

**STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES**

In the Matter of Tenure Hearing of Leonard Yarborough:

**STATE OPERATED SCHOOL DISTRICT
FOR THE CITY OF NEWARK, ESSEX COUNTY**

Case No. 69-3/15

and

OPINION
and AWARD

LEONARD YARBOROUGH

Before:

Edmund Gerber, Arbitrator

Appearances:

For the State Operated School District of the
City of Newark, Essex County:
Ramon E. Rivera, Esq.
Scarinci & Hollenbeck, LLC

For the Respondent:
Charles I. Auffant, Esq.
Stuart Ball, LLC

The State Operated School District of City of Newark ("District") initially filed a Notice of Inefficiency Charge against Leonard Yarborough ("Respondent") on October 9, 2014 pursuant to N.J.S.A. 18A:6-17-3. In an Opinion and Award of December 9, 2014, (#509-14) a Motion to Dismiss the tenure charges was granted. The Award was in reliance on the Opinion and Award of The State Operated School District of the City of Newark and Elena Brady, 270-9/14, wherein it was held that N.J.S.A. 18A:6-17-3 does not provide for consideration of 2012-2013 summative evaluations for the purpose of tenure revocation. As in Brady, the District relied upon the 2012-2013 summative evaluations in bringing tenure charges under N.J.S.A. 18A:6-17-3 against Yarborough. Accordingly, the motion was granted based upon the doctrine of collateral estoppel.

The District filed an Amended Tenure Charge on January 26, 2015 alleging inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16,

N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 (Section 8) against the Respondent. The amended charges make the same factual allegations as those stated in the original charges. It was specifically alleged that Yarborough demonstrated an inability to completely and responsibly execute his duties as a teacher and enumerated failures to implement curricular goals and objectives, design coherent instruction, access student learning, create an environment of respect and rapport, manage student behavior, etcetera. It was further alleged that the Respondent received an Ineffective rating for the 2012-2013 school year in an Annual Summative Evaluation and received a Partially Effective rating for the 2013-2014 school year in an annual Summative Evaluation.

On April 24, 2015, I was appointed to serve as arbitrator to hear and decide these amended charges. On May 5, 2015, Leonard Yarborough moved for an order dismissing the tenure charges against him with prejudice and filed a brief and answer in support of its motion.

RESPONDENT'S ARGUMENT IN SUPPORT OF MOTION

The Respondent specifically argues in support of its Motion to Dismiss that:

- 1) Pursuant to the doctrine of Law of the Case, the District is bound by the arbitrator's previous, precedential Opinion and Award barring the District from proceeding with inefficiency charges against Yarborough pursuant to Section 8 of the TEACHNJ Act. The law of the case doctrine requires judges to respect unreversed decisions made during a trial by the same court or a higher court regarding questions of law. Once an issue is litigated and decided in a suit, relitigation of that issue should be avoided, if possible. Sisler v. Gannett Co., 222 N.J. Super 153 App Div. (1987), State v. Hale, 127 N.J. Super 407, 410 App Div. (1974).

The issue has already been decided in this case; the amended charge is bound by the prior ruling. Specifically, the initial charge of inefficiency filed against Yarborough has been dismissed. Now the District seeks to proceed under Section 8 of the TEACHNJ Act. That same request was rejected by Arbitrator Simmelkjaer In The Matter of Neil Thomas and State Operated School District of the City of Newark, November 20, 2014 (465-15) when he held that "the District cannot rehabilitate charges found to be deficient under Section 25 by proposing that they be reconsidered under Section 8 as a default position." Also, Arbitrator Daniel Brent held In The Matter of Jodi Thompson, Dkt. No. 240-8/14 "the arbitrator is constrained by well established principles of equity and the labor arbitration rules of the American Arbitration Association not to permit a charging

party to plead a new cause of action that was not part of the original charge” (p. 6).

- 2) Pursuant to the doctrine of *res judicata*, the charge at issue has already been fully resolved, cannot be relitigated and must be dismissed. Even if the charge is treated as a new charge, it is nonetheless barred as a matter of law pursuant to the doctrine of *res judicata*, a “an ancient judicial doctrine which contemplates that when a controversy between the parties is once fairly litigated and determined, it is no longer open to relitigation and rests upon policy considerations which seek to guard the individual against vexatious repetitious litigation and the public against serious burdens which such litigations impose upon the community.” Lubliner v. Board of Alcoholic Beverage Control for the City of Paterson, 33 N.J. 428 (1960). Unlike the doctrine of law of the case, *res judicata* is a mandatory doctrine that a tribunal must apply to bar a party from relitigating a case or an issue already fully disposed of.

