence discussed further above, expressly stating that District evaluations conducted during the 2012 – 2013 school year were to be used to evaluate teacher efficiency. See, Exhibit B, Don Cert; see *also*, the effective date of adoption of each section of the Act and the statutes that established the procedure for adjudicating tenure charges. N.J.S.A. 18A:6-117 to 129 and N.J.S.A. 18A:6-16 through 17.5, respectively.

Respondent relies upon the tenure case I/M/O the Tenure Hearing of Sandra Cheatham, School District of the City of Newark, Docket No. 226-8/14 to suggest that this Arbitrator find that Petitioner’s inefficiency charge is premature. However, Respondent failed to cite any statute that indicates that the effective date of adoption of TEACHNJ was a later date. As such, the Respondent’s reliance on anything other than the TEACHNJ statute should be given no weight in this matter.

Respondent’s reliance on the decision I/M/O the Tenure Hearing of Neil Thomas, State-Operated School District of the City of Newark, Docket No. 244-

9/14 is also misplaced. The issues here are controlled by statute, not non-binding decisions. It is imperative to note that the practical effect of these decisions, which the District maintains may very well be overturned on appeal, is that Respondent would essentially get a “free pass” for years of poor performance. Simply, Respondent is not entitled to a “free pass” for one (1) year of poor evaluations and ineffective teaching.

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

Furthermore, since TEACHNJ’s adoption, arbitrators have not hesitated to consider tenure charges of inefficiency in non-mandatory cases pursuant to N.J.S.A. 18A:6-16. See, e.g., I/M/O Tenure Hearing of Lawrence E. Hawkins,

State-Operated School District of the City of Newark, Docket No. 243-10/13 (March 10, 2014) (where the Arbitrator sustained the charges of inefficiency and dismissal of Respondent); I/M/O Tenure Hearing of Felicia Pugliese, State-Operated School District of the City of Newark, Docket No. 272-9/12 (February 15, 2013) (Arbitrator upheld the tenure charges of inefficiency against the Respondent), *confirmed*, Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C84-13 (oral opinion September 16, 2013), *appeal pending*, Docket No, A-000857-13.

In contrast to this trend, in Cheatham, the arbitrator overstepped 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. As discussed *supra*, N.J.S.A. 18A:6-10 requires that once a matter is transmitted to arbitration by the Commissioner, the arbitrator must proceed to a hearing on the merits. The Commissioner alone, had the authority to examine tenure charges once transmitted to the Commissioner by the District. *Id.*

Respondent has recently submitted two (2) additional cases. At base, the Award entered in I/M/O the Tenure Hearing of Sandra Brienza and the State Operated School District of the City of Newark, Docket No. 235-8/14, is a wholesale adoption of Cheatham, without consideration of either the Arbitrator's authority or citation to any authority on which basis to wholly adopt the reasoning of another arbitration decision. The same tactic was adopted by Arbitrator

Gregory in I/M/O the Tenure Hearing of Lorraine Williams and the State Operated School District of the City of Newark, Docket No. 255-9/14, and as argued above, although these arbitration decisions may be considered by an arbitrator they are neither binding nor the law.

No final decision on the merits has been adopted in these matters and the District has the right of appeal, which it fully intends to invoke in each instance. In each and every decision subsequent to Cheatham, which too shall be appealed, an arbitrator improperly invoked the doctrine of collateral estoppel. Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521, 523 (2006), held that the invocation of the doctrine is not permitted to foreclose a party from asserting a legal claim or defense unless that party is unable to appeal it as a matter of law. See also, Lopez v. Patel, 407 N.J. Super. 79 (2009).

In conclusion, under N.J.S.A. 18A:6-16, the issue before the arbitrator is whether the evidence in the record presented supports the charge of inefficiency. See, Hawkins, supra, pp. 39-43; Carter, supra, pp. 24-27; Pugliese, supra, pp. 8-10. The only issue for the arbitrator is whether the record supports a finding that the charges are true. See, Chavez, supra, pp. 11-12. Accordingly, even if the Arbitrator here concludes, notwithstanding the facts and argument presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charge against Respondent should not be dismissed. Instead, the charge must be evaluated under N.J.S.A. 18A:6-16, as initially pled, with the case proceeding to hearing. For the foregoing

reasons, the Respondent's Motion to Dismiss must be denied in its entirety.

