

**STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES
TENURE HEARING**

In the Matter of the Arbitration Between)	
STATE-OPERATED SCHOOL DISTRICT)	
CITY OF NEWARK, NJ)	
PETITIONER)	DECISION ON
And)	MOTION TO
SHERLENE THOMAS)	DISMISS
RESPONDENT)	TENURE CHARGES
Agency Docket 257-9/15)	

ARBITRATOR	GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1
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APPEARANCES:

<u>FOR THE PETITIONER</u> JERROLD WOHLGEMUTH, ESQ. ADAM HERMAN, ESQ.	COUNSEL FOR PETITIONER COUNSEL FOR EMPLOYER
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<u>FOR THE RESPONDENT</u> NICHOLAS POBEREZHSKY	COUNSEL FOR RESPONDENT
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PROCEDURAL BACKGROUND

On August 11, 2015, Edwin Reyes, Principal of Technology High School, in the State-Operated School District of the City of Newark, filed a Notice of Inefficiency, (tenure charges) against the Respondent. That Notice of Inefficiency included thirty-five (35) separate counts of an inability of the Respondent to “completely and responsibly execute her duties as a teacher” for the period of September 2013 to the present. Those charges were filed pursuant to N.J.S.A. 18A:6-11, and N.J.S.A. 18A:6-17.3. On or about August 14, 2015, the above charges were served on the Respondent.

On September 8, 2015, Christopher Cerf, Superintendent of the State-Operated School District of the City of Newark, filed a Certification of Determination in support of the Tenure Charges filed by Principal Edwin Reyes. That Certification was filed in accordance with N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3. Superintendent Cerf also determined that, in accordance with N.J.S.A. 18A:7A-39 and N.J.S.A. 18A:6-14, the Respondent is to be suspended without pay for one hundred-twenty (120) days effective September 9, 2015.

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

On September 21, 2015, the Respondent filed an answer to the tenure charges. On September, 28, 2015, M. Kathleen Duncan, Director of New Jersey Department of Education’s Bureau of Controversies and Disputes, sent a letter to Messrs. Wohlgemuth and Poberezhsky in which she indicated that the tenure charges and Respondent’s

answer were reviewed pursuant to N.J.S.A. 18A:6-17.3 c, and upon review *“the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator’s decision with regard to those charges shall be made pursuant to N.J.S.A. 18A:6-17.2, subject to determination by the arbitrator of Respondent’s defenses and any motions which may be filed with the arbitrator.”* Additionally, Ms. Duncan stated that the arbitrator “shall review those charges brought pursuant to N.J.S.A. 18A:6-16 which are not dismissed as a result of a motion – under the preponderance of evidence standard.”

Accordingly, on this date, the case is being referred to Arbitrator Gerard G. Restaino. On October 16, 2105, a conference call was held to establish a briefing schedule. Both parties indicated they would need two (2) days to present their case in chief. On October 21, 2105, Respondent, with supporting letter memoranda, Certification and exhibits, submitted a motion to the arbitrator seeking to have the tenure charges dismissed because they were improperly derived, filed pursuant to incompatible provisions of the TEACHNJ Act, as well as the N.J.A.C. thereby rendering them defective.

On November 6, 2015, Petitioner submitted a letter brief in Opposition to Respondent’s Motion to Dismiss the tenure charges accompanied with Certification and numerous exhibits. On November 10, 2015, Respondent submitted a reply letter to Petitioner’s brief in Opposition to the Respondent’s Motion to Dismiss.

On November 13, 2015, Petitioner submitted a letter in opposition the Respondent’s November 6, 2013, reply letter alleging that the parties did not agree that any reply letters, briefs would be filed. Petitioner also addressed why the Motion to

Dismiss should be rejected. However, during the October 16, 2015, conference call the Arbitrator asked if there were going to be any reply briefs. Mr. Herman co-counsel for Petitioner stated he did not see a need for a reply brief. Mr. Poberezhsky stated he was not sure if he would file a reply brief, but at that time he did not want to preclude the filling of a reply brief.

Therefore, reply briefs are acceptable and will be made part of the record.

RELEVANT STATUTORY PROVISIONS:

N.J.S. 18A:6-11 is amended to read as follows:

Written charges, statement of evidence; filing; statement of position by employee; certification of determination; notice.

