
In the Matter of
Rinita Williams
and
State-Operated School District
of the City of Newark
in the County of Essex, NJ

Re: Tenure Charge of Inefficiency
Agency Docket Nos. 241-8/14 and 17-1/15

Opinion and Award

Tia Schneider Denenberg, Arbitrator

APPEARANCES

FOR THE DISTRICT:

Teresa L. Moore, *Riker Danzig Scherer Hyland & Perretti LLP*

FOR THE RESPONDENT TEACHER:

Genevieve Murphy-Bradacs, *Zazzali, Fagella, Nowak, Kleinbaum & Friedman*

BACKGROUND

This dispute initially concerned charges of inefficiency, dated July 22, 2014.¹ They were brought against tenured teacher Rinita Williams under Section 25 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3. as follows:

CHARGE: INEFFICIENCY

Respondent has been rated Partially Effective and Ineffective in two respective annual summative evaluations, as follows:

1. Respondent was rated Partially Effective in her 2012-13 annual summative evaluation.

¹ For ease of reference the arbitrator has cited the date on which each document was created rather than the date on the DOE stamp. In this matter there is no allegation of failure to comply with time limits.

2. Respondent was rated Ineffective in her 2013-14 annual summative evaluation.

WHEREFORE, Respondent has shown that she is unfit to discharge the duties and functions of the position in which she holds tenure in the School District, and she should be dismissed.

Accompanied by a statement of evidence, the charges were served on the teacher on August 4, 2014.² The teacher filed a position statement, dated August 11, 2014, alleging that "procedural deficiencies...render the instant charges inappropriate...particularly in light of the fact that full implementation of the new teacher evaluation system did not even begin until September of 2013" [at p. 2]. The teacher also alleged failure to respect her FMLA and workers' compensation leave status, as well as retaliation by her supervisors for filing disability and discrimination complaints.

In a letter dated August 28, 2014, the district notified the teacher that tenure charges were being certified to the New Jersey State Commissioner of Education and that she was suspended without pay for 120 days, effective August 29. At the same time, the file was forwarded to the commissioner, and copies were sent to the teacher and her attorneys. The district asserted that

the only question to be determined by the Commissioner is whether the School District has followed the evaluation process. See N.J.S.A. 18A:6-17.3(c); N.J.A.C. 6A:3-5.1(c)(6). We respectfully submit that the Commissioner should determine that the School District has complied fully with all required evaluation procedures. In 2012-13, in accordance with regulatory provisions in effect during that school year, Respondent received three formal observations and an annual summative evaluation. In 2013-14 a corrective action plan was developed collaboratively and implemented; that school year Respondent received four observations, a mid-year evaluation, and an annual summative evaluation.

The teacher filed a letter brief, dated September 5, 2014, asking the commissioner to dismiss the charges and grant "a motion seeking the same as well as a stay in transmitting the matter to an arbitrator." Included in the pleading was an answer to the charges, that asserted:

The implementation of the District's 2012-13 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 purpose of seeking or bringing tenure charges against Teachers, including, but not limited to Ms. Williams relating thereto.

On September 15, the parties were advised by the commissioner that

following receipt of respondent's answer on September 8, 2014, the...tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3c; upon review the Commissioner is unable to determine

² This ruling takes into account the complete record, which includes numerous submissions. In the interest of economy, not all submissions will be identified individually or summarized.

that the evaluation process has not been followed and accordingly, on this date, the case is being referred to Arbitrator Tia Schneider Denenberg as required by statute.

After consulting with the parties via e-mail and conference call, the arbitrator was granted a two-week extension by the commissioner for the purpose of allowing them to elaborate their positions in regard to the teacher's preliminary motion. The parties agreed to schedule three days of hearing—on November 12, 13, and 14—in the event that the case went forward and to establish a timetable for the required pre-hearing information exchange.

The teacher maintained that the arbitrator was now the designee of the commissioner, which implied that the procedure is governed by New Jersey administrative law precepts, including limited opportunity for parties to respond to each other. On October 17, the arbitrator notified the parties by e-mail as follows:

Under the traditional principles of arbitration and the AAA rules, I am obliged to ensure the parties have a full and fair opportunity to be heard. In keeping with that responsibility, the District will be permitted to submit a brief reply.

The teacher was also afforded an opportunity to submit an additional reply.

On November 5 the arbitrator informed the parties in another conference call that she would take the preliminary motion under advisement and that the hearings would proceed as scheduled, since there was no mutual agreement to adjourn. During the call, the teacher requested that the arbitrator conduct an initial review of the case as the commissioner's designee. The request was rejected on the ground that it was inconsistent with the role of arbitrator.

In its responses to the motion, the district had argued that if the Section 25 claim were dismissed, the allegations should revert to a non-mandatory tenure removal charge under Section 8. The district withdrew that contention in its opening statement [Tr., p. 14].

Hearings were held in this matter on November 12, 13, 14 and 19. The following witnesses testified under oath or affirmation:

For the District (Petitioner):

Viveca Williams,³ Principal of 13th Avenue/Dr. MLK School

³ Viveca Williams was hired in August, 2012, as Chief Innovation Officer (CIO), or as the "second hand to the principal." She became interim principal on January 13, 2013, and principal at the end of the school year [Tr., pp. 172-173]. Even though her roles varied over time, she is identified throughout this opinion as Principal Williams to avoid confusion with the teacher, Rinita Williams.

Simone Rose,⁴ Vice-Principal
LaShanda Gilliam,⁵ Vice-Principal

For the Teacher (Respondent):

Rinita Williams,⁶ Teacher
Latifa Graham,⁷ Teacher

At the district's request, a transcript was taken. Following the hearing (December 22, 2014), the district asked that the arbitration be held in abeyance in order to take account of an amended charge being filed against the teacher:

Please be advised that the principal of 13th Avenue School has filed an Amended Notice of Tenure Charge of Inefficiency against Respondent Rinita Williams. The amended charge includes the charge of inefficiency previously filed, served, and submitted to the Commissioner of Education; and on which you have completed an arbitration hearing; and it adds another count of inefficiency pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-16.

We expect that the Amended Notice of Tenure Charge of Inefficiency will be treated as a new filing, and, accordingly, Ms. Williams will have an opportunity to respond before the charge is considered by the Superintendent and the Commissioner, prior to its referral to arbitration. We therefore respectfully request that this matter be held in abeyance, pursuant to N.J.A.C. 6A:3-5.5(b), so the Amended Notice of Tenure Charge may be properly considered in accordance with applicable statutory provisions.

The next day, the teacher signaled opposition to this motion:

The present charge before you was filed pursuant to N.J.S.A. 18A:6-17.3 (Section 25 of the Act), which applies in cases of alleged inefficiency. That is the only charge before you and no additional amended charge has been transmitted to you by the Commissioner. Therefore, the amended charge is not

⁴ This is her third year as vice-principal at 13th Avenue School. She also served as vice-principal in another Newark school for one year [Tr., p. 452].

⁵ Ms. Gilliam became an administrator in November, 2006, at Vailsburg Middle School and remained there when that school closed and reopened as Ivy Hill Elementary School. She went to 13th Avenue School in August, 2009 [Tr., pp. 745-746]. In SY 2012-2013 she supervised preschool, kindergarten, and first and second grades. In SY 2013-2014 Ms. Gilliam supervised grades four and five [Tr., p. 747]. She assisted Principal Mackey in training teachers in each of the five competencies in SY 2012-2013 [Tr., p. 749].

⁶ Rinita Williams began employment with the District in 1998 and taught at several schools. Her classes included Pre-K, kindergarten, first grade, second grade (as lead teacher), third grade, and fourth grade. She holds a K-5 Certification [Respondent Brief, p. 4]. She was a substitute teacher for three years [Tr., p. 702].

⁷ Ms. Graham has been employed by NPS for sixteen years, teaching in a variety of schools including five years at MLK and at MLK/13th Avenue for 2012-2013 as a first grade teacher [Tr., pp. 662-663].

relevant to the proceeding before you, is entitled to no action or consideration on your part (indeed consideration of the District's request would be grossly improper since no amended charge has been transmitted to you by the Commissioner) and the only conceivable relevance of the District's amended charge is to demonstrate that the District is keenly aware that the present charge lacks merit and should be dismissed. I also believe that the District is attempting to prevent the Respondent from being returned to the payroll, as is required after tenure charges have been pending for 120 days. Once these "new" tenure charges are filed, the District will claim that Ms. Williams should be suspended without pay again.