For *res judicata* to bar the relitigation of a claim, the following three elements must be met:

- 1) The judgment in the prior action must be valid, final and on the merits
- 2) The parties in the later action must be identical to or in privity with those in the prior action and
- 3) The claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. Bondi v. Citi Group, 423 N.J. Super 377 App Div. (2011).

The doctrine of *res judicata* applies to arbitration awards, see Chattin v. Cape May Green, Inc., 216 N.J. Super 618 App Div. (1987).

In this matter, if the charge is considered a new charge, *res judicata* requires that the new charge be dismissed. The initial charge of inefficiency was brought against Yarborough last year on or about August 30, 2014. The District had ample time to consider the charge upon which it would seek dismissal. The District elected to pursue a charge of inefficiency under Section 25 of the TEACHNJ Act. Once it was determined that its Section 25 charge against Yarborough was substantively deficient, the District expressly sought to pursue an inefficiency charge against him under Section 8. That charge must be rejected. Since the December 29, 2014 Opinion and Award was never appealed, it is a valid, final and on the merits. It is argued that it was specifically determined that the District could not proceed under Section 8. The parties are obviously identical and the instant charge plainly grows out of the transaction or

occurrence as the prior tenure charge since the statements of evidence and exhibits of the charge are identical. Except for the section of TEACHNJ Act cited, the charges are exactly the same and the charge against Yarborough should be dismissed.

- 4) The District's amended charge against Yarborough is untimely filed and must be dismissed. Assuming *arguendo* that the District has filed a new charge against the Respondent, the District has failed to file that charge in a timely manner under either Section 25 or Section 8 of TEACHNJ. The TEACHNJ Act specifically provides timelines in which tenure charges must be served. Specifically, N.J.A.C. 6A:3-5.1, notice of tenure charges must be served on the teacher within three days of service on the State District Superintendent. If the charges are for inefficiency, pursuant to N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1, the employee has an opportunity within ten days to submit a written statement of position demonstrating how the District failed to follow the applicable evaluation procedures. The Superintendent then must certify the charges and file the same with the Commissioner of Education within thirty (30) days of receipt of same. N.J.S.A. 18A:6-17.3. Once charges are filed with the Commissioner, there are specific mandatory timelines for the filing of answers to tenure charges. Notably absent from either the statutory or regulatory scheme is a procedure for the amendment of certified tenure charges, whether brought for inefficiency pursuant to Section 25 or otherwise. The notice of tenure charge against Yarborough was initially served on him over nine months ago, on August 30, 2014. He duly filed his position to the charge with the State District Superintendent on September 19, 2014. The charge was certified by the District Superintendent and served on Yarborough on September 22, 2014. Yarborough's Motion to Dismiss was granted by this arbitrator on December 29, 2014. The three month period within which the District could have moved to vacate this arbitrator's Opinion and Award expired on March 29, 2015. The District did nothing for more than three months and now, long after the timeframes set forth by applicable statute and regulation governing the filing of tenure charges have expired, and long after its timeframe to move to vacate this arbitrator's decision, the District seeks a "do over" on the case.

The charge is not "new." Rather, it is merely a rehash of the same charge of inefficiency dismissed complete with the same notice of charges, statement of evidence and exhibits. The District is far beyond the time periods contemplated by law for either the certification of tenure charges or the amendment of same. Under Section 25, N.J.S.A. 18A:6-17.3, the District was required to file charges against Yarborough with the Commissioner of Education within thirty (30) days of filing with the State District Superintendent. The District here filed charges with

the State District Superintendent on July 9, 2014. The charge filed was based on the identical series of facts and allegations as the instant charge; thus the District was under an obligation to file the tenure charge within thirty (30) days thereof. The current charge was filed well outside that time period and thus the charge is untimely.