IV. STATEMENT OF THE CASE

At the outset and as a threshold matter, the Petitioner insists that I lack jurisdiction to entertain the instant motion, as it is the Commissioner of Education who is solely authorized to determine the sufficiency of the evaluation process and resulting tenure charges, per N.J.S.A. 18A:6-16. From the District's point of view, therefore, a dispositive motion by a teacher subject to tenure charges based upon the failure of a board of education to follow the evaluation process may only be made to the Commissioner prior to the referral to an arbitrator.

Such a narrow reading of the TEACHNJ Act and its enabling regulations was not contemplated by the framers. The plain language of N.J.S.A. 18A:6-16 provides the Commissioner of Education with the discretion to determine that if a tenure charge is sufficient to warrant dismissal or reduction in salary of the person charged, "he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012, c. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner *may* retain the matter for purposes of deciding the motion."

The pre-Act Administrative Code regulation is found at N.J.A.C. 6A:3-1.5(g) in the SUBCHAPTER 1. GENERAL PROVISIONS section, and permits a respondent to file a motion to dismiss in lieu of an answer. It goes on to say that "briefing on the motions shall be in the manner and within the time fixed by the

Commissioner or by the ALJ if the motion is to be briefed following transmittal to the OAL. The subsequent regulation found at N.J.A.C. 6A:3-5.3(a)1 under SUBCHAPTER 5. CHARGES UNDER TENURE EMPLOYEES HEARING ACT tracks the prior language and substitutes "arbitrator" for "ALJ."

Read *in pari materia*, the statute and the regulation therefore clearly contemplate that dispositive motions may be heard by an arbitrator assigned to a tenure dispute. The Petitioner has asserted that neither N.J.S.A. 18A-17.2 nor N.J.A.C. 6A:3-5.3 provide for the summary disposition of tenure charges. Such a position misses the mark, however, as Respondent has correctly maintained, the former limiting arbitral review in inefficiency cases refers to a hearing on the merits and not a pre-hearing motion. And while the latter may not expressly address this situation, it does not proscribe it. Under those circumstances, the AAA Labor Arbitration Rules are controlling, per N.J.S.A. 18A:6-17.1c. Rule 27, *Evidence and Filing of Documents* confers broad discretion on an arbitrator to accept and to determine the relevancy and materiality of evidence, while Rule 47 permits him to interpret and apply the rules insofar as they relate to his powers and duties.

Furthermore, I fully credit the position of Respondent, that arbitrators in tenure hearings are vested with the authority to enforce school laws once a "controversy and dispute" has been transferred to them, including ruling on procedural and substantive motions before, during and after a substantive hearing. This is consistent with the Commissioner's authority to appoint an

arbitrator to examine the charges and conduct an appropriate hearing as provided in N.J.A.C. 6A:3-5.1 (c)5. See, I/M/O of the Tenure Charge of Inefficiency Against Neil Thomas and the State Operated School District of the City of Newark, Agency Docket No. 244-9/14 (Simmelkjaer, 2014 at p. 33).

Nor is Petitioner's reliance upon the boilerplate language in the DOE's transmittal letter that "[t]he Commissioner is unable to determine that the evaluation process has not been followed," of any moment. Moreover, as Arbitrator Klein has remarked "[i]n other words, the Commissioner is expressly not making a finding." See generally, I/M/O the State Operated School District for the City of Newark and Elena Brady, Agency Docket No. 270-9/14 (Klein, 2014 at p. 8). [*emphasis supplied in original*].

Furthermore and as a practical matter, Petitioner's jurisdictional position is at variance with the actions of the Commissioner in this very case, and its prior conduct. In that regard, when the District filed its own MOTION TO DISMISS seeking a default judgment, DOE transmitted that application to me for resolution. As previously discussed, no threshold challenges to arbitral authority were lodged at that time by the Petitioner, which thoroughly litigated its position before me. It is accordingly somewhat curious that the District apparently believes I am empowered to hear its own dispositive motion but not Respondent's. Based upon the foregoing considerations, I find that the instant motion is properly before me for resolution.