18A:6-11. *Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statement of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board find that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. The consideration and actions of the board as to any charge shall not take place at a public meeting.*

8. *N.J.S. 18A:6-16 is amended to read as follows:*

Proceedings before commissioner; written response; determination.

18A:6-16. *Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's in the proceedings shall examine the charge and certification. The individual against whom the charges are certified shall have 15 days to submit a written*

response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges.

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012, c.26 (C.18A:6-17) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

18A:6-17.2 Considerations For Arbitrators In Rendering A Decision.

23.a In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including to, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by federal and state law, or other conduct prohibited by state or federal laws; or

(4) the District's actions were arbitrary and capricious."

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

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

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

18A:6-17.3 Evaluation Process, Determination Of Charges.

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

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

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

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

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

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

18A:6-123 Review, Approval Of Evaluation Rubrics

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

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

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

SUBCHAPTER 5. CHARGES UNDER TENURE EMPLOYEES' HEARING ACT

N.J.A.C. 6A:3-5.1 Filing of written charges and certificate of determination

(a) N.J.A.C. 6A:3-1.3, Filing and service of petition of appeal, shall not apply in a case of tenure charges filed with the Commissioner against an employee of a district board of education or of a school district under full State intervention. In place of the usual petition, the district board of education or the State district superintendent shall file written charges and the required certificate of determination with the Commissioner, together with the name of the attorney who it is anticipated for administrative purposes will be representing the district board of education or State district superintendent and proof of service upon the employee and the employee's representative, if known. Such service shall be at the same time and in the same manner as charges are filed with the Commissioner.

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

1. When the conditions described in N.J.S.A. 18A:6-17.3.a(1) or (2) have been satisfied, the superintendent shall promptly file with the secretary of the district board of education a charge of inefficiency.

2. The charges of inefficiency shall be transmitted to the affected tenured employee and the employee's representative, if known, within three working days of the date they were filed with the secretary of the district board of education or the State district superintendent. Proof of mailing or hand delivery shall constitute proof of transmittal.

3. The affected tenured employee shall have an opportunity within 10 days of receipt to submit to the district board of education or the State district superintendent a written statement of position under oath demonstrating how the school district failed to comply with the evaluation procedures.

4. Within 30 days of the filing, the district board of education or State district superintendent shall forward a written charge to the Commissioner unless the district board of education or superintendent determines the evaluation process has not been followed. Such determination shall be made by a majority vote of the district board of education's full membership or by the State district superintendent.

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

6. Within five days of the individual's deadline to submit a written response to the charge, the Commissioner shall appoint an arbitrator to hear the case and refer the case to the arbitrator, unless he or she has determined that the evaluation process has not been followed.

7. Pursuant to N.J.S.A. 18A:6-11, all deliberations and actions of the district board of education with respect to such charges shall take place at a closed meeting.

N.J.A.C 6A:10-2.1 Evaluation Of Teaching Staff Members

(a) A district board of education annually shall adopt evaluation rubrics for all teaching staff members. The evaluation rubrics shall have four defined annual ratings: ineffective, partially effective, effective, and highly effective.

(b) The evaluation rubrics for teachers, principals, vice principals, and assistant principals shall include all other relevant minimum standards set forth in N.J.S.A. 18A:6-123 (P.L. 2012, c. 26, § 17c).

(c) Evaluation rubrics shall be submitted to the Commissioner by June 1 for approval by August 1 of each year.

N.J.A.C 6A:10-2.2 Duties of district boards of education

(a) Each district board of education shall meet the following requirements for the annual evaluation of teaching staff members, unless otherwise specified:

1. Establish a District Evaluation Advisory Committee to oversee and guide the planning and implementation of the school district board of education's evaluation policies and procedures as set forth in this subchapter;

2. Annually adopt policies and procedures developed by the chief school administrator pursuant to N.J.A.C. 6A:10-2.4, including the evaluation rubrics approved by the Commissioner pursuant to N.J.A.C. 6A:10-2.1(c);

N.J.A.C. 6A:10-2.4 Evaluation Procedures For All Teaching Staff

a. This section's provisions shall be the minimum requirements for the evaluation of teaching staff members.

c. The annual summary conference between designated supervisors and teaching staff members shall be held before the written performance report is filed. The conference shall occur on or before June 30 of each year and shall include, but not be limited to, a review of the following:

3. Available indicators of scores of student achievement or growth, when applicable such as student growth objective scores and student growth percentile scores; and

4. The preliminary annual written performance report.

d. If any scores for the teaching staff member's evaluation rubric are not available at the time of the annual summary conference due to pending assessment results, the annual summative evaluation rating shall be calculated once all component ratings are available.