Alternatively, once charges were filed with the State District Superintendent, Yarborough could submit a statement of position and a written statement of evidence under oath within fifteen (15) days of receipt of the charge N.J.A.C. 6A:3-5.1. Upon receipt of the statement or within fifteen days, the State District Superintendent had forty-five (45) days to decide whether to certify the charges to the Commissioner of Education. N.J.S.A. 18A:6-13. The District filed charges with the State District Superintendent on September 22, 2014. The charges were based upon the identical series of facts and allegations and thus the District was under an obligation to vote on whether to file the charge under Section 8 within forty-five (45) days of receiving Yarborough's response to the charge and then was required to file the charge with the Commissioner within fifteen (15) days of making its decision. Clearly, it did not do so and the charge was filed outside the applicable time frame and must be dismissed. The statutory and regulatory time frames set forth exist for a reason; they protect the due process rights of educators subject to tenure charges. The District's conduct in belatedly amending its prior charge violate Yarborough's due process rights and should be dismissed.

- 5) The District's amended charge is barred by the entire controversy doctrine. The District cannot bring amended or new charges based on the same facts and series of transactions or occurrences at this stage of the proceedings.

The entire controversy doctrine requires that "to the extent possible, courts must determine an entire controversy in a single judicial proceeding and that such a determination necessarily embraces not only joinder of related claims between the parties but also joinder of all persons who have a material interest in the controversy." Cogdell by Cogdell v. Hospital Center at Orange, 116 N.J. 7 (1989). The entire controversy doctrine is equitable in nature and is fundamentally predicated upon judicial fairness and will be invoked in that spirit. Crispin v. Volkswagen Werk, 96 N.J. 336 (1984).

New Jersey Court Rule 4:30A provides, in relevant part, that "non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of omitted claims to the extent required by the entire controversy doctrine." The entire controversy doctrine applies to arbitration proceedings. Shoremount v. APS Corp., 368 N.J. Super 252, 255 App Div. (2004).

The District has already litigated its tenure charge of inefficiency against the Respondent based upon its evaluations for school years 2012-2013 and 2013-2014 and lost that charge. It could have brought other charges simultaneously under Section 8 based upon those same facts or series of transactions or occurrences. It cannot now relitigate the case. If the District is permitted to bring the instant charge, it will be free to continue refiling the same charge against the Respondent under various legal theories over and over again. Clearly this violates the entire controversy doctrine as well as principles of judicial finality and efficiency. And no less importantly, it violates Yarborough's due process rights to not be subject to the same charge repeatedly. The District cannot get a second bite at the apple. The case is concluded.

- 5) Inefficiency tenure charges can only be brought under Section 25 of the TEACHNJ Act. Therefore, the District's charges must be dismissed. Section 25 of TEACHNJ is the exclusive means through which a District can bring charges of inefficiency. Charges of inefficiency are now defined by and are required to proceed pursuant to Section 25 of the TEACHNJ only. TEACHNJ reforms the prior tenure law by linking tenure decisions directly to effectiveness ratings. N.J.S.A. 18A:28-5. TEACHNJ made a dramatic change to the tenure revocation process, particularly on the grounds of inefficiency pursuant to N.J.S.A. 18A:6-17.3. The new TEACHNJ deleted from Section 8, N.J.S.A. 18A:6-16 the former 90 day improvement period during which teachers were afforded notice of inefficiency and opportunity to cure any professional deficiencies. In its place, Section 25 was added which specifically addresses charges of inefficiency. N.J.S.A. 18A:6-17.3.

Section 25 has created a new definition of inefficiency. Tenure retention is now based upon continued efficient performance directly tied to evaluation outcomes and student achievement. The evaluation process itself was substantially revamped. Now only two performance evaluations can result in termination. Section 25, create a very limited scope of review of teacher evaluations and the limitations on defenses set forth therein directly flow from a concurrent overhaul of the evaluation process and procedures. Teachers may no longer challenge an evaluator's determination, but only so long as that determination is based upon evaluations which comply with applicable procedures.