In deciding this MOTION TO DISMISS this inefficiency tenure charge, any disputed facts have been viewed in a light most favorable to the non-moving party, in the case the Newark School District. As the proponent of this affirmative defense which operates as a threshold consideration, Respondent Kelly-Gamble accepts the burden of making a *prima facie* demonstration of her entitlement to the same, by a preponderance of the credible evidence. Once that is satisfied, the burden shifts to the Petitioner to attempt to rebut this prefatory showing through its affirmative defenses. Upon my analysis of the respective arguments and case citation exhaustively set forth in the parties' briefs, I find that the instant tenure charges of inefficiency must be **DISMISSED WITH PREJUDICE**, as the District has been unable to rebut the Respondent's *prima facie* presentation.

Petitioner suggests that the TEACHNJ Act went into effect on August 6, 2012 prior to the commencement of the 2012 – 2013 School Year, and that it is “[t]herefore indisputable that evaluations conducted in the 2012 – 2013 School Year may be used in tenure charges of inefficiency.” While it is certainly true that evaluation rubrics had to be adopted by a board by December 31, 2012, per N.J.S.A. 18A:6-123 (c), the full implementation of the new inefficiency standards governing teacher evaluations came into existence during 2013 -2014.

2/ N.J.S.A. 18A:6-122-123 provide for the annual submission of evaluation rubrics by New Jersey school districts to the Commissioner for review and approval. N.J.A.C. 6A:10-4.1 details the components of the required rubric. The *Guide To The TEACHNJ Act* (“Guide”) published by the New Jersey State Department of Education indicates that the districts choose their own observation measure, with the following TEACHER PRACTICE INSTRUMENTS available: Danielson 2011; Danielson 2007; Stronge; McREL; Marzano; Marshall; Rhode Island Model; Other. A footnote advises that a district may choose its own model but must seek the approval of the DOE. A board of education was then obligated to adopt an evaluation rubric approved by the commissioner by December 31, 2012, pursuant to N.J.S.A. 18A:6-123 (c).

Indeed, as Respondent has underlined, the comprehensive guidance published by the Department of Education itself severely undercuts the position of the Petitioner. The *Guide* referenced in note 2 discusses the *Intersect of Act and Regulations*, as follows:

- TEACHNJ Act, P.L. 2012, c. 26 adopted August 6, 2012
- 2 Rounds of Regulation
 - 1st Round
 - Meant to help districts prepare to launch improved evaluations in 2013 – 2014
 - Adopted in February of 2013 (2/7/2013)
 - 2nd Round
 - Proposed March 6, 2013
 - Is meant to contain “more details on evaluation policies and procedures”
 - To be effective for the 2013 – 14 school year
 - Projected adoption date November 2013
- **Practice Point:** What is operative at the beginning of the school year will change mid-year

The *Parameters of the Act* section provides:

Support

- **Required training** on the evaluation system
- Targeted feedback to drive professional development
- **School Improvement Panel** conducts evaluations, leads mentoring, and identifies professional development opportunities

- **Corrective Action Plan** for Ineffective, Partially Effective rating

Evaluation

- Implementation in **2013 – 2014**
- **Four levels** of summative ratings
- Educator practice instruments used for **multiple observations**
- **Multiple objective measures** of student learning for teachers, principals, VPs/APs

Tenure

- Teachers earn **tenure after 4 years based on effectiveness**
- Effective ratings required to maintain tenure
- Dismissal decisions decided by **arbitrators**

[emphasis supplied in original]

It is the *History: Timeline for Implementation* section of the *Guide* that is perhaps most telling, and includes:

EVOLUTION OF EVALUATION REFORM IN NEW JERSEY

2010 – 2011

NJ Educator Effectiveness Task Force work / Teacher evaluation pilot opportunity announced

2011 – 2012

Teacher evaluation pilot In progress / Capacity-building requirements announced for all districts to follow in 2012 – 2013

2012 – 2013

Cohort 2 teacher evaluation/new principal evaluation pilots in progress; districts building capacity / New tenure legislation in effect

2013 – 2014

Statewide Implementation of New Evaluation System

In *History: Timeline for Implementation*, the *Guide* identifies the 2013 – 2014 School Year Implementation Guideline. This explained that: “[t]o build capacity leading up to statewide implementation in 2013 – 2014, districts were required to form District Evaluation Advisory Committees and School Improvement Panels, select evaluation instruments, and begin training during SY 12-13. The following timeline depicts additional implementation deadlines for SY13-14:”

By July 1

Train teachers on teacher practice instrument.

By Aug. 31

All teachers hired after May 1, 2013 must be trained on instrument. Districts report to state Department on progress of implementation.

By Oct. 31

Train principals and evaluators on principal practice instrument.