The District's actions are unconscionable. On the first day of the hearing, on the record, the District's counsel specifically withdrew its request that this matter be "convert[ed]" into a "non-mandatory tenure charge claim of inefficiency." (T14). And yet now, after 4 days of hearings and after the submission of post-hearing briefs, the District is attempting to amend the charge to do just that, while also asking you to refrain from deciding this case while it attempts to sneak in through the back door what it could not get in through the front. This is tantamount to plaintiff's counsel advising the trial judge after a week-long trial - while the jury is deliberating - that she has filed an amended complaint before another judge, and that therefore she is requesting that the jury be told go home. Obviously, something so absurd would never be countenanced in any court of law. Nor should it be permitted here.

As the arbitrator in this case, it is respectfully submitted that you are empowered, as is a judge, to decide all issues that arise in this matter, both procedural and substantive. Accordingly, please treat this letter as a formal motion to preclude the District from amending its tenure charges against Rinita Williams at this late date. Accordingly, and in light of the foregoing, it is respectfully requested that you issue an order restraining the District from filing any amended tenure charges against Ms. Williams, and that a decision on the pending motion to dismiss, and on all the substantive aspects of the tenure charge, issue expeditiously.

The submission of corrected transcripts, briefs and attachments was completed on December 26, 2014. The district provided scanned copies of all exhibits on a CD. In view of the complexity of the record and the time taken to complete it, the arbitrator was granted two additional extensions by the commissioner. The award became due on March 30, 2015.

On January 22, 2015, the teacher's counsel wrote the arbitrator as follows:

Today I received an email from Ms. Moore, a copy of which is enclosed, indicating that the District is filing amended tenure charges against Ms. Williams with the Commissioner of Education. I am writing to apprise you of this most recent development, as well to briefly respond to Ms. Moore's most recent letter-brief, dated January 16, 2015, in which she reiterates her request that you stay your decision and opposes Ms. Williams' motion seeking an order precluding the District from filing amended charges against her.

Based upon Ms. Moore's January 22, 2015 email, it is readily apparent that the District does not intend to wait for your ruling on Ms. Williams' motion for an order precluding the District from filing an amended charge. It is also clear that the District does not plan to move before you, the Arbitrator in this case, to amend the charge. Instead, it seeks to circumvent the law - and your authority in this case - by simply moving ahead with its plan to file amended charges with the Commissioner, despite the fact that it has no legal authority to do so. Candidly, I'm not surprised, given that each of the District's actions to date, individually and collectively, demonstrate a belief that it is above the law,

and that it is entitled to do whatever it wants, whenever it wants, in pursuit of its unjust and pathological quest to remove Ms. Williams (and many others) from tenured employment.

Given this most recent development, I am reiterating my request that you issue an order precluding the District from filing amended charges against Ms. Williams. After 4 days of hearings and the filing of numerous post-hearing briefs, the record is closed. The proper time to request leave to amend would have been prior to the hearing in this matter, and such a request should have been directed to you, the arbitrator appointed by the Commissioner to dispose of this matter, who is the only person to whom such a request can properly be made. See Elkouri & Elkouri, How Arbitration Works (6th Ed. BNA) at p. 294 (citing John Wiley & Sons v. Livingston 376 U.S. 543, 557 (1964) for the proposition that when "the subject matter of a dispute is arbitrable, 'procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.'"). Moreover, on the first day of the hearing, on the record, the District's counsel specifically withdrew its request that this matter be "convert[ed]" into a "non-mandatory tenure charge claim of inefficiency." (T14).

The District bizarrely claims that Ms. Williams will not be prejudiced by its amendment of the charges because "[t]he Amended Charge is based on the identical evidence that the School District presented at the hearing." (See Letter from T. Moore dated January 16, 2015 at 1). Nothing could be further from the truth. Ms. Williams undertook her defense of the charges against her within the confines of the extremely limited defenses that were available to her under Section 25 of the Act. For example, under Section 25, Ms. Williams is statutorily precluded from offering evidence that her classroom performance did not warrant the ratings she was given. Had she in fact been the subject of tenure charges brought pursuant to Section 8, she would have presented additional evidence and raised additional defenses to counter such charges. An amendment at this stage would rob Ms. Williams of her opportunity to do so. Obviously, it would be absurd to permit Ms. Williams to be prejudiced in this manner simply because the District now has buyer's remorse over its prior litigation strategy.

Moreover, as the vast majority of arbitrators have now ruled, even if the District had timely and properly moved before you to amend its charge, the amendment should have been denied as futile, as inefficiency charges can only be brought, if at all, pursuant to Section 25 of the Act. To the extent the District seeks to rely upon Henchey, Thomas, and Whitehurst, it is clear that such reliance is misplaced. These cases involved charges that were initially pled in the alternative and did not involve what amounts to unilateral action by the District amending the charge after the hearing has been concluded and the record has closed. Accordingly, these cases have absolutely no bearing on the present issue.

In light of the above, Respondent respectfully requests that the Arbitrator take swift action to preclude the District from certifying these amended charges, which, I am told, are being filed today. Such an order is necessary and appropriate, particularly since, should the Commissioner allow these amended charges to proceed, there is no guarantee that the District will not take the position - or that the Commissioner will not so find - that the amended charges should be transmitted to, and decided by, an entirely different arbitrator.

As the arbitrator in this case, it is respectfully submitted that you are empowered to take such action. Accordingly, and in light of the foregoing, it is respectfully requested that you issue an order restraining the District from filing any amended tenure charges against Ms. Williams, and that a decision on the pending motion to dismiss, and on all the substantive aspects of the tenure charge, issue expeditiously.

On January 22-23, the district reported by e-mail that it had certified "amended" charges to the DOE and had "requested that the amended charge be assigned to you as a matter of case management." The district asked for a conference call that would include Ms. Duncan, but the teacher objected to her participation. On January 26, the arbitrator informed the parties that a conference call was unnecessary. On January 31 the undersigned arbitrator issued an interim award:

The petitioner's request to hold this matter in abeyance is denied. The arbitrator retains jurisdiction for the purposes of resolving any and all disputes regarding the tenure charges brought against respondent by SOSD of Newark for school years 2012-2013 and 2013-2014.

The arbitrator wrote the parties on February 13, 2015, as follows:

On February 6, 2015, I was notified by Ms. Duncan of the Bureau of Controversies and Disputes that I have been appointed to hear and decide a second matter involving Ms. Williams. At the same time, Ms. Duncan informed the parties that the new matter has been docketed "as new charges...and which are being processed with respect to Charge Two, Section 8 inefficiency charges only, [and] are being referred to Arbitrator Tia Schneider Denenberg to handle as she deems appropriate."

Therefore, I am combining the two matters into a single case for the school years 2012-2013 and 2013-2014. I plan to issue one decision. Each party may submit an additional letter brief of no more than 5 pages by February 20, 2015.

I also acknowledge receipt of various emails and the following documents:

- (1) Copy of letter from Genevieve M. Murphy-Bradacs to Ms. Duncan, dated February 5, 2015, enclosing a copy of Respondent's Answer to Amended Tenure Charges.
- (2) Letter from Ms. Murphy-Bradacs to the arbitrator, dated February 6, 2015, requesting that her pending motion, seeking an order barring the filing of amended charges be treated as a motion to dismiss. In support of this motion, Respondent relies upon all prior submissions, as well as the post-hearing brief.
- (3) Letter from Ms. Moore to the arbitrator, dated February 10, 2015, in response to Ms. Murphy-Bradacs' letter in No. 2 above.

With respect to No. 2, I am granting the respondent's request to consider her submission as a motion to dismiss.

By copy of this letter, I am asking the Commissioner to consider the due date for the consolidated case to be March 30, 2015, which is the extended due date of Docket No. 241-8/14.

The parties each filed a timely letter brief.

At the hearing, Principal Williams testified to the school's troubled history:

It's a pre-K to eight school located in the west ward of Newark, New Jersey. When I arrived to 13th Avenue, it was known as a RENEW school, RENEW meaning that they closed 13th Avenue because 13th Avenue was a failing school, and they closed Dr. MLK School...because that was considered a failing school as well. The superintendent reopened 13th Avenue, combining both schools, 13th Avenue and Dr. MLK School into one school [Tr., pp. 19-20].