Here, however, what the District is effectively saying is that both N.J.S.A. 18A:6-17.2 and N.J.S.A. 18A:6-17.3 are optional. It may comply with statutory and regulatory procedures or not. The District apparently believes that if it fails to comply with applicable procedures necessary to bring charges under Section 25 as was previously determined in this case, it may simply ignore Section 25 altogether. The limitations on review of evaluations and defenses cannot apply

because those limitations were predicated on compliance with statutory evaluation requirements and procedures. Effectively, the efforts of the legislature to streamline tenure proceedings are rendered a complete nullity. In sum, the terms of the applicable statute, regulatory provisions and guidance issued by the Department of Education all confirm that the exclusive means by which to bring inefficiency charges against a teacher is through Section 25 and only Section 25. The District is seeking to amend the charge against the Respondent so as to pursue the charges under Section 8. Arbitrators have flatly rejected such attempts as held by Arbitrator Simmelkjaer in the matter of Thomas supra held that:

The Respondent logically argues that the District, having brought the charges pursuant to Section 25 is bound by the procedures in that section of the statute. Failure to adhere to these requirements result in the tenure charges being dismissed. On this point, the District cannot rehabilitate charges found to be deficient under Section 25 be reconsidered under Section 8 as a default position. The District cited absolutely no language in Section 25 of the Act or any other authority which would indicate that the legislature intended for deficient inefficiency charges to simply proceed to arbitration via Section 8 of the Act.

Similarly, Arbitrator Simmelkjaer also held in Ursula Whitehurst in the State Operated School District for the City of Newark, Agency Docket No. 282-9/14.

The arbitrator is not convinced that having dismissed the charge against Miss Whitehurst based on the District's non-compliance with N.J.S.A. 18A:6-17.3 through its utilization of the Respondent's annual Summative Evaluation for the 2012-2013 school year, he can now proceed to a hearing under N.J.S.A. 18A:6-16.

It is undisputed that the District may proceed against the Respondent on statutory grounds other than inefficiency by filing such charges in accordance with Section 8. However, the District cannot file inefficiency charges on alternative grounds or once its filing under Section 25 has been found deficient, rehabilitate the inefficiency charges under Section 8 and then proceed to arbitration on this basis. Had the legislature in enacting TEACHNJ intended this outcome, it would have written the appropriate language. See also, In the Matter of Tenure Charges of Inefficiency of Sandra Cheatham and the School District of the City of Newark, Agency Dkt. No. 226-8/14, Arbitrator Stephen M. Bluth, wherein the request of the District to convert a tenure charge under Section 25 to a Section 8 matter effectively would give the District two bites at the apple and rejected that request. See also, In the Matter of the Tenure Charges against

Reninta Williams and the State Operated School District of the City of Newark, Agency Docket Nos. 211-8/14 and 217-1/15 wherein Arbitrator Tina Schneider Denenberg, citing the decisions in Whitehurst and Thompson, rejected the District's pursuit of charges under Section 8 as well. It is argued that if the legislature had intended for deficient Section 25 inefficiency charges to proceed to arbitration via Section 8, it would have so stated. Instead, it specifically and clearly revamped the entire process of bringing inefficiency charges against a teacher, removing them from the general framework of Section 8 and creating an entirely new and specific process under Section 25. Section 25 separated out inefficiency from all other charges with its own statutorily and regulatory provisions concerning unique timeframes, procedures and requirements, all of which are different from the requirements set forth in Section 8 which involve charges brought on grounds other than inefficiency.

Accordingly, based upon all of the above arguments, the Respondent urges that the instant charge of inefficiency be dismissed and Yarborough be made whole for any lost wages and benefits.

PETITIONER'S ARGUMENT IN OPPOSITION TO THE MOTION

On May 15, 2015, the Petitioner filed a brief in opposition to Respondent's Motion to Dismiss. The Petitioner makes the following arguments:

- 1) The amended tenure charges were timely filed and the State Appointed Superintendent completed a Certification of Determination within the time limits for tenure charges. The arbitration award dismissing the original tenure charges was issued on December 29, 2014. The Petitioner's amended tenure charges were submitted to the State Appointed Superintendent on or about January 6, 2015. On or about January 7, 2015, the State Appointed Superintendent advised the Respondent that the tenure charges had been amended and that pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1, the Respondent had fifteen (15) days to submit a response to same. A response was filed by the Respondent with the District on or about February 13, 2015. Thus, the District then had forty-five (45) days from February 13, 2015 as to make a determination as to probable cause on the amended tenure charges. The District certified this determination on the 40th day, on March 25, 2015. On March 27, 2015, the 42nd day, the District filed the amended tenure charges and certification with the Commissioner of Education and notified the Respondent of the determination of probable cause. The Commissioner of Education acknowledged receipt of the amended tenure charges and noted the applicable timeliness for same on or about March 21, 2015. The Commissioner did not find any procedural defects for the filing of the amended charges and on April 24, 2015, this was referred to Arbitrator Gerber

on the Section 8 charges. Therefore, the amended tenure charges were timely filed in accordance with the clear procedures set forth for tenure charges pursuant to N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-13, and N.J.A.C. 6A:3-5.1(B)(4).

