
In the Matter of Tenure Charge of Inefficiency of

Sandra Cheatham

Docket No. 68-3/15

-and-

School District of the City of Newark

APPEARANCES

For the District

Brenda C. Liss, Esq.

For the Respondent

Colin M. Lynch, Esq.

BEFORE: ARBITRATOR STEPHEN M. BLUTH

BACKGROUND

The facts of this matter are unusual and stem from a previous charge against Respondent in 2014.

At that time the Newark School District (District) preferred charges of inefficiency against Sandra Cheatham (Cheatham or Respondent) under Section 25 of the TEACHNJ Legislation (Law). As a result it sought the termination of her employment on the grounds of inefficiency. Subsequently, Respondent answered the charges against her. Consequently, I was selected to hear and decide this matter. However, after hearing this matter I determined the District had not followed the appropriate procedures and dismissed the charges against her. On or about October 16, 2014, I issued my decision whereby I determined Respondent should be reinstated with full back pay.

Also, at this hearing the District claimed even if a teacher is exonerated under Section 25, it did not preclude it from instituting charges under against Respondent Section 8 of the Law. In my decision I firmly rejected the District's contention if I found Respondent not culpable of the charges against her

under Section 25, I should treat the matter as if the charges had been filed under section 8.

Thereafter, on or about January 30, 2015 the District brought forth a second tenure charge seeking Respondent's dismissal. In the District's view, this second set of charges they claimed were "new" or "amended." Consequently, Respondent again challenged the District's claim. I met with parties on April 28, 2015 to discuss this matter and hear oral argument in support of their positions. This Opinion and Award follows.

POSITIONS OF THE PARTIES

The District contends Respondent's reliance on the "Law of the Case" doctrine is misplaced. It points out this doctrine is a non-binding rule to prevent re-litigation of a previously resolved issue in the same case. Further, the District maintains, the Respondent's claim this instant matter is the same as the previous one is not accurate. To buttress that contention, it explains, the first case was docketed as 226-814, while the instant matter was assigned Docket Number 68-3/15. In its view this proves these

are two different cases and renders the "Law of the Case" doctrine inapplicable.

Further, the District argues, the Res Judicata Doctrine does not apply to the instant matter because the present matter is not the same as the previous proceeding. It points out, for this doctrine to apply, the judgment in the prior action must be valid, final, and on the merits. Also, the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. The District also insists the issue of whether a school district may proceed on inefficiency charges under section 8 and whether Respondent should be removed from her position are matters of public importance which should not be barred from consideration.

Also, according to the District, there is no merit to Respondent's claim inefficiency charges must be brought only under Section 25, as using Section 8 is contrary to the law. It points out the Legislature created a new form of charge, that of Section 25 in TEACHNJ, which dealt with the discipline of inefficient teachers. It was under this Section the District proceeded with this form of charge against

Respondent in 2014. However, the District emphasizes, absent from TEACHNJ is any statement Section 25 is the only type of inefficiency that may be brought against a poorly performing teacher. It explains Section 25(a) of the ACT N.J.S.A.18:6-17.2(a) states "In the event that the matter before the arbitrator. . . is employee inefficiency pursuant to Section 25 of this act. . . ." indicates inefficiency may be brought before an arbitrator other than pursuant to Section 25.

Moreover, it argues, interpreting Section 18A:6-17.3 as the exclusive authority for insufficiency charges leads to the illogical, untenable result in that it created a three-year hiatus from 2012 to at least 2015 during which time the State's boards of education would be prohibited from bringing any charges of inefficiency against poorly performing teachers.

Also, the District refers to numerous arbitration awards that have recognized charges brought under Section 8 N.J.S.A.18:6-16 would have been available to the School District if that basis for the charge had been pled. The contention that an inefficiency charge cannot proceed on any basis other than N18:6-173 would

lead to the absurd conclusion the Legislature intended to hand poorly performing teachers a "free pass" for three years after the Act's effective date is contrary to legislative intent.