By Nov. 15

Teachers participate in goal-setting conference with their supervisor, finalize SGO(s).

By Feb. 15

Make adjustments to SGOs with approval from a principal and CSA.

By April 30

Complete required observations for non-tenured teachers.

3

By end of school year

Complete all observations for teachers. Have annual summary conference to review available component scores

See also, N.J.S.A. 18A:6-120; N.J.S.A. 18A:6-123 (e); N.J.A.C. 6A:10-4.1 et seq; Department of Education's 2012 *Evaluation Pilot Advisory Committee EPAC Interim Report & 2013 Final Report*; *New Jersey DOE Summary of Legal Requirements for Evaluation and Tenure Cases*, March 2014.

The record reflects that seven (7) of the Petitioner Newark District's schools participated in a 2011 – 2012 Pilot Program along with eleven (11) other districts throughout the state, in conjunction with DOE's Excellent Educators For New Jersey Program. Then during the 2012 – 2013 School year, the pilot was continued for the entire District. The parties agree that in both school years, the four (4) category rating system was utilized for teacher evaluations. Based in part upon these facts, Petitioner argues that the "Partially Effective" rating on

3/ The *Guide* also contained a *History Training Timeline*, which contained the 2013 – 2014 Training Requirements for teaching staff members, evaluators, and administrators, which included: all teaching staff members being trained on all components of the evaluation rubric by July 1, 2013; all observers being trained on the practice instrument by August 31, 2013 before observing for the purpose of evaluation, as well as participating in 2 "co-observations (at least 1 before December 1st, with the double observation used to calibrate teacher practice instruments and promote accuracy in scoring; all administrators, principals/assistant/vice principals being thoroughly trained on the principal evaluation rubric by October 31, 2013; superintendents/CSAs certifying each year that observers have been trained and can apply the educator practice instruments accurately and consistently.

Respondent's 2012 – 2013 annual summative evaluation along with the "Ineffective" rating for 2013 – 2014 should be utilized to satisfy the requirements of N.J.S.A. 18A:6-17.3(a)(2).

However, adopting such a position would require that I ignore the foregoing guidance from the very agency tasked with implementation as well as other critical components of TEACHNJ, such as N.J.S.A.18A:6-17.3(d), which mandates that "[t]he only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C. 18A:6-117 et al." It also eviscerates the remedial safeguards in the Act that are designed to assist an educator whose evaluations have been less than stellar.

An example is the School Improvement Panel ("SIP"), which the *Guide* counsels "is charged with ensuring the effectiveness of the school's teachers by overseeing mentoring activities, conducting evaluations, identifying professional development opportunities, and conducting a mid-year evaluation of any teacher rated Ineffective or Partially Ineffective in the most recent annual summative evaluation." See, N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-3.1. Respondent has maintained without challenge that the Newark District did not have a SIP in place during the 2012 – 2013 School Year and rhetorically questions how it can then be responsible for the conduct of evaluations and the implementation of TEACHNJ given that fact. See, ANSWER to NOTICE OF TENURE CHARGES OF INEFFICIENCY.

Several other factors are also worth noting. As Respondent has recognized, the 2011 – 2012 Pilot Program in which the District participated preceded the August 6, 2012 adoption of TEACHNJ. Of critical significance is the fact that the regulatory guidance provided in Title 6A of the Administrative Code only came into effect in 2013, with the 1st Round of regulations adopted February 7, 2013 and the 2nd Round proposed on March 6, 2013 and adopted March 14, 2013. Since the instant tenure charge encompassed the period from December 21, 2012 forward, that begs the question succinctly articulated by Arbitrator Bluth at page 11 of his Award in I/M/O Tenure Charge of Inefficiency of Sandra Cheatham and School District of the City of Newark, Agency Docket No. 226-8/14 (Bluth, 2014) of:

[h]ow therefore, can the District claim their program was in compliance with the Department's regulations when the 2012 – 2013 School Year began? The clear answer is they could not because the District had no way of knowing what the effects of TEACHNJ would be until March 2013. By that time, approximately seventy percent of the school year had elapsed. This undermines the District's claim its evaluation program, which was implemented in September 2012 was the same as the plan outlined by the Department of Education in March 2013.