- 2) The evaluations of Respondent for the 2012-2013 school year are valid as Section 25 of the TEACHNJ Act was in effect and in full force in the 2012-2013 school year. TEACHNJ was enacted on August 6, 2012 and was effective prior to the start of the 2012-2013 school year. The effective date of the adoption of TEACHNJ was provided as stated in N.J.S.A. 18A:6-117, "adopted L. 2012, c. 26 ¶1, approved August 6, 2012 in the 2012-2013 school year." The statute provides thereafter (N.J.S.A. 18A:6-118 through 119), that it was adopted "August 6, 2012 in the 2012-2013 school year." In addition, the statutes that established the procedure for adjudicating tenure charges N.J.S.A. 18A:6-16 through 17.5 also cite that same was approved "August 6, 2012 in the 2012-2014 school year."

The District piloted a new teacher evaluation system in the 2011-2012 school year, not 2012-2013 as asserted by the Respondent. Thus, evaluations conducted in 2011-2012 pilot did not "count" for official purposes, but the experience of that pilot program informed the development of the TEACHNJ process adopted, approved and implemented in the subsequent school year, 2012-2013.

It is indisputable that the legislature purposefully adopted and approved TEACHNJ August 6, 2012 in the 2012-2013 school year. There is no question that the evaluations in 2012-2013 were to be used towards determining if tenure charges were warranted.

On October 24, 2014, the Department of Education notified Respondent to the District's request for clarification with respect to its intent in "Guide to TEACHNJ Act" states that "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."

Such clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions such as the decision to renew or non-renew a tenure teacher to the decision to bring a tenure charge of inefficiency charge against a tenured teacher. 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 TEACH NJ Act.

The Department of Education is the agency tasked with taking all actions necessary for the Act's implementation. It is for that agency or a reviewing court of competent jurisdiction to evaluate the legislative intent of the Act. Nowhere in the limited purview of N.J.S.A. 18A:6-17.2 is "consideration for an arbitrator in rendering a decision."

TEACHNJ required school districts to institute pilot programs to test their new evaluation rubrics by January 31, 2013 at the latest. Neither the legislature nor the Department of Education required school districts to wait a year to implement their evaluation rubrics if the rubrics had been adopted and approved earlier. N.J.S.A. 18A:6-17.2 provided the latest dates by which districts were required to test and implement their new rubrics. They did not prohibit implementation of approved rubrics earlier than the stated deadline. Nothing in TEACHNJ, or any regulations, provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014 for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3. See IMO Tenure Hearing of Renee Pulliam-Newell and State Operated School District of Newark, Agency Docket No. 276-9/14 where the Commissioner of Education upheld tenure charges for inefficiency under N.J.S.A. 18A:6-17.3 based upon annual summative ratings for consecutive years 2012-2013 and 2013-2014.

In the Matter of IMO LaRhonda Ragland and the State Operated School District for the City of Newark, Docket No. 258-9/14, Arbitrator Timothy Brown, concluded that he had the authority to review the tenure charge to N.J.S.A. 18A:6-17.3 and once the Commissioner transferred the matter, the arbitrator was required to hear the merits of the case. The arbitrator concluded that "the Commissioner's referral of this matter to me was specifically pursuant to TEACHNJ Section 25 and no other Section of the Act and grants me the narrow authority to determine the case under the provisions of Section 25 and no other." The District argues that the teacher evaluations conducted within the District in 2012-2013 were valid, effective and counted for all purposes, including to support tenure charges such as this. The Respondent's contention to the contrary should be rejected.

- 3) The arbitrator has jurisdiction to decide this matter for inefficiency under Section 8. In Chavez, supra, the arbitrator found that TEACH NJ provides more broad authority for arbitrator review of tenure charges than that narrowly provided in Section 23 [now N.J.S.A. 18A:6-16]. Section 22 of the Act [now N.J.S.A. 18A:6-17.1] provides, among other things, "the Commissioner of education shall maintain a panel of 25 permanent arbitrators to hear matters pursuant to N.J.S.A. 18A:6-16. The plain meaning of such language supports the conclusion that the

Act grants authority to arbitrators to consider all types of tenure charges, including inefficiency charges beyond merely those covered by Section 23.”