Additionally, the District rejects Respondent's claim the new evaluation rubrics were developed in exchange for speedy tenure charges with limited defenses. While it acknowledges that claim may be accurate, it avers Respondent reaches too far in suggesting the "quid pro quo" also entailed the complete elimination of inefficiency charges under Section 8, and a three-year moratorium on all charges without warranting a single statement from the Legislature to that effect. The District emphasizes TEACHNJ is not a wholesale replacement of New Jersey's Tenure Act; rather it is a package of amendments to some, but not all, of the sections of the Tenure Act. It argues, as well, under Respondent's interpretation no teacher within the State of New Jersey could be removed based on inefficiency during that three-year time period. Therefore, based on reasons delineated herein the School District of Newark submits Respondent's motion to dismiss and/or for summary

judgment should be denied and this matter should proceed to hearing.

Respondent alleges the charges against her are baseless. In her view the instant amended charges filed against her are simply a legal ploy to avoid the consequences from the District's premature filing of charges against her pursuant to Section 25 of the TEACHNJ Act. Respondent stresses the District initially failed and the charges were dismissed. As a result, she relates, it now seeks to file so-called "new" tenure charges. However, Respondent avers, these charges are not new. Rather, they are simply a rehash of the same charges filed against her with the Commissioner in August 2014. Also, Respondent reports, these new charges are ostensibly brought pursuant to Section 8 rather than Section 25 of TEACHNJ. However, she emphasizes, even a cursory inspection of these "new" charges reveals they constitute little more than an amendment of the prior charges I dismissed in my decision of October 14, 2014. Moreover, she reports, both the Statement of Evidence and the accompanying documentary exhibits appended to the "new" charge are effectively identical to those accompanying the

dismissed charge. Thus, in Respondent's view, these amendments are not "new." At best, they are an amendment of the previously dismissed charges, she declares.

In addition to that factor, Respondent relates these amendments have been filed long after I previously dismissed the charges against her, Respondent reports. Further, she avers, they are predicated on a legal theory I expressly rejected when I determined the District could not proceed under Section 8 of TEACHNJ, given its failure under Section 25. Importantly, Respondent reminds, I barred the District from getting a "second bite at the apple" and a "do-over." She further avers if the District disagreed with my findings, it had ample opportunity to attempt to vacate my Award, something it failed to do.

Also, according to Respondent, the amended complaint is substantively deficient, as the charge seeks to pursue a claim of inefficiency against her under Section 8 of TEACHNJ in light of the revamping of the tenure laws, which hold the only section of that statute in which a school district may bring a

charge of inefficiency against a teacher is Section 25; Section 8 is available for other charges such as misconduct or "conduct unbecoming." Therefore, Respondent posits, the District's amended charge of inefficiency must be dismissed with prejudice.

Respondent explains as well, she taught in the District from 1974 to approximately 1992, at which time she moved to Georgia. However, she returned to Newark in 2003-2004 and has taught there ever since that time, she explains. Respondent emphasizes, for the entirety of her career including 2011-2012, she has been rated as a "proficient" and "effective" educator. It was only after Cheatham filed a workers' compensation claim and filed complaints regarding the health and safety of her Kindergarten classroom she received a "partially effective" rating for 2012-2013, while at the conclusion of the 2013-2014 her rating was "ineffective." In her view these ratings were solely in retaliation for her workers' compensation claim and complaints about the health conditions of her classroom.

As a result of these two ratings, Respondent was served with a Notice of Tenure charge seeking her

removal for "inefficiency" pursuant solely to Section 25 of the TEACHNJ Act. Then, on or about August 16, 2014, Respondent relates, the State District Superintendent, Cami Anderson, certified the tenure charges and filed them with the New Jersey Department of Education, Respondent reports. As a result, the matter proceeded to arbitration in which I was appointed arbitrator. After hearing all the evidence, I concluded the District's evaluation program was not in compliance with applicable regulations in the form of ACHIEVENJ because those regulations did not go into effect until the 2013-2014 school year.

Additionally, Respondent explains, I rejected the District's claim it could proceed under Section 8 of the Act N.J.S.A. 18A:6-16 if a teacher is exonerated under Section 25. She emphasizes, too, I rejected the District's claim exonerated under Section 25 that does not preclude it from instituting a similar procedure under Section 8, thus giving the District the proverbial "second bite." Notwithstanding my ruling, the District served a second Notice of Tenure Charges on Respondent pursuant to Section 8 of TEACHNJ, and filed them with the Commissioner of Education on

or about March 30, 2015. In Cheatham's view, the improperly certified and filed amended charges by the District should be dismissed because they were not in compliance with the law.