In August, 2012, the school "had to rehire 80 percent of the teachers. They had to be new teachers that were brought to the school to impact and help improve student achievement in the school altogether" [Tr., p. 20]. The teachers were asked to work extra hours, the witness recounted, in order to augment student learning time:

...[S]tudies have shown that when students have opportunities to have after-school programs, that they are successful in their academics and they care about that, economics, and also having an opportunity to give teachers more time to teach. One of the things that we were focusing on was developing social and emotional learning for students.... [W]e implemented curriculum that helped teachers and students improve the relationships within the class among each other, among each other in the classroom, to build their relationships. In addition, we had a couple of new curriculums, such as math and focus, which was a math curriculum; expeditionary learning, which was a reading curriculum and core knowledge, which was a reading curriculum for grades K through two, and our creative curriculum program for preschool, preschool teachers as well.

We also had the opportunity to have our teachers sign something called an extended work agreement, which states that as you are working at 13th Avenue, you are committing to staying past 3:05, so basically the teachers finished at 4:05. You are committing to attending Saturday retreats.... But the goal was so that we can impact student achievement during the course of the day in academics, and in improving social and emotional supports as well [Tr., pp. 20-21].

During the entire period at issue, the students failed to perform well academically. The school needed to be "on the move or better, and we are not there as yet.... Our goal was to hire great teachers to impact and help us to move the students of 13th Avenue Dr. MLK to be future doctors, lawyers, teachers, etcetera" [Tr., p. 22]. Principal Williams estimated that there were 50 teachers, five administrators and "close to 120 staff members" at the school [Tr., p. 23]. The enrollment was "800 to 830. Our school is very transient at times, so our numbers kind of fluctuate " [Tr., p. 20]. The principal maintained that

my number one role is one to support teachers and coach teachers, and help them...with what they do in the classroom to help students. It's to help provide them professional development. It's to help them think about and reflect about their practices and what they do on an everyday basis, and to help them become highly effective and effective teachers, and to move ineffective and partially effective teachers to the next level where they're able to help students in the classroom [Tr., pp. 24-25].

In addition to that, I'm responsible for not only coaching teachers but also giving evaluations, giving observations to teachers, giving observations to my vice principal or my other administrators in the building, also providing feedback to the teaching assistants as to how they are doing in the classroom. My responsibility is also to take a look at curriculum and see how the curriculum is helping to impact instruction in the classroom, to help move students to -- so that we are a school on the move and they're better at what they're doing to be better readers, writers and mathematicians [Tr., pp. 25-26].

At the beginning of SY 2012-2013, Principal Williams testified the NPS “Framework for Effective Teaching, Teacher Observation and Performance Evaluation, A Guidebook for Teachers and Administrators” [Joint Exhibit 60] was issued to all teachers. The guidebook

talked about what the process would be, how teachers would be observed, when would they be observed, what were the time lines as it pertains to observations, mid-year conferences, end-of-year conferences, that all teachers received, and all teachers had to sign that they received it during that time as well [Tr., p. 32].

The guidebook included the “Framework for Effective Teaching Rubric,” which called for rating teachers as Highly Effective, Effective, Partially Effective, or Ineffective in five competencies:

- Competency 1: Lesson Design and Focus
 - Competency 2: Rigor & Inclusiveness
 - Competency 3: Culture of Achievement
 - Competency 4: Student Progress Toward Mastery
 - Competency 5: Commitment to Personal and Collective Excellence
- [Joint Exhibit 60]

The first four competencies would be rated on the basis of observations conducted throughout the year. The fifth competency would reflect the teacher’s cumulative performance and would appear only in the mid-year review and end-of-year evaluation. A mid-year review conference was not required but was strongly recommended as

an opportunity for the administrator to discuss the teacher’s progress toward student, classroom, school, and district performance goals as well as the implementation and alignment of the professional standards for teachers.

* * *

The mid-year ratings are formative ratings, rather than summative. The mid-year ratings serve as one piece of evidence for the Annual Review Ratings and as an important element of formative feedback for the teacher.

[Id., pp. 22-23]

The fifth competency rating may add points for highly effective teaching or subtract points for poor attendance and lateness. For tenured teachers one formal observation was required, followed by a post-evaluation conference within ten calendar days [Id., pp. 21-22]. A performance review “must be completed for each teacher on an annual basis. This evaluation is a summative statement which incorporates the data and evidence gathered throughout the year” [Joint Exhibit 60, p. 23].

Administrators were trained in the rubric before the school year began, the principal said:

...[B]etween the first week and the second week of my employment, all of the administrators in the district had to attend a professional development for three days, given by Mitch Center, who was one of the assistant superintendents in Newark Public Schools [Tr., p. 37].

Vice-Principal Gilliam said that post-observation conferences were important, because

every time a teacher is observed on a particular competency, you do sit with them at the post-conference, you're relating all your conversations to the actual rubric and things that they saw you do in that rubric and some things you need to do to be effective there. So every time you observe, you're going back to the rubric. You're going back to look at the language again; and what did I do and what can I do to make effective there? Did I do that? What was the evidence of what I did, and how can I be better? So you are constantly talking about the framework. It's the guideline to the conference [Tr., p. 757].

She also explained the significance of an announced observation and pre-observation conference, which was not required until 2013-3014:

The purpose is to plan with the teacher. Usually at a pre-conference the teacher will talk with you about a lesson she wants you to do, you can plan a lesson with them. The teacher is only required to have I think one pre-conference a school year, but the rest can be unannounced [Tr., pp. 791-792].

But the framework makes clear that struggling teachers are owed more attention:

Pre-Observation Conferences are especially recommended for:

* * *

- Struggling teachers to focus on particular areas of growth
[Joint Exhibit 60, p. 20, Tr., pp. 792-793]

Teacher Rinita Williams was rehired in August, 2012, as part of the school's reorganization and assigned to kindergarten. She began with a 90-day improvement plan, which was a carry-over from the previous school year, when a different evaluation model had been in place.⁸ Principal Williams, who was then the CIO, said that "administrators would observe to see...how she was moving student performance within that 90 days, and then determine...what their next steps would be" [Tr., pp. 43-44]. Ms. Gilliam said that only Ms. Mackey who created the plan would have the authority to determine if it was mastered [Tr., p. 811].

⁸ The teacher maintains that the plan was inadequate as well as incomplete: Previously, the district had utilized the Charlotte Danielson evaluation model. According to Vice-Principal Gilliam, "there was a vast difference in [the Framework for Effective Teaching] as opposed to the Charlotte Danielson evaluation" model. The Danielson rubric focused on "the teacher and what the teacher had to do," while the Framework focused on "what the students had to do." Accordingly, it was necessary for teachers to be trained on the framework. However, Ms. Graham testified that teachers did not receive training in all of the competencies [Respondent Post-Hearing Brief, p. 6]. The 90-day plan received in evidence [Joint Exhibit 41], according to Ms. Gilliam, was incomplete and had no signature page [Tr. p. 761]. The district had provided the plan to its counsel in that form.

Table A, below, indicates observations and evaluations of the teacher during SY 2012-2013:

Table A – SY 2012-2013

Date	Observation Type	Evaluator	Rating	Exhibit No.
09/25/12	Partial	Vice-Principal Gilliam	Partially Effective	Joint 2
11/16/12	Partial	Vice-Principal Gilliam	Partially Effective	Joint 3
11/19/12	Formal	Special Assistant Barbara Evans	Partially Effective	Joint 4
01/02/13	Formal	Vice-Principal Gilliam	Partially Effective	Joint 5
06/7/13	Annual Evaluation	Vice-Principal Gilliam	Partially Effective	Joint 6

On January 13, 2013, Principal Mackey was terminated.⁹ Viveca Williams assumed the role of interim principal. By the end of the school year, Principal Williams recalled, the teacher was placed in a Corrective Action Plan (CAP) developed by Vice-Principal Gilliam, because she had been rated Partially Effective in the annual (summative) evaluation [Joint Exhibit 7].

Ms. Graham, who was a first-grade teacher in SY 2012-2013, said that she did not apply initially for a position in the reorganized school but received a phone call in late August, inviting her application. She believed that the school “didn't have the proper number of teachers [and] were just calling people who were still employees on the placement list.” She hesitated: “There was a lot of hearsay around the district: No, don't go there” [Tr., pp. 663-664]. After she was hired by Principal Mackey

there was like supposed to be like a two-week orientation for the school, but the majority of that two weeks was spent like looking for furniture for classrooms. The classroom I was assigned to was formally a world language class. I had to get rid of all materials, find tables and chairs for my students. I taught first grade at Martin Luther King. It was told to us if we were assigned to the 13th Avenue School, that the materials we had already would more than likely follow. But when we got there, we couldn't find the materials. We looked all in the basements. We couldn't find them.... I thought they would be somewhere at 13th Avenue School. I thought it's a good fit for me to go there because now I'll have the first-grade materials, but they were not there.... I was left with a classroom that didn't have any age-appropriate materials. The only things that I had that were age appropriate were the things I had, you know, just from my years of teaching, things I had in my basement. Basically, I had to bring in all the supplies that I needed [Tr., pp. 664-665].