Similarly, IMO the Tenure Hearing of Dr. Audrey Cuff, Cumberland Regional School District Board of Education, Docket No. 71-3/14 (June 26, 2014), the arbitrator stated:

As the parties have acknowledged, this proceeding was initiated before the new procedures of the TEACH NJ Act could be fully implemented. Under TEACHNJ, charges of inefficiency can only be brought where there have been two annual evaluations conducted in accordance with the “rubric adopted by the Board and approved by the Commissioner. C.L. 2012 c. 26, [N.J.S.A. 18A:6-17(3)(d)]. Accordingly, until such time as there have been two annual evaluations, inefficiency must be decided upon the old standard.”

Upon review of the evidence set forth at the hearing, the tenure charges alleging inefficiency were sustained and the teacher was dismissed.

The contention that an inefficiency charge cannot proceed on any basis other than N.J.S.A. 18A:6-17.3 and that a charge cannot proceed on that basis either, until all applicable requirements are met, that is, the legislature intended to hand poorly performing teachers a “free pass” for two years after the Act’s effective date, has been rejected by TEACH NJ arbitrators. See in the matter of IMO Tenure Hearing of Henchey, Agency Dkt. No. 8-15 January 3, 2015 where the arbitrator stated “to hold otherwise would be to usurp the power of the legislature.” (Id. at pg. 8-9). See also the matter of IMO Tenure Hearing Pugliese, Agency Dkt. No. 272-9/12, February 15, 2013, confirmed Superior Court of New Jersey, Chancery Div. Essex County, Dkt. No. C84-13, September 16, 2013, Appeal pending, Dkt No. A-000-57-13.

Arbitrators in several cases in which Section 25 charges have been dismissed have suggested that dismissal might not have been required if the charges had been pled, in the alternative on the basis of Section 8 as well as section 25 Where Section 25 of TEACHNJ is inapplicable because it was held that a teacher cannot be based on two years of ineffective or partially effective ratings, a school district must nevertheless be permitted to proceed with an inefficiency charge in an appropriate case. More importantly, N.J.S.A. 18A:6-16 provides a statutory basis to do so.

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.

Accordingly, even if the arbitrator here concludes, notwithstanding the facts and argument presented herein, that the requirements for inefficiency tenure charges under Section 25 have not been met, the inefficiency charge must be evaluated under Section 8.

- 4) The role of the arbitrator is set forth in N.J.S.A. 18A:6-17.1 is limited. 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. Pursuant to N.J.S.A. 18A:6-17.1, the arbitrator's authority is confined to determine based on the evidence presented at hearing whether or not:
 - 1) The employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
 - 2) There is a mistake of fact in the evaluation
 - 3) The charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
 - 4) The district's actions were arbitrary and capricious.

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

For the charges regarding inefficiency under Section 25, the arbitrator can only make a determination on the four elements set forth above; thus a hearing on the merits on the District's inefficiency charges under Section 8 and Section 25 must be heard pursuant to N.J.S.A. 18A:6-17.1. Therefore, at this juncture, the arbitrator is required to make a determination in effect and conduct a hearing on this matter.

- 6) The Doctrine of *res judicata* does not apply to preclude the instant charges. *Res judicata* is a term that refers broadly to the common law doctrine barring relitigation of claims or issues that have already been adjudicated. Velasquez v. Franz, 123 N.J. 498, 505 (1991). The doctrine of *res judicata* will only apply to a final and valid adjudication of the merits of a claim. The merits of the amended tenure charge against Yarborough were never adjudicated and thus the defense does not apply. The District previously filed an inefficiency tenure charge against Respondent (Docket No. 268-9/14) under Section 25 of the TEACHNJ Act. The arbitrator dismissed the charge on the basis of the argument concerning the applicability of Section 25. See In the Matter of the Tenure Hearing of Leonard

Yarborough *supra*. The arbitrator did not reach the merits of the charge under Section 8 and never addressed the issue of inefficiency *per se*. Thus, Section 8 was not adjudicated. Even if the District is bound by the arbitrator's decision in the previous matter, it is not precluded by that decision from bringing the instant charge because the arbitrator did not address the charge now presented under Section 8.