N.J.A.C 6A:10-4.2 Student Achievement Components

(e) Student growth objectives for teachers shall be developed and measured according to the following procedures:

5. *Adjustments to student growth objectives may be made by the teacher in consultation with his or her supervisor only when approved by the chief school administrator or designee. Adjustments shall be recorded in the teacher's personnel file on or before February 15.*

POSITIONS OF THE PARTIES

For the Respondent

Respondent argues that for the following three (3) reasons the Tenure Charges of Inefficiency must be dismissed:

1. Respondent's summative evaluation for the 2014-2015 school year was improperly derived, thereby rendering the tenure charges defective. Respondent contends the *"Petitioner woefully failed to meet its legal obligations with respect to the Respondent's 2014-2105 summative evaluation by not factoring in the appropriate SGO¹ into her final evaluation."* Moreover, she also states that *"it appears that Petitioner skewed the evidentiary record to make it appears as if these obligations were met, which is remarkable"*. Respondent further alleges *"that Petitioner fabricated the evidentiary record to overcome its shortcomings."*

Respondents CAP² for the 2014-2015 school year, *"which was implemented on October 8, 2015, listed diagnostic test as the assessment metric, and even provided the results of the diagnostic exam when it was administered at the start of the school year."*

¹ SGO Student Growth Objective

² CAP Corrective Action Plan

Unbeknownst to Respondent, the CAP was apparently edited by an administrator to include the words April 2015 following diagnostic test.”

Respondent acknowledges that Petitioner submitted a version of the October 8, 2014, CAP with handwriting on it as part of its record of evidence. Nevertheless, on page 3 of the CAP, someone circled the words “*diagnostic exam and wrote post April 2015 above it, drawing a line connecting the two phrases.* (see Respondent’s Certification, Exh. F)

Respondent further argues that “[L]ow and behold, the CAP that was included with the Statement of Evidence attached to the instant charges listed [diagnostic test] April 2015 as its assessment metric in regular print with no handwriting.” (see Respondent’s Certification, Exh. F). Respondent asserts that the data used by the Petitioner to factor her SGO was “*based on classroom quiz results, not the diagnostic exam.*” In fact, “*the documents containing the students’ grades were actually labeled as quizzes.*” (see Respondent’s Certification, Exh. G)

Respondent contends that the “*implication is clear. In an effort to correct the deficiency in her summative evaluation – namely, failing to factor the appropriate, agreed to SGO scores, therein – Petitioner may have retroactively changed the assessment metric in her CAP to justify the otherwise premature issuance of her 2014-2015 summative evaluation.*” Most importantly, Respondent never had the opportunity to re-administer the diagnostic exam to her students, which is the “*appropriate assessment metric to determine whether she met her SGOs.*”

Respondent alleges that even if Petitioner was not acting in bad faith and the CAP was not retroactively changed “*following her annual summative conference, the*

instant tenure charges are facially effective and must be dismissed.” Respondent argues that the “Partially Effective overall rating she received in 2014-2015 is not valid and without two (2) consecutive ineffective or partially effective summative ratings, tenure charges based on inefficiency may not be filed.” Moreover, in accordance with 18A:6-17.3 et al, Petitioner may not submit any additional evidence to correct this deficiency.

In her Certification (see ¶ 7) Respondent stated “[I] never requested to adjust my CAP, including the SGOs and corresponding assessment metrics, at any point during the 2014-2015 school year. It was always my understanding that the terms of my CAP would not be changed unless I personally requested adjustments to it. I signed the CAP during the follow-up meeting on October 14, 2014, but it was not explained to me that adjustments were made to the original CAP terms we agreed to.”