⁹ December 1, 2014, e-mail from district counsel to the arbitrator and teacher's counsel.

Other teachers experienced similar difficulties, according to Ms. Graham. A co-worker's classroom

was used as a storage room, and like I actually helped her move...the old, big file cabinets and furniture. We were actually moving the furniture ourselves. And then...we didn't have any curriculum materials....In this summer, for two days, they sent the K to two teachers [to] start training for Core Knowledge. We were told this was the program that the district was going to be utilizing for literacy. However, when we returned to the school, we were told this school will not be utilizing that program.... Over the course of the next couple weeks, we saw the materials in the building for the Core Knowledge, but we were not given access to that. Instead, we were given a list. We were given a two-page list. It was e-mailed to us with random topics. We were told spend two weeks on one topic. It was like a skill and strategy; two weeks on a skill, one week strategy, vice versa.... [T]here was nothing to go with it. You had to go online and research. And the same thing for the math. The district had adopted Everyday Math, but we didn't have any tools. We were told use the Common Core standard, and while we know that textbooks are not...used not like a Bible, you use them as a supplemental resource, we had nothing to go with. Everything was Googling topics and trying to figure out what went with the topics. Some of the topics, when we would Google them, you would find material, it would say this is usually a skill that is not taught at the first-grade level...they were very obscure. And this is expected from pre-k...all the way to eighth grade. So whatever pre-k three was doing, first grade, second grade, all the way to eighth, she wanted the same skills and the same strategy taught. At some of these levels, you can't even find materials for these skills and strategies. Some of them, we didn't have a clear understanding [Tr., pp. 665-667].

Ms. Graham found the process frustrating, because

you didn't really know what to do. Then when you would do the lesson plans, you know, it became to the point you would do them and then it's, like, not right. We would submit them to our immediate administrator. We were told we weren't doing them correctly. And then we were told to do them again when the next set would be due, and we were asked to do them a month in advance. It became [very] frustrating to complete that much work, and you didn't have resources. A lot of times we didn't get our prep periods or we would miss our prep periods, so you would find yourself at home, you're up all night. Very stressful. Some teachers after the Christmas break didn't even return. Some teachers left before the Christmas break. It was a constant turnover of teachers. Even within our team, one teacher who had been with the district several years, she quit like maybe in November, so it was very frustrating for teachers at that school [Tr., pp. 667-668].

Ms. Graham also testified that Principal Mackey brought in her own curriculum:

...a reading foci which focused on a skill of the week and a strategy of the week. So for instance, you had to talk about main idea, characters, setting, the synthesis, the various things that dealt with literacy and actually implement it into stories with your students and create your own lesson plans [Tr., p. 607].

She was forced to find materials on the Internet:

We had to rely on pulling from the internet, pulling lesson plans and utilizing the books that we may have had in our classroom to correlate with the type of skill or strategy that we were focusing on. Say, for instance, it was "The Three Little Pigs." We would talk about -- we were dealing with setting.

We would review the setting of the story, characters, location, plot, various things of that nature, so...we were almost curriculum developers ourselves [Tr., p. 609].

Other NPS schools had implemented Core Knowledge at the beginning of the school year. In January, when Principal Mackey departed and Viveca Williams became interim principal,

all the materials we were denied access to, they showed up. The math curriculum, we got the Everyday Math books. We got the Core Knowledge. We started to get the Core Knowledge units. And what was interesting is that our school...had a different pacing than the rest of the district's because we were so behind the other schools. So like some of the topics we actually had to skip over because our kids weren't going to get the chance to be exposed to those topics because we missed so many months of the program.... It's...what every first grader should know and every third grader should know.... [W]hat they did in kindergarten will connect to first, it was a new program, but -- or what they did in the first domain might come in handy in the third domain. But we had to skip. They went through and they picked out the ones probably my kids skipped and the kids could still move through, because our pacing definitely would be different from the rest of the district [Tr., pp. 669-670].

Ms. Rinita Williams said that the materials were gradually distributed to teachers, but that there was not enough to go around:

We were able to get boxes that were stored in the basement of the school or found containing the resources, workbooks that we needed to implement this Core Knowledge, that everyone in the district kept talking about.... It took a very long time. Due to the fact that there were two instructional specialists, if I can remember, that were just really literally rolling a cart around to each classroom. We had to sign for them.... [W]e had to share a lot of the materials. We were short a lot of things, so we didn't have full what they call full resource kits [Tr., pp. 610-611]

Ms. Graham recalled receiving some training in the Framework for Effective Teaching during the school year but understood that other schools had more extensive training in August, 2012:

I remember at 13th Avenue, like once, when that first-week period...2012-2013, we started...to discuss it at one staff meeting, but then we never discussed it anymore. We never discussed it. We never -- even within a framework, I never received my observation back from my immediate supervisor, so we never discussed, like, where I was and how it fit into the framework. I think we only got to it in a staff meeting. We only focused on the first domain,¹⁰ and then I don't think we discussed it anymore.... But I do know that a lot of other teachers in the district stated that they went to a big formal training, but we had no knowledge of that training at 13th Avenue School.... We were never given those training dates [Tr., pp. 671-672].

She attended training on competency one, conducted by Ms. Mackey and Ms. Gilliam in the media center. However, "on some of the training days, the K to two teachers, we were not there because we were sent to the district for the Core Knowledge" [Tr., 673-674].

¹⁰ Under the previous evaluation plan competencies were referred to as domains, according to Ms. Gilliam [Tr., p. 761].

Ms. Gilliam explained that

Core Knowledge is a curriculum that is Common Core aligned.... But the goal, as a state is, that teachers are well-versed in the Common Core standard, and they can read a standard and apply instruction without heavily being based on the curriculum. Any curriculum used has to be Common Core aligned, so Core Knowledge was a new curriculum because the prior curriculums were not Common Core aligned, so it's a Common Core aligned curriculum [Tr., p. 815].

* * *

Ms. Mackey was adamant about teachers becoming well-versed in the standard. She wanted them to learn the standards verbatim and learn how to read them and apply practices. Because in this state, there are assessments that have to be given to scholars when they get to third and fourth grade, and there's certain Common Core standards that have to be mastered and taught. And if you're following the curriculum step by step, you may not necessarily cover all of the standards, so you go to the standards to pick what lessons you're going to teach. If they happen to appear in the curriculum, that's fine, but you are relying on the standard, not so much the curriculum. And if you don't know the standards all the way, you might be inclined to rely heavily on the curriculum and you have to base everything statewide on the standard first and only. The curriculum is a resource for it, and it will help you, but you have to know the standards. You have to know the standards [Tr., pp. 816-817].

In SY 2013-2014 a revised framework was adopted to take account of new regulations as well as the district's experience in the prior year. A mid-year review was required for teachers who were subject to a CAP:

Pre-Observation Conference (required for at least one observation)

Announced observations may start with a pre-observation conference; at least one announced observation each year must have a pre-conference. The pre-observation conference should occur within seven days before an observation. We recommend that for non-tenured teachers and teachers with a CAP, this pre-observation conference take place before a long observation. During this conference, the teacher and observer discuss the planned lesson, including lesson objectives, instructional strategies, anticipated outcomes, assessments such as quizzes and tests, resources, unique class characteristics, specific areas of growth to look for, etc. During this pre-observation conference, the observer can ask guiding questions to help the teacher consider the planned learning experience or suggest possible alternatives to enhance the lesson before it is delivered.

Teachers may upload artifacts such as their lesson plan in the BloomBoard system prior to the pre-observation conference. The most important questions to answer in a pre-observation conference are:

- Is the teacher clear on what students should know and be able to do by the end of the class?
- Are the strategies and objectives aligned to the standards?
- Are the strategies the teacher is planning to use likely to ensure student mastery?
- How will the teacher know whether the students mastered the content?
- Has the teacher considered all students in the planning?
- Is there anything in particular the teacher would like feedback on as part of the observation?

* * *

Post-Observation Conference (Required)

Following an observation—whether long or short, announced or unannounced—the observer must meet with the teacher to reflect on the lesson together. This reflection process is the centerpiece of

professional growth, refinement of instruction, and continuous improvement. The post-observation conference must take place within 10 teaching staff member working days after the observation (though it is recommended within 3 days of the lesson in order to provide timely feedback).