Moreover, Respondent contends the dismissal of tenure charges against her is now the "law of the case," and the District's amendment of those charges is constrained by that doctrine. This is so because the amended inefficiency charges rely on the same facts and evidence presented in the initial charges. The District's attempt to amend tenure charges that have already been dismissed is fundamentally unfair and in clear violation of her rights, Respondent argues, and should not be permitted to proceed. This "law of the case" doctrine, she relates, requires judges to respect un-reversed decisions made during a trial by the same or higher court regarding questions of law. This is based on the simple principle once an issue is litigated and decided in a suit, re-litigation of that issue should be avoided if possible, Respondent explains. Since, in the instant matter, the issue has already been decided, the amended charges are bound by the "law of the case," Respondent

contends. She reminds, the District attempted to proceed under Section 8 after I dismissed the charges filed under Section 25 and that I specifically rejected the notion that, having failed under Section 25, the District could proceed with charges under a different section of the law. She also reminds the District had three months in which to attempt to vacate my Award. It did not do so, Respondent avers, but rather adopted the questionable tactic of re-filing the same charges with the apparent hope of getting a different result.

Further, Respondent cites the Res Judicata Doctrine, which holds when a controversy between parties is once fairly litigated and determined it is no longer open to re-litigation. Thus, while "Law of the Case" is a discretionary doctrine applied by a tribunal regarding legal determinations made in the same case, Res Judicata is a mandatory doctrine that a tribunal must apply to bar a party from re-litigating in a new case an issue already disposed of, Respondent declares. She maintains the criteria for Res Judicata to bar re-litigation of a claim have been met in this matter. She reminds, the first criterion is the

judgment in the prior action must be valid, final, and on the merits. Second, the parties in the later action must be identical to or in privity with those in the prior action. Finally, the claim in the later action must grow out of the same transaction or occurrence. As a result this issue cannot be re-litigated as it is the same claim as the District made in the earlier case. Therefore, Respondent argues, since all three criteria in this matter have been met, the Res Judicata Doctrine prohibits the District from re-litigating this matter.

Additionally, when the District realized the charges against her were deficient, it sought to pursue inefficiency charges against her under Article 8, Respondent informs. However, she points out, I expressly rejected that claim in my first Award. In fact, because my decision was final, the parties were identical, and the instant charges grew out of the same transaction or occurrence as the prior tenure charge, and since the Statements of Evidence and the exhibits attached thereto for both charges are effectively identical, Respondent claims, this

Doctrine precludes the District from proceeding with the new charges.

Moreover, according to Respondent, the District's amended charges against her were untimely filed and must, therefore, be dismissed. For example, she explains, under Section 25 the District was required to file charges against her with the Commissioner of Education within 30 days of filing with the State District Superintendent. In this case, the District certified the charges in August 2014. Said charges were based on the identical series of facts and allegations as the instant charges. Thus, the District was under an obligation to file the tenure charges against Respondent within 30 days thereof, she maintains. It is clear the current charges were filed well outside that time period and are untimely under TEACHNJ. Accordingly, Respondent argues, they must be dismissed.

Also, even if the instant charges were deemed to have been filed pursuant to Section 8, they are still untimely, Respondent avers. She stresses, once charges were filed with the State District Superintendent, she could submit a position statement and statement of

evidence within 15 days of receipt of charges. Upon receipt of this statement, or at the end of the 15-day period, the District Superintendent had 45 days to decide on whether to certify the charges to the Commissioner of Education, Respondent relates. Then, it had 15 days to file written charges with Commissioner after making a decision. In the instant matter, Respondent explains, the District filed charges with the State District Superintendent in August 2014. These charges were based on the identical series of facts and allegations as the instant charges. Therefore, according to Respondent, the District was obligated to vote on whether to file charges under Section 8 within 45 days of receiving her response to the charges; it was then required to file charges with the Commissioner within 15 days of making its decision. Respondent argues the District did not do so and the charges were filed outside the applicable time frame. Consequently, the charges were untimely filed under TEACHNJ and should be dismissed, Respondent insists.