2. Respondent asserts that Petitioner may argue that *“even if the 2014-2015 summative evaluation was erroneously derived, thereby rendering the tenure charges based on inefficiency (N.J.S.A. 18A:6-17.2 and 6-17.3) defective, they may still be heard on the basis of conduct unbecoming (N.J.S.A. 18A:6-11). Even though Petitioner filed its tenure charges pursuant to both provisions of TEACHNJ Act, the inefficiency provision (N.J.S.A. 18A:6-17.2 and 6-17.3) commonly referred to as Section 25 of the Act, is the only appropriate basis here.”* Furthermore, there was *“absolutely no rational for Petitioner to bring the charges under the conduct unbecoming provision (N.J.S.A. 18A:6-11). That section of the statute refers to [a] charge made against any employee of a board of education under tenure during good behavior and efficiency.”*

Respondent questions “[H]ow can Petitioner justify bringing tenure charges under N.J.S.A. 18A:6-11, which is only applicable to efficient employees, and also Section 25 which is predicated on inefficiency”.

In support of her argument, Respondent references the arbitration awards of arbitrators Stephen Bluth, I/M/O Tenure Hearing of Sandra Cheatham, State-Operated School District, City of Newark, Agency Docket No, 68-3/15 and Daniel Brent I/M/O Tenure Hearing of Jodi Thompson, State-Operated School District, City of Newark, Agency Docket 240-8/14 and 16-1/15. Arbitrator Bluth dismissed the tenure charges filed under N.J.S.A. 18A:6-11 because “they were based on the same facts that gave rise to charges previously filed under Section 25. Arbitrator Brent dismissed the Petitioner’s tenure charges because “*there was no valid basis in the statute to afford the District two separate, sequential opportunities to litigate identical charges arising from the same set of facts by citing different sections of the statute in two sets of tenure charges.*”

3. Respondent also contends that Petitioner violated the terms of N.J.A.C. 6-10-2.4(4)(d), and her 2014-2015 summative evaluation was legally defective. That provision of the Administrative Code prevents the Petitioner from factoring “*Respondent’s annual summative rating until her student assessment results were available.*” Petitioner’s Framework for Effective Teaching (see Petitioner Exh. 1) states that the “*annual evaluations for teachers on a CAP should be completed by May 15th, but also notes that the required state deadline to complete annual evaluations is the end of the school year.*”

Therefore, *“Petitioner was not required, even by its own policies, to calculate Respondent’s summative rating for the 2014-2015 school year by May 15, 2015.”*

Petitioner never afforded Respondent an opportunity to re-administer the diagnostic exam, *“even at the time of the annual conference. By then, she was told that her evaluation rating was already calculated, and she was deemed ineffective.”*

Accordingly, Respondent strongly argues that the 2014-2015 annual summative rating was legally defective, improperly obtained and cannot be used in these proceedings. Most importantly, because there are not two (2) consecutive partially effective or ineffective annual summative ratings, the instant tenure charges must be dismissed.

For the Petitioner

Respondent was assigned as a math teacher at Technology High School for the 2013-1014 and 2014-2015 school years. For the 2013-2014 school year her annual summative evaluation rating was “partially effective.” (see Exh. 1, ¶ 3). Therefore, Respondent was placed on a CAP for the 2014-2015 school year. (see Exh. 1, ¶ 4) On September 30, 2014, Respondent met with her supervisor, Vice Principal Milagros Ortiz, for a goal setting conference to discuss Respondent’s CAP for the 2014-2015 school year. (see Ortiz Certification ¶ 4, and Exh. A) The goal setting conference had to be adjourned and re-scheduled for October 8, 2014, because Respondent failed to submit her CAP form by September 26, 2014. (see Ortiz Certification ¶¶ 5-7, and Exh. A)

During the October 8, 2014, meeting, Vice Principal Ortiz gave Respondent a draft CAP *“along with Ms. Ortiz’s handwritten notes and comments, so that Respondent*

could incorporate same into her final CAP.” (see Ortiz Certification ¶ 8). One of Vice Principal Ortiz’s handwritten note on the CAP form stated that *“Respondent was to administer a follow up diagnostic math test to her students in April 2015.”* (see Ortiz Certification ¶ 9, and Exh. B) The Respondent had already administered a diagnostic math test to her students in September 2014, and the follow up was to measure student growth. (see Ortiz Certification ¶ 10). Petitioner strongly argues that subsequent to the October 8, 2014, meeting, Ms. Ortiz emailed the draft CAP with her handwritten notes to Respondent along with various suggested action steps, and Respondent was asked to update her CAP on the Bloom Board system. (see Ortiz Certification ¶ 12)