[Joint Exhibit 61, pp. 19-20, 23]

BloomBoard was introduced as

a fully-functional performance evaluation and professional development management platform. BloomBoard is a web-based tool that allows schools to keep track of goal-setting documents, short and long observations, mid-years, and annual evaluations all in one place online. Every teacher and school administrator in the district will have a BloomBoard account and will be logging in to the system on a regular basis [Joint Exhibit 61, p., A.10].

BloomBoard also automatically alerts teachers to scheduled conferences, such as a pre-observation conference with an evaluator [Tr., pp. 144-146].

Teacher Williams was assigned to a first-grade class, the principal testified:

She told me [in SY 2012-2013] she wanted to remain at 13th Avenue, and she was interested in an upper grade, and she asked me if she could teach second grade. We didn't have any vacancies for second grade. I had some for first grade, and I said, "It would be great if you could go to first grade."... [H]er classroom was a beautiful classroom that was set up. It was a classroom that was set up that if I had my child, just bringing my child in was very warm, engaging, and that's something that was amazing that she was able to do, bulletin boards, you know, set up beautiful for children, and really, they were great. Hearing her ask that question, I said, you know, "I want you to go to first grade," and she said she wanted to go to first grade as well. [Tr., pp. 45-48].

Table B, below, lists observations and evaluations of the teacher during SY 2013-2014. Because there were four changes of assignment during the year, as well as a workers' compensation absence and other periods of disability, those factors are included for context.

Table B—SY 2013-2014

Date	Event	Evaluator	Rating	Exhibit No.
09/19/13	Formal Observation and Post-Observation Conference	Vice-Principal Rose	Partially Effective	Joint 9
10/06/13	Off the job ankle injury—Intermittent FMLA leave and 504 accommodation (limited walking, elevator use)			Tr., pp. 635-636, 643-644
10/09/13	Observation Followup	Vice-Principal Rose		Joint 10
10/22/13	Formal Observation	Vice-Principal Rose	Ineffective	Joint 11
10/28/14	Post-Observation Conference			
11/18/13	Reassigned to teach social studies and science to first-grade class			Tr., pp. 675-676

12/10/13	Reassigned to teach reading and math to at-risk 8 th -grade class two periods a day (Not certified for 8 th grade). Four periods daily first-grade social studies and science (effective 12/11/13).			Respondent 36.a
12/11/13 (Shown as 12/12/13 on evaluation)	Short Observation	Principal Williams	Partially Effective	Joint 12
1/13/14 (shown as 1/13/16)	Post-Observation Conference for Dec. 11			
01/15/14	Reassigned guided reading K, 4 th and 5 th ; also two periods daily 8 th grade guided reading			Tr., p. 678
01/31/14	Mid-year review	Principal Williams	Ineffective	Joint 13
03/03/14	Injured by 8 th grade student			Tr., p. 648
04/30/14	Return to work (last three days intermittent FMLA, remainder workers' comp)			Joint 39
04/30/14	Short Observation	Principal Williams	Partially Effective	Joint 14
05/15/14	Annual Evaluation and Post-Observation Conference for April 30	Principal Williams	Ineffective	Joint 16

An observation was conducted on September 19, 2013, by Vice-Principal Rose, who was responsible for the first grade. Evaluated on the first four competencies, the teacher received six points, which amounted to an overall rating of Partially Effective. A post-observation conference was held the same day. When the vice-principal and the teacher signed the evaluation, on September 23, the teacher was placed in a revised CAP. The program became more focused, the principal said, because the district "got smarter...it really talks about what are the action steps that you're going to use in order to support the teacher" [Tr., p. 55]:

[W]e're looking at what the teacher's action steps are going to be, and how will the administrator support her in achieving those at that time, and what will be the metrics that will be used. So we learned that it is better to be more concise, because if we give a teacher that we know requires a lot of support so many things to work on, she's not able to identify what the primary areas is that she needs to work on, so that's why we developed another CAP in the beginning of the school year [Tr., p. 54].

A second formal observation was conducted on October 22 by Vice-Principal Rose. The teacher was awarded only four points, which translated into an overall rating of

Ineffective [Joint Exhibit 11]. The teacher attended a post-observation conference with the principal and vice-principal on October 28. A few days later (November 1), the teacher requested in writing a transfer to another school:

The school is not a good "fit" for me. I am unable to receive a fair and objective evaluation. This has now become uncomfortable for me and my career. In addition, my 504 accommodations have not full[y] been met at my school and has caused a physical setback in my foot healing completely.

[Joint Exhibit 31]

Neither of the two administrators was immediately aware of the request, because transfer is normally a human resources function of the central office. Principal Williams said, "I was not informed that [the teacher] was requesting a transfer from the school. She never asked or said anything to me to release her from the school at any time" [Tr., 84].

Principal Williams described the support given to the teacher:

[W]e had embedded once a week professional development and coaching, where they actually came into classrooms and gave feedback to teachers on the different areas where they needed to be improved upon....But my master teacher would go in and offer supports, and also...do demonstration lessons for the first grade teacher.... She did demonstration lessons in the new CK curriculum.... Core knowledge curriculum, showing them how they can become more effective in the rubric. So as a school, we identified there were two competencies we needed to work on as it pertained to teacher performance. We needed to work on questions and tasks, rigorous tasks for our students in all areas, and then also how do we provide feedback and ensure that students are mastering the objective and mastering the grade level content that you're providing for them. So at this particular point, my coach went in, Miss Rose went in to observe and give support on things that she needed to do. At this time, there were different things that were reported to me and different things that I saw. It was reported to me that they would walk into a classroom and Miss Williams was on the phone. Children were running all over the classroom. They were not engaged in a morning meeting, which we've told all teachers that your morning meeting needs to be complete by nine o'clock. We've opened the school earlier so that breakfast didn't take away from morning meeting, and it was an opportunity for teachers and students to bond and learn about each other [Tr., pp. 68-70].

On November 18 the teacher was involuntarily reassigned to "provide social studies and science to two first-grade classes" [Tr., p. 67]. One of the classes was taught by Ms. Gooden, the school's math coach or master teacher. The reassignment was necessary, the principal said, "because there was no instruction going on for the first graders, and we needed to act quickly until we were able to get someone in that particular classroom at that time" [Tr., p. 68].

On December 5, the principal visited the classroom that Teacher Williams shared with Ms. Gooden [Joint Exhibit 34]:

I observed Miss Williams sitting at a desk, working in a box of some sort, and...some children were watching a movie, some kids were running around the classroom. When I came in, I asked Miss Gooden, I said, "Miss Gooden, are you leading the lesson at this time?" She said, "No, I've just pulled this child here for independent practice so that they can complete their work." When I asked Miss

Williams, she said to me, "Oh no, we made the decision," referring to her and Miss Gooden, "that we were going to split the class and I was going to teach my lesson and Miss Gooden was going to teach her lesson."...I asked Miss Gooden if this was the decision that they came to based upon what she shared with me. Miss Gooden said absolutely not, that she was providing a small group instruction. Miss Williams never said anything to her about splitting the class. So at this point, first off, all teachers know that we do not watch any movies, particularly Christmas movies.... I've said it at numerous staff meetings. I've sent emails that that is not effective practices in our building. Children can watch movies at home, they do not watch it at school, unless there is a connection that allows the teacher to provide a snippet of five minutes or less to connect to the lesson. In this case, the students were watching the movie and they were not engaged in a lesson at all at this particular time.... I wrote her up for neglect of duty because she was not instructing.... I wrote her up for conduct unbecoming for lying to the principal, because when I come in and I ask you what's taking place and you tell me that, oh, you and the other teacher made a decision to split, that is conduct unbecoming. You do not lie. And this would be the second time that she had lied to me about something she was doing inside her classroom. The first time was with the email, when she said she was doing -- she was checking -- she was doing attendance, when I could clearly see that her email was up on the screen...That was during one of my walk-throughs in the morning, and I did not write her up for that. But now this would have been the second time where she had lied to me, not telling the truth [Tr., pp. 84-86].¹¹

On December 10, an e-mail from Ms. Rose to Principal Williams reflected another change in the teacher's assignment. Attached was

the revised schedule for the 8th grade class that includes Ms Marlene Davis and Ms Rinita Williams. Both teachers will be assisting the lead teachers (Clanton and Ferrara) during the designated block with small group instruction: guided reading groups and project-based learning groups. Both teachers have signed for and have copy of their new schedule and will begin tomorrow 12/11/13.

[Respondent Exhibit 36.a]

Although Teacher Williams lacked certification to work with eighth-grade students, she was assigned two periods a day in that capacity [Respondent Exhibit 36.b].