While the two charges of inefficiency against the Respondent have been based upon the same facts, they are supported by different statutory authority. Therefore, this is not a "second bite of the apple" as Respondent asserts and this matter must proceed to a hearing for a determination on the merits of the inefficiency charge under Section 8.

Assuming *arguendo* that it is determined that the issue of Respondent's inefficiency has already been litigated The Restatement (Second) of Judgments, *supra* ¶128, sets forth the following with regard to claim preclusion:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, negation of the issue in a subsequent action between the parties is not precluded in the following circumstance[s]: 2) the issue is one of law and (a) the two actions involve claims that are substantially unrelated or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.

Here the initial determination by the arbitrator essentially set forth that the evaluations of 2012-2013 could not be utilized under Section 25 of TEACHNJ. Unless the District is now permitted to proceed with tenure charges under Section 8, the evaluations during that time period cannot be utilized at all for the purposes of tenure charges. This is clearly an inequitable administration of the TEACHNJ Act and a new determination which takes into account the evaluations and performance of the Respondent is warranted.

- 7) The entire controversy doctrine is not applicable. Rule 4:30A requires all claims against all potential defendants be brought in one encompassing litigation. The threefold objectives behind the doctrine are 1) to encourage the comprehensive and conclusive determination of a legal controversy; 2) to achieve party fairness, including both parties before the court as well as prospective parties; and 3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation. Cogdell v. Hospital Ctr. at Orange, *supra*.

Respondent asserts that the District is relitigating the tenure charges against him because these charges have already been brought before an arbitrator and the District lost. However, that decision was not based upon Respondent's evaluations or the merits of the District's argument. The previous charges were dismissed against the Respondent based upon the arbitrator's interpretation of TEACHNJ which he determined does not allow for evaluations from the 2012-2013 school year to be considered in tenure matters. This is not a conclusive determination of the legal controversy presented between the parties. Further, a dismissal of these charges would not achieve an equitable result because the District would essentially be unable to bring tenure charges against any teachers based upon their poor evaluations from the 2012-2013 school year. Lastly, this charge does not constitute a duplicative litigation because the merits of the charges have yet to be heard. Accordingly, the District's tenure charges against Respondent should proceed to hearing and a determination on the merits.

- 8) The doctrine of Law of the Case is not applicable. The doctrine sets forth that unreversed decisions made during the trial by the same court regarding questions of law should not be disturbed. State v. Weldan, 100 N.J. 187, 203 (1985). The policy for such a doctrine is that "once an issue is litigated, relitigation should be avoided if possible." However, the law of the case doctrine is discretionary. State v. Weldan (*supra* at 205). The doctrine does not apply in matters which contain an "ambiguous or uncertain decision" Sisler v. Gannett Co., Inc., 222 N.J. Super 153, 160 (App Div. 1987) Certif. Denied, 110 N.J. 304 (1988). Additionally, the doctrine is usually applicable in situations "where a judge must decide where a ruling made in one trial stage of the action is binding throughout the remainder of the trial." Sisler v. Gannett (*Supra* at 159).

In the instant matter, the law of the case doctrine is clearly inapplicable. The initial charges against the Respondent were dismissed on a procedural issue regarding Section 25 of TEACHNJ. The arbitrator did not review any evidence in support of the charges in this dismissal, nor did he analyze the legal sufficiency in the District's position. Also, the arbitrator's decision was ambiguous with regard to utilizing the authority of Section 8 to bring the charges. The issue regarding the substance of the District's underlying charges was never litigated and no legal determination was made in this regard. This issue has yet to be argued, let alone re-litigated.

Additionally, the application of this doctrine is discretionary and should be applied flexibly to serve the interests of justice. State v. Weldan *supra* at 205). Here, the

interests of justice would not be served by procedural dismissal. If the evaluations for the 2012-2013 school year do not count for purposes of tenure charges under Section 25, and the District's request to charge Yarborough under Section 8 was denied, Yarborough simply gets a free pass for his poor performance for this time period. This was clearly not the intent of the drafters of TEACHNJ. The interests of justice would be served by permitting this matter to proceed to a hearing on the merits.