As a tenured teacher a CAP Respondent’s annual evaluation was required to be completed by May 15, 2015. (see Ortiz Certification ¶ 11, and Exh. C). Moreover, the “Framework For Effective Teaching, Newark Public Schools Teacher Performance Evaluation, A Guidebook for Teachers & Administrators, 2014-2014” specifically states that for tenured teachers on a CAP, annual evaluations should be completed by May 15, 2015. (see Ortiz Certification ¶ 11, and Exh. C)

Only teachers such as Respondent have the ability to modify and finalize their actual CAP document through the Bloom Board system. Accordingly, on October 14, 2015, Respondent made her final edits to the CAP for the 2014-2015 school year on the Bloom Board system. (see Ortiz Certification ¶¶ 13-14, and Exh E and F). One of the edits made by the Respondent to her 2014-2015 CAP *“was to specify that the diagnostic test was to be given in April as required. Thus, on the third page of the CAP under the heading [Assessment/Metric] Respondent herself typed ...Diagnostic test - April 2015.”* (see Ortiz Certification ¶ 15, and Exh. E). After Respondent made her final

edits to the CAP on October 14, 2015, including the insertion of the phrase “...*diagnostic test April 2015,*” Respondent and Vice Principal Ortiz signed the CAP that same day. (see Ortiz Certification ¶ 16, and Exh. E)

Petitioner argues that “*no adjustments were made to the CAP after October 14, 2015.*” (see Ortiz Certification ¶ 20).

Respondent did not administer the diagnostic tests to her students in April, May, and June 2015. (see Ortiz Certification ¶ 19). Petitioner acknowledges that during the May annual evaluation conference Respondent submitted quiz results, but “*those quiz results could not, and were not utilized as part of her SGO.*” (see Ortiz Certification ¶ 21). Petitioner was “*unable to determine Respondent’s SGO because she failed to administer the diagnostic test to her students in April 2015 as required.*” (see Ortiz Certification ¶ 22). As Respondent was rated partially effective in 2013-2014 and ineffective in 2014-2015, the two (2) consecutive school years standard as set forth in N.J.S.A. 18A:6-17.3 was implemented by Petitioner.

Respondent failed to comply with the requirement in her CAP that she was to administer the diagnostic math test to her students in April 2015. Petitioner strongly asserts that Respondent’s argument that Petitioner failed to meet its obligations by not factoring in the appropriate SGO scores into her 2014-2015 annual evaluation is fundamentally flawed for the reasons set forth above and below.

As previously indicated, Respondent administered a diagnostic math test to her students in September 2014 “*in which 23 of her 26 students were unable to answer questions about circles, and in which 20 of her 26 students were unable to make geometric constructions and express geometric properties with equations. As such, as*

a result of the goal setting conference, Respondent's CAP identified two student learning goals for the 2014-2015 school year: (a) understanding and applying theorems about circles; and (b) make geometric constructions and express geometric properties with equations. (see Ortiz Certification ¶ 16, and Exh. E) Moreover, "Respondent's CAP made clear that she was to administer the same diagnostic test in April 2015, as a measure of student growth in these two areas." (see Ortiz Certification ¶ 16 and Exh. E)

Petitioner asserts that Respondent acknowledged Vice Principal Ortiz's recommendation, and the Respondent herself incorporated and typed the April 2015 date into her CAP using the Bloom Board system. Once signed by both Respondent and Vice Principal Ortiz, Respondent was *"expected to ensure that her students met their learning objectives, which were then to be measured when Respondent's students retook the follow up diagnostic test in April 2015."*

Furthermore, Petitioner argues that it *"is without any knowledge as to why Respondent ignored her responsibilities and decided not to retest her students. To the extent the Respondent had fallen behind with her lesson plans, Respondent had the ability to adjust her SGOs by February 15, 2015. (see N.J.A.C. 6a:10-4.2(e)4. Respondent, however, never requested or made any attempt to adjust her SGOs."*