On December 11, the first day of the new assignment and a new schedule, the principal conducted an unannounced observation. The principal found the teacher giving a science lesson, involving beetles. The teacher had to

send the students to another classroom to go get the beetles and bring them back so she could provide this instruction to the students at this time, so it's almost last minute. I know I'm supposed to be doing social studies, but I'm not doing that. You know what, I'm going to pull this science lesson so let me send someone over. That's what's lacking and why this is not effective. But she starts off having the students list some of the things that beetles have, and the students were instructed to copy off of the chart paper. She mentions a couple of vocabulary words during that particular time. Some students drew beetles. Some students played with the dead beetles during that particular time. But at the end of the lesson, what did they take away from what they learned? What new did you teach them? What was the whole focus and premise of the lesson based upon what you were supposed to plan for them, that they're able to take away? And that is not evident in this lesson [Tr., p. 98].

¹¹ The teacher was never charged with conduct unbecoming.

Other deficiencies, according to the principal, were the absence of an agenda on the board and the lack of a lesson plan. As a result of the observation, the teacher received six points, which amounted to a rating of "Partially Effective."

Teachers were expected to post lesson plans on a specially designated website that the principal termed

an opportunity for the staff, for me as an administrator to observe what's taking place, and to kind of have an idea what this teacher's planning and how she's going to deliver her lessons. So I can give feedback and support her on what things she should change or what things that she's doing well. There are no lesson plans that are submitted [by Teacher Williams]. I can go and find her name, click on it, look for the date, can't find a lesson plan for Miss Williams [Tr., p. 93].

The principal could not recall seeing plans from the teacher in the previous two years, even though she had scheduled sessions to help her prepare them [Tr., pp. 94-95]. However, evaluators Rose and Gilliam testified that the teacher did in fact provide them with lesson plans [Tr., pp. 561, 800-801].

Another observation was scheduled for December 19 [Plaintiff Exhibit 5]. Ms. Rose testified that she had given the teacher through BloomBoard about a month's notice of a pre-observation conference on December 18. Ms. Rose received an e-mail reply, "saying she did not want me. She did not feel comfortable with me...observing her any more" [Tr., p. 477]. Neither the conference nor the observation was rescheduled.

A conference was held on January 13, 2014, to discuss the December 11 observation [Joint Exhibit 12]. On January 31 the teacher met with Principal Williams and Vice-Principal Rose for a mid-year review and rating [Joint Exhibit 13]. She was rated Ineffective. On March 3, the teacher was injured by a student in the eighth-grade classroom and missed almost two months of work while recovering.

On April 30, the day that she returned to work after the lengthy absence, the teacher was observed by the principal — unannounced — in a fourth-grade guided reading class. The teacher was rated Ineffective at the post-observation conference on May 15 [Joint Exhibit 14], and on that occasion her annual evaluation rating was declared to be the same.

After her annual evaluation, the teacher was observed on another occasion by Ms. Jackson, an outside Peer Validator (evaluator) and rated Ineffective [Joint Exhibit 15]. The report form was computer generated by Bloomboard and bore no signature. Ms. Jackson did not testify, and her rating played no part in the summative evaluation, according to the principal. [Tr., pp. 139-142].

DISCUSSION

TeachNJ was signed into law on August 6, 2012, and became effective on August 12. AchieveNJ, the procedure for evaluating teachers followed. When fully implemented, the legal framework created by these enactments would require a superintendent to file a charge of inefficiency if a rating of Partially Effective in one year is followed by a rating of Ineffective in the following year. The new scheme diminished a tenured teacher's allowable defenses against removal and provided for a forum of arbitral review whose scope was relatively narrow,¹² as outlined in a state publication:¹³

TEACHNJ clearly defines the criteria that arbitrators may consider in rendering their decisions. Specifically, the arbitrator may only consider the following four aspects:

- Whether the evaluation failed to adhere to the evaluation process.
- There is a mistake of fact in the evaluation.
- The charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination, or other conduct prohibited by State or federal law.
- The district's actions were arbitrary and capricious.

[TEACHNJ Guide (Updated 6-14), p. 6]

In order to resolve this dispute, the arbitrator has addressed below the three salient issues.

I. Is a Charge of Inefficiency in SY 2012-2013 Valid Under Section 25?

The teacher whose removal is being sought received ratings of Partially Effective and Ineffective in SY 2012-2013 and SY 2013-2014 respectively. The district maintains that filing a charge thus was mandatory. The teacher, however, denied that performance in SY 2012-2013 could be a basis for removal, since the new evaluation system was not yet fully formed. Poor ratings during a trial period should not count, the teacher maintains.

Determining procedural rules for removal under a complex statute has been a considerable task. Many aspects of the new system were ill-defined, challenging stakeholders to devise a suitable scheme for evaluation. At various points in the transition to the new framework, DOE has attempted to deal with ambiguities by issuing "guidance" documents and delivering less formal advice by means of websites, letters to districts, and press releases.

¹² Tenure cases previously were decided by administrative law judges.

¹³ The teacher noted: "This procedure is substantially different from the procedure for filing tenure charges alleging 'incapacity,' 'conduct unbecoming,' or 'other just cause,' which is set forth in N.J.S.A. 18A:6-16 and N.J.A.C. 6A:3-5.1(b). Letter Brief, October 10, 2014, fn. 2.

Local approaches to evaluation that would be consistent with the law have been fostered. Stakeholders in each district were encouraged to create Teaching Practice Evaluation Instruments. A three-year, statewide effort was planned, beginning before TeachNJ was even enacted. It involved a “pilot year” (SY 2011-2012) for some school districts, including Newark. Pilot status was announced by DOE in a press release on September 1, 2011:

10 districts have qualified to participate in Excellent Educators for New Jersey (EE4NJ) teacher evaluation pilot program over the course of the 2011-12 school year.... An eleventh District, Newark, will also participate in the pilot through a separate grant.

[District Submission, October 3, 2014]

Larisa Shambaugh, Executive Director of Strategic Initiatives in the Newark district’s Talent Office, oversees implementation of the process to “evaluate the teaching performance of NPS teachers,” according to the requirements of TEACHNJ [Id.]. The certification issued by Ms. Shambaugh on September 29, 2014, stated: “In the 2011-12 school year, seven NPS schools participated in a ‘pilot’ of a new teacher evaluation system.”

The parties agree that removal was not to be based on evaluations during the pilot year (SY 2011-2012). The dispute focuses on the next school year (2012-2013), when the legislature and DOE were still shaping the new system. In that period, minimum standards for evaluations were supplemented. The DOE Evaluation Pilot Advisory Committee (EPAC), a group of stakeholders who joined in a consensus-based process, was tasked with defining “best practice” under TEACHNJ in order to guide each district in refining its evaluation procedure. The arbitrator takes judicial notice of EPAC’s Interim Report (2011-2012), which specified the goals of the project:¹⁴

Based on the recommendations offered in the March 2011 Educator Effectiveness Task Force Report, the Department launched a teacher evaluation pilot program in the fall of 2011. This project was designed to enable the experiences of pilot districts to inform the development and implementation of the evaluation system to be launched statewide. Having successfully applied for grants through a competitive Notice of Grant Opportunity (NGO), 10 districts were selected to participate in the pilot program, splitting \$1.1 million in funds. Newark Public Schools also participated in the pilot using funding provided by another grant. In addition, 19 schools receiving federal School Improvement Grant (SIG) funds were required to participate.¹⁵

¹⁴ The interim report was cited [at p. 5] in the final EPAC report (2013), which was submitted in argument by the district on October 10, 2014 [Exhibit C].

¹⁵ Seven NPS Schools were listed as SIG Schools: Newark Central High School, Dayton Street School, Newark Vocational High School, Malcolm X. Shabazz High School, Brick Avon Academy, Barringer High School, and West Side High School [Appendix A, p. 29].

All participating districts were instructed to adopt the following elements of a teacher evaluation system during the 2012-13 school year:

- Thorough training of evaluators and teachers in effective teaching practices based on professional standards;
- Annual teacher evaluations that include multiple observations and result in clear, actionable feedback for improvement;
- Multiple measures of teacher practice and student performance, proven to be valid and reliable, with student academic progress or growth as a key measure;
- A summative rating that combines the scores of all the measures of teaching practice and student achievement;
- Four summative rating categories that clearly differentiate levels of performance; and
- A link from the evaluation to professional development opportunities that meet the needs of educators at all levels of practice [p. 7].