DISCUSSION

In granting the Motion to Dismiss of the initial tenure charges against the Respondent, this arbitrator, in applying the doctrine of collateral estoppel relied upon the decision of Arbitrator Joyce Klein in Elena Brady, supra. In that Opinion and Award, the arbitrator did not address whether the District could proceed with tenure charges against the Respondent under Section 8, Rather the Award was limited to the finding that N.J.S.A. 18A:6-17.3 does not provide for consideration of a summative evaluation for the year 2012-2013. As the arbitrator stated:

The notice of "charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6—17.3 and N.J.S.A. 18A:6-3.5.1" against the Respondent charge her with inefficiency under Section 25 N.J.S.A. 18A:6-17 rather than Section 8 N.J.S.A. 18A:6-16, which covers tenure charges other than those of inefficiency under the new provisions of TEACHNJ. The District's efforts to proceed under Section 8 are limited by the charges themselves, which include N.J.S.A. 18A:6-17-3 and not N.J.S.A. 18A:6-16. The District cannot seek to amend its charge to include N.J.S.A. 18A:6-16 at this juncture. As there is no basis for proceeding under N.J.S.A. 18A:6-16, I do not address whether such a proceeding would be warranted based upon the record in this case.
Supra. Pg 24

Accordingly, since the Award relied upon in granting the original Motion to Dismiss never addressed whether tenure charges may be brought based upon conduct during the 2012-2013 school year, the Respondent's arguments that this matter was subject to *res judicata* or that the matter is bound by the Law of the Case simply do not apply.

Further, I the District's Amendment to the tenure charges in this matter is not untimely. The initial opinion and award dismissing the tenure charges was issued on December 29, 2014 and the District notified the respondent of its intention to file an amendment to its tenure charges on or about January 6, 2015 or approximately 8 days

later. As argued by the District, every subsequent action by the District and Department of Education fell within regulation guidelines. There is no rule directly on point concerning the timing of the filing of amended charges after the granting of a Motion to Dismiss the original charges. However, the timing of the Petitioner's Amendment is certainly timely. The Respondent argues that all filings must be timed from the filing of the initial tenure charges but such an argument has no legal support and is unconvincing.

The issue of this arbitrator's jurisdiction to rule upon the instant motion has been previously determined. See City of Newark and Elena Brady, *supra*. This arbitrator does have authority to rule upon the instant motion.

Further, I find that, pursuant to the Entire Controversy Doctrine, the District had an obligation to present its entire controversy in its initial pleadings.

The entire controversy doctrine has evolved "to eliminate delay, prevent harassment of a party and promote fundamental fairness." See *Barres v. Holt, Rinehart and Winston, Inc.* 74 N.J. 461, 465 (1977) (Schreiber J., dissenting). See Cogdell v. Hospital Ctr., *supra*

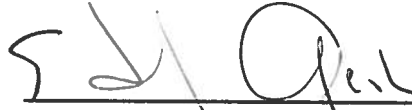
The Entire Controversy Doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings. There was nothing to prevent the District from alternatively pleading a count of inefficiency under Section 8 in its initial papers. The Respondent here faced tenure charges to remove him from his position as teacher and was successful in having those charges dismissed, only to have a second set of charges re-filed concerning the identical alleged facts. Although the District argues that it would be inequitable to prevent it from allowing to present its case on the merits, the harm done to the Respondent would be far greater. It is a denial of fundamental fairness to force the respondent to defend his face an action regarding the identical facts which would deny him of his position a second time. As Arbitrator Bluth held in Sandra Cheatham, *supra* "the District is not entitled to two bites at the apple."

It is not necessary to make a determination as to whether the evaluations for the 2012-2013 school year may be used in bringing a charge of inefficiency under Section 8. I note however, in a prior matter, this arbitrator did take evaluations of 2012-2013 into consideration in a tenure proceeding where the parties did not challenge the Board had a right to do so. In the Matter of Aubrey Cuff *supra*.

Accordingly, I enter the following:

AWARD

The Respondent's Motion to Dismiss the charges in their entirety is granted and Respondent Leonard Yarborough shall be made whole for all lost wages and benefits.

A handwritten signature in black ink, appearing to read "Edmund Gerber", written over a horizontal line.

Edmund Gerber, Arbitrator
June 8, 2015