Petitioner contends that the Respondent's summative evaluation was not issued before she had an opportunity to re-administer the diagnostic test. More importantly, the Respondent's argument that the Petitioner *"did not factor the appropriate SGO scores into her final evaluation, incredibly overlooks the fact the she did not re-administer the assessment within the time unequivocally set forth in the October 14, 2014, CAP."*

Additionally, Petitioner *“did not surreptitiously speed up the date of Respondent’s final evaluation. Respondent was fully aware of the fact that she was on a CAP, that her CAP stated she was to administer the diagnostic test in April 2015.”*

Petitioner strongly argues that the record clearly and unequivocally establishes that in October 2104, *“Respondent was made aware of her SGOs and her obligations to retest her students in April 2015 in order to determine if her class experienced growth in its knowledge of circle theorems and geometric constructions and properties.”* It certainly appears to the Petitioner that Respondent intentionally disregarded the unambiguous and agreed-upon obligations in her CAP.

Petitioner asserts that Respondent completely ignores the reality of how her CAP for 2014-2015 school year was created. She conveniently overlooks the fact that she herself put into her Cap using the Bloom Board system *“April 2015.”* The record clearly established that only Respondent can edit, delete, or make changes to her CAP using the Bloom Board system. Administrators or supervisors cannot make any changes to a teachers CAP in the Bloom Board system.

Petitioner asserts that Respondent’s motion to dismiss is baseless, must be denied and the hearing on the tenure charges should proceed as scheduled.

OPINION AND ANALYSIS

Respondent’s arguments in support of her Motion to Dismiss Tenure Charges are based upon three (3) significant components. Preliminarily, Respondent has a high level of comfort in her arguments that Petitioner violated N.J.A.C. 6A 10. 2.1, 2.2, 2.4, N.J.S.A.18A:6-123, and Petitioner’s Framework for Effective Teaching, Newark Public Schools Teacher Performance Evaluation concerning her May 14, 2015, annual

summative evaluation. As set forth below, that comfort level has a short life expectancy.

Respondent judiciously avoids addressing the Certifications of Vice Principal Ortiz and the progeny of events that developed after the October 8, 2014, conference. It is important to recall that in September 2014, Respondent had already administered a diagnostic math test to her students, and the follow up was to measure student growth. (see Ortiz Certification ¶¶ 10). The results of that diagnostic test revealed 23 of Respondent's 26 students were unable to answer questions about circles, and in which 20 of her 26 students were unable to make geometric constructions and express geometric properties with equations. As such, as a result of the goal setting conference, Respondent's CAP identified two student learning goals for the 2014-2015 school year: (a) understanding and applying theorems about circles; and (b) make geometric constructions and express geometric properties with equations. (see Ortiz Certification ¶¶ 16, and Exh. E) Moreover, Respondent's CAP made clear that she was to administer **the same diagnostic test in April 2015**, as a measure of student growth in these two areas. (see Ortiz Certification ¶¶ 16 and Exh. E) (emphasis supplied)

Respondent's bold assertions concerning the development of her CAP and her signature dated October 14, 2014, clearly and unequivocally establish for the arbitrator that her arguments are part of Harry Potter type of wizardry.

At the October 8, 2014, goal setting conference to establish Respondent's CAP, the uncontradicted certifications of Vice Principal Ortiz, show without blemish that Ms. Ortiz gave Respondent a draft cap with her handwritten notes and comments to incorporate into Respondent's CAP. Additionally, subsequent to the October 8, 2014,

meeting, Vice Principal Ortiz emailed Respondent the draft CAP with various recommended performance steps and asked Respondent to update her CAP via the Bloom Board system.(see Ortiz Certification ¶¶ 8, 9, 12,and Exh. D)

The record lucidly shows that only Respondent can make any additions, deletions to her CAP via the Bloom Board system. Yet somehow after Respondent signed her CAP, the same day Vice Principal Ortiz signed it, an unknown individual used the Bloom Board system and changed the CAP to insert April 2015. Candidly, that position of the Respondent defies credulity.

Respondent is a professional individual who has been employed approximately twenty-three (23) years as a math teacher in the Newark Public Schools and signed her 2014-20105 CAP without reading and/or objecting to specifics in the CAP and insists Petitioner *“skewed and fabricated the evidentiary record to overcome its shortcomings”*

To advance such an argument and expect the arbitrator to accept it expands the boundaries of believability to beyond any recognizable limit. Respondent has not offered any proof that she was coerced, forced or manipulated into signing her 2014-2015 CAP on October 14, 2014. Her entire argument on the CAP and April 2015 is nothing more than bold assertions without any substance.