The EPAC report acknowledges that building a proper evaluation mechanism would be time-consuming and that full implementation would not be achieved until 2013-2014. Under the heading “Extension of the Pilot Program and Implementation Timeline,” the report recorded that

EPAC members provided ongoing input on pilot implementation and preparation for statewide rollout. Several concerns surfaced repeatedly in the course of the year. These included local districts’ capacity for meeting heightened expectations for educator evaluation, broad stakeholder input into local evaluation decisions, and the timing of full implementation. In early spring 2012, the Department decided that the timeline for statewide implementation of the new evaluation system should be extended. In addition, the Department decided that a second year of pilot implementation would be valuable to ensure the success of the new evaluation model. Both of these decisions were codified in the TEACHNJ Law enacted in the summer of 2012. *According to Peter Shulman, Assistant Commissioner, Division of Teacher and Leader Effectiveness, this course correction was made in large part due to the feedback received via the EPAC from pilot districts and EPAC members. The decision to extend (and expand) the pilot program into 2012-13 and push back full implementation to 2013-14 was met with universal acclaim by EPAC members. One commented that she was “impressed when the EPAC pressed for the extended year and the Department took the recommendation [Emphasis added, pp. 21-22].”*

The report’s conclusion offered the following caution:

While the theory behind the evaluation initiative is sound, it is clear from the deep work of the EPAC and the Cohort One pilot districts that the task of bringing these goals to fruition is difficult and complex. Even with an extended implementation timeline, *an extra year of piloting, and additional districts engaged in trial runs of a new system*, this work is just beginning and promises to present challenges for years to come [Emphasis added, p. 28].

By December 31, 2012 (SY 2012-2013), all public school districts, including NPS, had to develop and obtain approval for the rubric, which is the

specific tool for use in implementing the Framework for Effective Teaching in observations or evaluations. Depending on the rubric, it may include competencies, indicators, and descriptors that specify what each competency and indicator looks like in practice at different levels of performance.

[NPS Framework for Effective Teaching: A Guidebook for Teachers and Administrators, 2012-2013, Appendix A: Glossary of Terms, p. 30]

In short, SY 2012-13 was seen as a time for refining and establishing the new evaluation procedure. A variety of deadlines were set to occur during the course of that school year for

- finalizing evaluation rubrics (December 31, 2012—extended until January 31, 2013, for some districts)
- promulgating regulations (March, 2013)
- putting regulations into effect (October, 2013)

EPAC's final report noted: "The Department recognizes that statewide implementation of AchieveNJ in SY13-14 is just one step on the path to improving student achievement in New Jersey" [p. 43]. This sentiment was echoed in the DOE Guide to the TEACHNJ Act: "The law mandates statewide implementation of stronger, more rigorous evaluation systems starting in the 2013-2014 school year" [TEACHNJ Guide (Updated 6-14) p. 3].

The district maintains that it had taken advantage of SY 2011-2012, designated as a pilot year, to fine-tune the new evaluation system. By the summer of 2012, according to Ms. Shambaugh, the evaluation instrument (the rubric) was complete, evaluators were trained in its application, and a guidebook for teachers and administrators had been made available. In September the district applied for DOE approval, which was granted the next month [Shambaugh Certification, September 29, 2014, Exhibit C]. Therefore, the district argues, its program was not merely preliminary but fully functional when the teacher was evaluated in SY 2012-2013. The district considers that the ratings were valid grounds for removal under Section 25.

Nevertheless, in a well-reasoned decision involving Newark schools (*Whitehurst*), Arbitrator Simmelkjaer carefully analyzed the statutory language and its context, concluding that SY 2012-2013 "was intended as a test year in preparation for the 2013-14 school year wherein all tenure related issues, including the establishment of the criteria for completing evaluations and observations...would be implemented" [at p. 39]. He noted that state officials had described SY 2012-2013 as "a planning and capacity building year" [at p. 46]. The undersigned arbitrator concurs with the Simmelkjaer analysis.

This decision and others in the same vein are supported by the foregoing review of the historical record, which demonstrates that the state's educational planners strove to introduce the new tenure removal framework incrementally over a period of years, allowing stakeholders to assess the innovations and make necessary adjustments. The

EPAC report cautioned districts against rushing the process and encouraged them to first improve metrics for judging teacher performance. Each district was empowered to develop its own approach, adapting the law to conditions on the ground. Experimentation did not necessarily end with SY 2011-2012, the initial pilot year.

The wisdom of incrementalism was evident in the deviations from the evaluation process that marred the tenure removal effort at the 13th Avenue/MLK School in SY 2012-2013. In opting to begin the charge in that year, the school clearly acted prematurely. It was in the throes of reorganization, striving to meld two failed schools into a single coherent entity. Students were performing poorly, and there was turnover of leadership.

Teachers were recruited hurriedly and thrust into conditions that bordered on chaotic. They were abruptly handed assignments for which they were ill-prepared. Key curriculum materials were not even shared with teachers until mid-January — that is, after the observations of Teacher Williams had been completed. She received no more support than other teachers, according to the principal, even though a 90-day improvement plan had been imposed on her.

Although not required by regulation until the next school year, pre-observation conferences and announced observations were regarded as important by the district for assisting struggling teachers. Yet the benefits of these measures were denied to Teacher Williams. The circumstances thus demonstrate that the school was not ready to properly carry out its responsibilities under the new tenure removal framework in SY 2012-2013.

The year was also marked by other irregularities, including the following:

- All the observations of the Teacher Williams were incomplete, were labeled draft or near final draft. In the annual evaluation she is referred to in one place by the wrong name [Joint Exhibits 2-6].
- Academic performance data to benchmark student learning was lacking.

II. Did the Evaluation in SY 2013-2014 Meet the Requirements of Section 25?

The arbitrator's interim award retained jurisdiction for the purpose of resolving any and all disputes regarding the tenure charges brought against the teacher by SOSD of Newark for SY 2013-2014. The teacher's evaluation rating for that year was Ineffective. Having provided the parties with a full and fair opportunity to present evidence and argument, the arbitrator finds that the evaluation failed to adhere to the prescribed process in SY 2013-2014, because it was replete with arbitrary and capricious actions that materially affected the outcome by placing the teacher at a distinct disadvantage.

Lack of an Announced Observation. AchieveNJ mandates at least one announced observation each year, and the district's framework emphasizes the utility of announced observations for struggling teachers. The record demonstrates that announced observation provides crucial support in planning and executing a teacher's responsibilities. Yet the principal acknowledged the lack of an announced observation for Teacher Williams in SY 2013-2014.

A pre-conference had been scheduled for December 18, 2013, but it was cancelled because the teacher had filed various complaints against Ms. Rose, who had been her evaluator. There was no attempt to reschedule a pre-conference or an announced observation [Tr., pp. 270, 689], and no satisfactory rationale for the omission has emerged.

The district offered two questionable explanations. First, it asserted that the teacher sought the cancellation [Brief, p. 22], but she merely objected to Ms. Rose as the evaluator. By the time Principal Williams conducted the unannounced observation on December 11, she was aware of the cancellation; nothing precluded her from conducting the pre-conference herself on December 18 and following with the announced observation scheduled for December 19 [Tr., 479, Plaintiff Exhibit 5].

Second, the principal pointed to the teacher's attendance record, which she regarded as substandard.¹⁶ She contended that persistent absenteeism ruled out rescheduling of the pre-conference and announced observation. She testified that on the day the teacher

was scheduled for the announced observation, she was absent, so there was no way we could conduct an announced observation if you are absent on the day we're telling you we're coming to observe you. The other thing is, too, is that she had quite a few absences throughout the school year. So it was pretty much we had to—you know, when she was there was the opportunity when we had to come in and work and give feedback during that particular time [Tr., p. 167].

In recommending to Superintendent Anderson that both the initial tenure charge and the second charge be brought, Principal Williams sent letters (identical and undated) that included the following sentences:

Ms. Williams did not receive an opportunity to have a pre-conference prior to an observation because of her absences. Every time a pre-observation conference was scheduled she would be absent on that date [Joint Exhibit 1 and Attachment one in the second tenure charge submission].

¹⁶ Points were deducted for absences and tardiness in the teacher's annual Summative Evaluation.

Among the teacher's interrogatories, which were certified by Principal Williams in November, 2014, is a somewhat different explanation:

9. How many announced observations (short or long) did Respondent receive during the 2012-2013 and 2013-14 school years, respectively?

Answer: ...The School District responds: Vice Principal Simone Rose scheduled an announced observation for Respondent for December 18, 2013. The observation did not occur because Respondent objected to Ms. Rose evaluating her since Respondent had filed a complaint against Ms. Rose.