The preceding findings of fact establish that the Respondent has made a *prima facie showing* on her MOTION, that the instant tenure charges should be dismissed with prejudice. That is not to say that I do not recognize and endorse the District's position that Respondent or any other educator should not be afforded a *free pass* when it comes to inefficiency charges. The obvious caveat, however, is that only procedurally correct annual summative evaluations may be

utilized in order to fulfill the mandate of N.J.S.A. 6-17.3(a)(2) and that operates as a condition precedent. Accordingly, because 2012 – 2013 was designed to be a pilot year within the State of New Jersey and the Newark School District, Petitioner's consideration of the same in connection with the subject tenure charge renders it infirm. The burden is therefore shifted to Petitioner to establish its affirmative defenses.

Petitioner initially points to the October 24, 2014 guidance provided by the DOE which stands for the purported proposition that the intent of the Agency all along was to permit teacher evaluations conducted during the 2012 - 2013 School Year to be utilized for inefficiency charges brought pursuant to the TEACHNJ Act. The *ex post facto* nature of this *ex parte* communication which was clearly intended to pull an end run around Cheatham, coupled with the fact that the guidance is in direct conflict with DOE's own TEACHNJ literature, however militate against the acceptance of the same.⁴

4/ Respondent has also highlighted in her Reply Brief that Mr. Shulman's position taken in the October 24th correspondence contradicts his prior posture on the subject. See, e.g. July 30, 2012 Memorandum to Chief School Administrators, subject, EDUCATOR EVALUATION SYSTEM IMPLEMENTATION UPDATE, section 1 Capacity Building Requirements for all Districts for 2012 – 13: "[a]s we prepare for statewide rollout of an improved educator evaluation system in 2013 – 2014, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs..."

One of the above *Frequently Asked Questions* provided as follows:

- Q. Will summative ratings 'count' this year (2012 – 2013) toward tenure decisions?
- A. No the only item 'on the clock' is the mentorship year for new teachers. No evaluation outcomes in the 2012 – 2013 school year will impact tenure decisions. 2013 – 2014 is the first year where the statewide evaluation system will be in place, And the first year when [the] summative rating clock will start.

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

In that regard, paragraph a. of the charge contends that "[t]he Respondent was rated as "Ineffective" and/or "Partially Effective" in 2 consecutive annual evaluations. Paragraphs r and s go on to assert that "[t]he Respondent has received a partially effective/ineffective rating for the 2012 – 2013 School Year in an annual summative evaluation; " and "[t]he Respondent has received a partially effective/ineffective rating for the 2013 – 2014 School Year in an annual summative evaluation." Principal Ortiz's STATEMENT OF EVIDENCE states *inter alia* at # 2. that "[d]uring the period from December 21, 2012 to the present Respondent failed to satisfactorily perform the duties and responsibilities of a classroom teacher despite numerous suggestions and assistance given by the administrative staff."

Instead, as Arbitrator Simmelkjaer reasoned at page 51 of his Award in I.M.O. the Tenure Charge of Inefficiency against Neil Thomas, *supra* Agency Docket No. 244-9/14:

[i]n the Arbitrator's opinion, had the legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially []effective ratings on their annual summative

ratings be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with Section 25 of TEACHNJ and the other consistent with Section 8, N.J.S.A. 18A:6-16 – it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charges.

Accordingly, if Petitioner wishes to proceed against Respondent on alternative statutory bases, it must do so via the perfection of new tenure charges before the Commissioner of Education. The Pre-Act arbitration awards relied upon by Petitioner to support its position are also inapposite, as they preceded the full implementation of the new inefficiency tenure standards during the 2013 – 2014 School Year, and are factually distinguishable. See, I/M/O the Tenure Hearing of Gerald Carter, School District of the City of Camden, Agency Docket No. 369-12/12 (Simmelkjaer, 2013); I/M/O/ the Tenure Hearing of Felicia Pugliese and the State Operated School District of the City of Newark, Essex County, Agency Docket No. 272-9/12 (Brent, 2013); I/M/O Tenure Hearing of Dr. Audrey Cuff and Cumberland Regional School District Board of Education, Docket No. 71-3/14 (Gerber, 2014).; I/M/O/ the Tenure Charges Against Vice Principal Lawrence E. Hawkins by the State Operated School District of the City Of Newark, Agency Docket No. 243-10/13 (Laskin, 2014).