Respondents’ argument on the improper application of Petitioner’s Framework for Effective Teaching, Newark Public School, belies the following excerpts from that document:

Frequently Asked Questions

Why do we have to participate in a goal-setting conference?

*“The goal-setting conference ensures that **goals are established collaboratively between teachers and administrators.** Once the teacher and*

administrator have finalized the teacher's student learning goals and IPDP or CAP, the goal-setting process is complete.... The IPDP or CAP provide teachers and administrators with a shared tool for consistently communicating about goals and anticipating growth areas, and they will serve as a reference document for other evaluation conferences, feedback discussions, and professional development over the course of the year." (emphasis supplied) (see page A11)

What is the responsibility of a teacher on a CAP?

"A teacher on a CAP is responsible for the development of goals outlined in his or her CAP with the principal." (see page A12)

The above cited sections give the arbitrator a ringside seat at the goal setting conference. The key word collaboratively renders all of Respondent's arguments about the development of 2014-2015 CAP ludicrous to say the least. If there is one clear absolute in the record, it is that Respondent developed the 2014-2015 CAP collaboratively or in concert with Vice Principal Ortiz. To deny that the CAP was created in collaboration with Vice Principal Ortiz is to deny reality.

Respondent contends that Petitioner violated the May 15, 2015, date found on page A 12 of the Framework for Effective Teaching, Newark Public School for the annual evaluation of a tenured teacher on a CAP, because she never had the opportunity to re-administer the diagnostic exam to her students, which is the appropriate assessment metric to determine whether she had met her SGOs.

The Respondent's own words set aside her accusation about the May 15, 2015, date. Respondent stated in her Certification "*I was instructed to bring data demonstrating student growth at the annual summary conference, **but because the diagnostic exam was not administered by then, and my students were still learning circles, the only somewhat-appropriate artifact I could think to bring was a spreadsheet consisting of my students' scores on exit slips and tests from***

December 2014 and January 2015 relative to geometric shapes.” (see. Thomas Certification ¶ 9, and Exh. C) (emphasis supplied) ¶

January 2015 was four months away from April 2015, the date in Respondent's CAP and yet she still had not administered the diagnostic exam. Respondent admits that at the time of the annual summative conference **“her students were still learning circles.”** Nevertheless, as a result of the goal-setting conference Respondent's CAP identified two student learning goals for the 2014-2015 school year: (a) understanding and applying theorems about circles; and (b) make geometric constructions and express geometric properties with equations. (see Ortiz Certification ¶ 16 and Exh. E)

Frankly, as of May 14, 2015, Respondent still had not met the goal of understanding and applying theorems about circles, yet she insists the Petitioner rushed to administer the annual summative evaluation without the results of the diagnostic exam that she blatantly refused to administer in April 2015.

Respondent's lack of administering the diagnostic test cannot be held against the petitioner. Even if the May 15, 2015, summative evaluation conference was adjourned, Respondent's Certification showed a remarkable lack of adhering to her 2014-2015 CAP. She stated, *“On or about May 14, 2015, I was called into the office to meet with Vice Principal Ortiz for my annual evaluation conference, during which time we discussed my summative evaluation. **At this Point I did not have an opportunity to re-administer the diagnostic exam. My students haven't even completed the unit on circles yet, so it would not have been appropriate to re-administer the diagnostic exam even if I had chosen to do so.**”* (see Thomas Certification ¶ 8)

When Respondent met with Vic Principal Ortiz she knew that she had not complied with her 2014-2015 CAP. She had the opportunity to request that the evaluation not be held until she had completed the diagnostic exam. She chose not to do so and incredibly blames the Petitioner for not adhering to the permissive date for evaluating a tenured teacher on a CAP. Nothing can be further from the truth. Candidly, Respondent could have admitted she did not administer the diagnostic exam which was in violation of her 2014-2015 CAP and ask for more time. The record shows she did not take advantage of that opportunity.