Finally, Respondent cites the "entire controversy doctrine" that bars the District from bringing "amended" or "new" charges based on the same facts and

series of transactions or occurrence at this stage of the proceeding. In this case the District has already fully litigated its tenure charges against Respondent based on her 2012-2013 and 2013-2014 evaluations. It lost on those charges, Respondent reminds. She also emphasizes the District could have attempted to bring other charges simultaneously under Section 8 based on those same facts of transaction or occurrence and attempted to do so. However, Respondent stresses, I rejected its attempt to do so. She maintains the District cannot now re-litigate the case. If it is to be allowed to do so, it will be free to continue re-filing the same charges against her under various legal theories. This would allow it to get second, third or more bites at the apple, and would violate Respondent's due process rights to not be subjected to the same charges repeatedly and indefinitely by the District, she maintains. Therefore, Respondent asks the instant charges not be permitted to be brought anew under Section 8. Accordingly, she asks the charges be dismissed and she be made whole for any lost wages or benefits.

DISCUSSION AND FINDINGS

I have reviewed the arguments, submissions and briefs submitted by the parties. Based on my examination, I determine the District may not proceed with charges against Respondent. I so find for several reasons.

First, at the arbitration I held in 2014, the District charged Respondent with inefficiency and sought her dismissal. At that time I dismissed the charges against her brought under Section 25 of TEACHNJ. The District then argued it could bring these charges against Respondent under Section 8. At that time I indicated it could not do so because it filed under Section 25. My reasoning in that matter was the District was attempting to get a "second bite of the apple" and a "do-over," and should not be permitted to do so.

I observe, as well, after my Award was issued, the District made no attempt to have it vacated. That failure indicates to me the Department accepted my findings and that should have ended the controversy.

Moreover, I find the Doctrine of Res Judicata is relevant in this matter. This so because I have examined both the first and second set of charges and

observe the charges filed in January 2015 were virtually identical to the charges I had previously dismissed. Further, I reject the District's claim the matters raised in the second set of charges are not the same matter and thus, do not fall under Res Judicata. In my opinion, this is pure nonsense. Just because the charges were filed under a different section of the law does not render the matter different. I am also unsympathetic to the District's claim this is a matter of public importance and should not be barred from being heard. While I certainly agree the matter is one of public importance, this does not override the age old Res Judicata.

Additionally, I find, the District's claim it could file "new" or "amended" charges does not conform to TEACHNJ. My review of that Section reveals it is part and parcel of other Sections specifically Section 5. Section 8 simply contains the procedures the parties must follow if charging a tenured teacher. While Section 8 makes no mention of inefficiency, it must be read in conjunction with Section 5 (N.J.S.18A:6-11). That Section reads, "Any charge made against an employee of a board of education under

tenure during good behavior and efficiency (emphasis added) shall be filed with the secretary. . . ."

Therefore, Section 8 refers to teachers who, among other criteria, are deemed to be "efficient." Therefore, Section 8, in conjunction with Section 5, limits charges to teachers who are efficient. Thus, under this principle excluded are teachers who are deemed inefficient, This squares with the long-established concept of "*expression unius est exclusive alterius*" (to include one thing is to exclude others). Since teachers with good behavior and efficiency are covered by Section 8, the only way to proceed against an inefficient teacher is under Section 25. The District's claim this would lead to an unacceptable three-year hiatus due to the need for three less than efficient ratings over a three-year period, the fact remains that is the way the legislation was written.

As for the District's argument the "Law of the Case" is not binding, while true, it certainly provides guidance as to what criteria must be met to establish it. In this, I find Respondent clearly met the criteria.

Finally, with regard to the timeliness issue, since I have determined the District improperly charged Respondent and that those charges should be dismissed, I find no reason to address that matter. Consequently, I make no comment on it.

Based on the evidence presented, I determine the District improperly charged Respondent under Section 8 of TEACHNJ. The appropriate remedy is reinstatement with full back pay and benefits. It is so ordered.

AWARD

The District improperly charged Respondent under Section 8 of TEACHNJ. The appropriate remedy is reinstatement with full back pay and benefits.

6/25/15

Stephen M. Bluth

STEPHEN M. BLUTH, ARBITRATOR

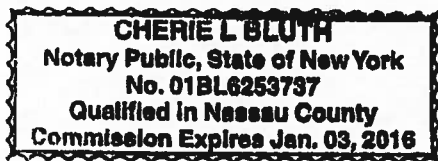
State of New York)

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County of Nassau)

On this, the 25 day of June, 2015, before me a notary public, the undersigned officer, personally appeared Stephen M Bluth, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

In witness hereof, I hereunto set my hand and official seal.



Cherie L Bluth
Notary Public