[Respondent Exhibit 38]

The district argued:

As to 2013-14, an announced observation was scheduled for December 18, 2013 but was cancelled at Respondent's request and was not rescheduled. (V. Williams, T270; Rose, T479.) It would be unreasonable to conclude that a lack of one announced observation was arbitrary or capricious, or materially affected her summative evaluation for that year.

[Petitioner Brief, p. 22]

Nevertheless, the shifting reasons for ignoring the teacher's right to at least one announced observation for the year are less than compelling. The notion that it was not worthwhile to schedule a pre-conference and announced observation because the teacher would be absent is presumptuous, to say the least. Given the assignment changes to which the teacher was forced to adapt during the year, the possibility that the observation would have significantly improved her evaluation results cannot be lightly dismissed. Eliminating the prescribed observation must be viewed as a serious failure to adhere to the evaluation process .

Unannounced Observation on Return from Extended Leave. The teacher returned from almost two months of leave on April 30, 2014, and was greeted with an unannounced observation early that day. A teacher normally could expect to be allowed time to discover what had happened in her absence and determine the priorities for resuming her workload. An observation at the very moment she returns from a lengthy absence seems calculated to catch a teacher before she has re-acclimated herself to the classroom and gotten her bearings. In this instance, the teacher discovered that her teaching materials were not organized in the way she left them, and the classroom appeared

almost like ransacked, because the teacher who I shared it with, she had gone out on a family leave like weeks before, so the classroom was open, and it was just being utilized. I don't even know what was happening while I was gone, because when I came back, it was just me in the classroom, and there was just stuff everywhere [Tr., p. 679].

Moreover, although the district contends that she was never evaluated while teaching eighth grade, the teacher has argued persuasively in her post-hearing brief that she was indeed rated for that ability:

In the certified answers to interrogatories provided by Principal Williams in this case (R-38), Principal Williams claimed that although Ms. Williams was not certified to teach 8th grade, "Respondent was never observed in Room 330 for the purposes of evaluation." (R-38 at 11, Answer to interrogatory no. 21). However, this is not true. In Ms. Williams' annual summative evaluation Principal Williams stated the following under "evidence based growth areas" in connection with Ms. Williams' rating for Competency 3:

Ms. Williams provided guided reading instruction to students in 8th grade, and was not clear with expectations to students. As a result, students walked out of class, ran away from her while she transitioned them to her classroom. There were no consequences established with students, and behavior earning system was not used or established with students. As a result of norms not followed and established by teacher and students, classroom community was negative.

(J-16A at 5). As a result, Ms. Williams was rated "partially effective" in this competency. *Id.* Accordingly, and contrary to Principal Williams' claim, Ms. Williams was evaluated in connection with her instruction of the 8th grade students, despite the fact that she was not even certified to teach this grade.

[Brief, at pp. 13-14]

The annual evaluation for SY 2013-2014 also was deficient because it was not based on student achievement data. The administrators gave conflicting testimony about which data could be utilized. The principal suggested that data from her SY 2012-2013 kindergarten students could somehow provide a basis for evaluating student mastery the next year. But there was only one student in common, not many, as the principal asserted [Tr., p. 824]. Finally, as in SY 2012-2013, extraordinary support from the school, other than the CAP, never materialized. The reassignments actually kept her from other sources of support: the accompanying change of preparation period prevented her from attending Turnaround for Children workshops and other professional development activities provided to her grade-level colleagues [Tr., 691-692].

Multiple Involuntary Re-Assignments. During SY 2013-2014, the teacher received four classroom re-assignments, involving various age groups and subjects. The most detrimental to the teacher was the assignment, beginning on December 11, to teach eighth-grade math, even though she lacked certification for that grade and considered herself ill-equipped to deal with older students who chronically misbehave. In the class she was asked to teach, the students were so lacking in self-control that they required escorts to the bathroom. Sadly, her concerns were validated by the subsequent physical injury she suffered at the hands of a student. The principal manifestly believed the teacher to be exaggerating her injuries, even though they qualified for workers' compensation, and

regarded her a malingerer, despite a lack of concrete evidence. Those groundless views contributed to an unfavorable impression of the teacher's abilities and efforts.

An unannounced observation in December, 2013, is emblematic of the district's prejudicial approach. The principal faulted the teacher for not putting December 12 on the board for a first-grade class. That date could not have been correct, however, because the teacher's attendance record shows that she was absent on December 12, as the principal conceded in her testimony [Tr., p. 226, Joint Exhibit 39]. The observation must have taken place on December 11, the day she learned of the re-assignment. It was the principal who mistook the date but the teacher who was blamed for poor performance.

It is noteworthy that, on a day when she was already under stress from an unexpected change of assignment to a higher grade, she was also subjected to an unannounced observation in a lower-grade class. The new arrangement entailed a physical obstacle: her two eighth grade classes (Period Three and Period Six) were on a different floor than the lower grades, and her ankle was injured. Although she was allowed to use the elevator as a disability accommodation, changing classrooms quickly was difficult.

The post-conference for this observation did not occur until January 13, so that shortly after gaining the feedback her assignment changed again. On January 15 she was ordered to teach guided reading to four different grades, including two eighth-grade periods. As a result, the mid-year summary evaluation (January 30) occurred amid drastic disruption of her schedule. She testified

[E]very time I was getting ready to get into like a groove of teaching the kids, getting to know them, starting to get the day rolling, I was immediately switched to another role, so I never got an opportunity to master or be effective, I should say, in that particular role because it seemed like a couple weeks, a couple months later, I was changed into another role. So I pretty much felt like I was just—just out there, kind of just feeling my way through; you know, along with other things that were happening at the same time. But focusing on what you just asked me, I just felt like I never got a chance to master—to become the effective or highly effective teacher that I feel that I am capable of being [Tr., pp. 678-679].

III. Can the Charge Be Amended and Brought Under Section 8?

In *Whitehurst*, Arbitrator Simmelkjaer declined to consider under Section 8 a charge of inefficiency that had been brought originally under Section 25, because the two provisions were asymmetrical in their purpose and procedure:

[H]ad the Legislature intended that a teacher charged with inefficiency for two consecutive years, with 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 charge [at p. 50].

Similarly, Arbitrator Brent held in *Thompson*, another Newark case, that he could not “permit a charging party to add a new cause of action that was not included as part of the original tenure charge” [at p. 6], because “[p]leading two separate causes of action, each invoking different standards of proof, requires adequate prior notice.” He reasoned that it would be a denial of due process to allow the district to “materially increase the exposure of the Respondent to culpability and penalty by adding a cause of action during the hearing phase of a tenure charge proceeding, and certainly not after the record has been closed” [at p. 7]. The undersigned arbitrator agrees with these holdings and therefore must reject the concept of rehabilitating¹⁷ the charge as an Article 8 claim.

CONCLUSION

For the reasons discussed above, and after considering the arguments and the entire record, the arbitrator concludes that all charges against the teacher must be dismissed.


Tia Schneider Deneberg
Arbitrator

DATED: March 30, 2015

¹⁷ The district agreed at the hearing not to present an Article 8 claim, recognizing the difficulty of arguing from two different statutory grounds simultaneously.

In the Matter of the Tenure Hearing of

**Rinita Williams
and
State-Operated School District
of the City of Newark
in the County of Essex, NJ**

Re: Tenure Charge of Inefficiency
Agency Docket No. 241-8/14 and 17-1/15

Award of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L. 2012, c. 26, to hear and decide the above-captioned matter, rules as follows:

With respect to Agency Docket No. 241-8/14 and Agency Docket No. 17-1/15, the charges against the teacher are dismissed for the reasons given in the accompanying opinion. The teacher shall be reinstated with full back pay and benefits to another NPS school.



Tia Schneider Denenberg
Arbitrator

DATED: March 30, 2015

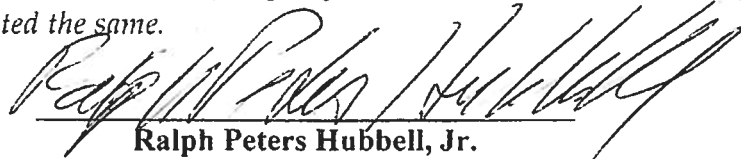
I, Tia Schneider Denenberg, do hereby affirm that I am the individual described in and who executed this instrument, which is my award.



Tia Schneider Denenberg
Arbitrator

*State of New York
County of Columbia*

On this 30th day of March, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.



Ralph Peters Hubbell, Jr.
*Notary Public State of New York
No. 4793303
Qualified in Dutchess County
Commission Expires October 31, 2015*