More importantly, Respondent's reply brief does not address the mysterious manner in which she alleges "April 2015" appears in her CAP. To bolster her unsupported assertions Respondent in her reply brief strongly contends that under "*the laws of our State, it is the duty of the school board employer – not the tenured employee – to ensure the statutory requirement, of annual evaluations are complied with.*"

Yes, but teachers tenured or not have a professional obligation to cooperate with those laws and make sure their intent is carried out. Her argument about the May 15, 2015, date for completion of her annual evaluation segues into her contention that the Petitioner violated N.J.A.C. 6-10-2.4(4)(d), and her 2014-2015 summative evaluation was legally defective.

N.J.A.C. 6-10-2.4 is the evaluation procedure for all teaching staff. Section (4)(d), states: *If any scores for the teaching staff member's evaluation rubric are not available at the time of the annual summary conference due to **pending assessment results**, the annual summative evaluation rating shall be calculated once all component ratings are available.* (emphasis supplied)

There was no pending assessment result because Respondent did not administer the diagnostic exam in April 2015. Respondent placing blame on Petitioner because Respondent did not comply with her 2014-2015 collaboratively agreed upon CAP is another example of her refusing to take responsibility for her actions or lack thereof. It defies logic to pass blame on the Petitioner when Respondent did not do her part in having completed the diagnostic exam so it could be addressed in her annual summative evaluation.

There is nothing sufficient or compelling in Respondent's arguments about the CAP and its progeny including the Petitioner's alleged violation of N.J.A.C. 6-10-2.4(4)(d), to dismiss the tenure charges.

Respondent's arguments about the application of N.J.S.A. 18A:6-11, and N.J.S.A 18A:6-17.3 is misapplied. The seminal case in addressing inefficiency charges utilizing two (2) distinct separate sections of Ch. 26 is Arbitrator Simmelkjaer I/M/O Neil Harris, State-Operated School District, City of Newark Agency Docket 244-9/14. Arbitrator Simmelkjaer determined that *:[H]ad the Legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially ineffective 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 – it had the wherewithal to provide appropriate statutory language."*

Section 8 refers to N.J.S.A. 18A:6-16 and Section 25 refers to N.J.S.A 18A:6-17.3. Arbitrator Simmelkjaer dismissed the tenure charges because the evaluation process had not been followed.

In the Cheatham award, supra arbitrator Bluth dismissed the tenure charges because the Petitioner (same Petitioner as in the instant matter) filed amended tenure charges of inefficiency under N.J.S.A. 18A:6-16. However, the above award was the second award with the same parties. In the first award I/M/O Tenure Hearing of Sandra Cheatham, State-Operated School District, City of Newark, Agency Docket No, 266-8/14 Arbitrator Bluth rejected the Petitioner's argument that if he "*found that Respondent was not culpable under Section 25, he should treat the charges as if they had been filed under Section 8.*" That determination places the Cheatham awards supra, in context with the fact pattern in the matter before me. The standards for an arbitrator to review inefficiency charges is found in N.J.S.A. 18A:6-17.3 and not in N.J.S.A. 18A:6-11.

In fact, N.J.S.A. 18A:6-17.3 c. specifically states, "*Notwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the Commissioner shall examine the charge.*" There is nothing in Section 25 that would allow a charge of inefficiency to be heard under N.J.S.A. 18A:6-11.

In fact, N.J.S.A. 18A:6-11 informs the parties, and in particular, a board of education as to what is required in the filing of tenure charges such as written charges, statement of evidence, statement of position by employee, and certification of charges, and that any hearing will not take place at a public meeting. It is acted upon in compliance with N.J.A.C. 6A 3.5-1 (c).

Nevertheless, it must be acknowledged that the Petitioner is not contending that if they are not successful under N.J.S.A. 18A:6-17.3, I am to review the tenure charges of inefficiency under N.J.S.A. 18A:6-11.

For the foregoing reasons, and having heard the proofs and allegations of the parties, I AWARD the following:

AWARD

The Respondent has not met its burden of proof for the tenure charges of inefficiency filed against Sherlene Thomas to be dismissed.

Therefore, we shall proceed to hearing with the agreed upon dates starting with December 7, 2015.

Dated November 16, 2015


Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 16th day of November, 2015, before me personally came and appeared Gerard G. Restaino to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.