5/ In I/M/O the Tenure Charge between State Operated School District, City of Newark and Owen Newson, Agency Docket No. 276-9/12 (Pecklers, 2013), I concluded that the evaluation rubric to be adopted by all boards and approved by the commissioner had a January 2013 submission date, and pursuant to [26] 25.d of the ACT, “[t]he only evaluations which 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.” Accordingly, the old standard of “*beyond a preponderance of the evidence*” was applied. As argued by Respondent, the new inefficiency standard of N.J.S.A. 18A: 6-17.3 with attendant regulations represented wholesale changes to inefficiency cases heard under N.J.S.A. 18A:6-10, among them the elimination of the 90 day improvement period. N.J.S.A. 18A:6-17.2 limited the discretion of the arbitrator when considering an inefficiency charge. Nothing convinces me that the Legislature intended inefficiency cases filed during and after the 2013 – 2014 School Year to be heard under both.

The District next emphasizes the fact that in October 2012, a Memorandum of Agreement (“MOA”) was entered into with the teachers’ majority representative, the Newark Teachers’ Union. (“NTU”). According to Petitioner, this provided that a new evaluation process would be implemented beginning in the 2012 – 2013 School Year, with four (4) summative evaluation rating categories adopted in accordance with TEACHNJ, N.J.S.A. 18A6-117. Attention is then drawn to Section II.A.4 of the MOA, which provides that the entire agreed-upon compensation system would be based upon teacher performance, as measured by the new evaluation framework. The argument follows that as such, the NTU specifically agreed to this new evaluation system.

Notice is initially taken, that as urged by Respondent, nothing in the 36 page MOA addresses the issue of the use of the new evaluation system by the District in making tenure-based decisions. Rather, the MOA purely addresses the District’s much-publicized merit pay initiative, as well as salary guides and every other related issue. Therefore, while the District may properly argue that the NTU agreed to a new evaluation system that was for the discrete purpose of teacher compensation.⁶

And even assuming without deciding that the MOA addressed the tenure charge at hand, it is axiomatic that the statutory provisions of the TEACHNJ Act

^{6/} The District adopted an evaluation rubric as part of a performance evaluation system known as the Newark Public Schools’ Framework for Effective Teaching, which was implemented during the 2012 – 2013 School Year. According to Petitioner, the accompanying *Guidebook* clearly described the new levels of performance as highly effective, effective, partially effective and ineffective.

would preempt any local agreement to the contrary. *See generally*, State v. State Supervisory Employees' Association, 78 N.J. 54, 80-81 (1978); *see also*, I/M/O/ the State Operated School District for the City of Newark, and Elena Brady, Agency Docket No. 270-9/14 (Klein, 2014). Even in the event the NTU would have been permitted to waive a statutory right such as this on behalf of a Union member, Respondent has correctly argued that such a waiver would have to have been clear and unmistakable per Red Bank Regional Education Association vs. Red Bank Regional High School District, 78 N.J. 122, 140 (1978). No such evidence has been provided by the Petitioner Newark School District.

Petitioner also takes direct aim at the post-Cheatham awards of my arbitral colleagues, accusing each of improperly invoking the doctrine of collateral estoppel, in violation of the New Jersey Supreme Court's ruling in Olivieri v. Y.M.F Carpet, Inc., 186 N.J. 511, 521, 523 (2006). *See also*, Lopez v. Patel, 407 N.J. Super, 79 (2009). Leaving aside any technical definition, it should be made clear that Respondent herein has not relied upon that argument in her moving papers, nor is my AWARD grounded upon *collateral estoppel*.

Rather, the awards cited have been accorded persuasive and not precedential authority, in keeping with the generally accepted arbitral practice. Parenthetically, they are entitled to substantial deference unless palpably erroneous. *See generally*, *The Common Law of the Workplace, The Views of Arbitrators*, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Inc., Washington, D.C. 2005, St. Antoine, Ed., at p. 85 § 2.16

Use of Prior Arbitration Awards. Therefore, based upon the totality of the foregoing considerations, Respondent has presented an un-rebutted *prima facie* case that the instant inefficiency tenure charge should be **DISMISSED WITH PREJUDICE. IT IS SO ORDERED.**

V. CONCLUSION

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

AWARD

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

Dated: January 30, 2015
NORTH BERGEN, N.J.



MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
 SS}
COUNTY OF HUDSON

ON THIS 30TH DAY OF JANUARY, 2015, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.



NOTARY PUBLIC

ZOILA R. VARGAS
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 5/27/2018