

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

In the Matter of Tenure Hearing of Michelle Gates:

**THE STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON**

Case No. 144-5/16

and

Ruling on
Motion for Judgement

MICHELLE GATES

Before:

Edmund Gerber, Arbitrator

Appearances:

For the Paterson City School District:

Joseph L. Roselle, Esq.

Schenck Price Smith & King, LLP

For the Respondent:

Gail Oxfeld Kanef, Esq.

Oxfeld Cohen, LLC

Tenure charges were brought against Michelle Gates, a teacher employed by the State Operated School District of the City of Paterson. These charges all stem from her alleged actions of knowingly and improperly providing answers and assisting with word definitions to students during the

New Jersey Assessment of Skills and Knowledge (“NJ ASK”) test on five (5) days in May of 2012.

At the hearing, the District’s witnesses testified that the Office of Fiscal Accountability and Compliance (“OFAC”) of the New Jersey Department of Education was alerted by Measurement Incorporated, the company which administers the NJ ASK testing program, of an irregularity in the test papers of students who took the test supervised by the Respondent in 2012. An erasure analysis of the tests revealed a high number of wrong to right erasures. That is, a significant number of students had erased wrong answers and filled in right answers. This triggered an investigation by OFAC.

Two OFAC investigators testified that they interviewed approximately twenty-seven (27) students who took the 2012 NJ ASK exam under the Respondent’s supervision. Seventeen (17) of the students said that the Respondent assisted them directly during the test or witnessed the Respondent helping other students with the test. Audio recordings were made of the student interviews. The recordings and transcripts of the recordings were admitted into evidence. The students who were interviewed were not under oath and neither the Respondent nor her representative were present during these interviews and had no opportunity to cross-examine the students.

Jazmin Rotger de Parra, the District’s Testing Coordinator, testified as to the protocol for maintaining test security, and specifically about the training the Respondent underwent regarding these tests and that the Respondent signed documentation attesting to the fact that she maintained test security and did not assist students on the exam at issue. After reviewing the reports of the OFAC investigators and the recordings and transcripts of the interviews of the students involved, Rotger de Parra initiated the instant tenure charges against the Respondent.

The District rested its case without ever calling any of the twenty-seven (27) students that were interviewed by the District. The Respondent thereupon moved to dismiss the charges contending that all of the evidence presented by the District constituted hearsay evidence and such evidence

was not supported by a residuum of competent, admissible non-hearsay evidence.

The undersigned reserved ruling on the motion at that time and asked the parties to file written submissions on the Motion¹.

ARGUMENT

Respondent

The Respondent argues that N.J.S.A. 18A:6-17.1(c), provides:

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

No specific provisions exist in Title 18 as to admissibility of evidence. Accordingly, the American Arbitration Association rules as to admissibility and relevance of evidence apply here. AAA Labor Arbitration Rule #27 states in pertinent part:

The arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conformity to legal rules of evidence shall not be necessary.

Consequently, the arbitrator maintains wide latitude in determining admissibility and relevance of evidence. Nevertheless, determinations must be made with consideration of fundamental fairness. In Dolan v. East Orange, 287 N.J. SUPER 136, the Appellate Division held that Dolan, a public employee, was denied administrative due process when he was not provided an opportunity to cross-examine the witness accusing him of

¹ As it was early in the day and the Respondent had a potential witness available, I asked the Respondent to begin its case pending my determination on the motion. The Respondent called one of the students as a witness. Given that I herein grant the Respondent's motion I have not considered the testimony of said witness.

wrongdoing which resulted in his termination. The Court noted that while hearsay evidence is admissible in an administrative proceeding, there must be a residuum of competent, non-hearsay evidence to form the basis for the findings against the public employee. The same principles have been applied in the tenure hearing context. See In re Tenure Hearing of Cowan, 224 N.J. SUPER 737 (App. Div. 1988). Also, In the Tenure Hearing of Morimo Okundaye and the Newark School District, Arbitrator Timothy Brown received into evidence a videotape of the Respondent interacting with a student. However, the arbitrator determined that the videotape standing alone, without direct evidence of how, when and under what circumstances the recording was made, was hearsay evidence and held that it would violate the rules of fundamental fairness to rely solely on the video to establish the truth of the tenure charges and dismissed said charges.

In State Operated School District of Paterson v. Richard Vincenti, Arbitrator Howard Edelman effectively applied the residuum rule finding that while hearsay evidence was admissible, it cannot, standing alone, form the basis to terminate an employee's employment. Arbitrator Edelman acknowledged that fundamental fairness dictates that an employee have the ability to confront his or her accusers with cross-examination.

According to Rule 801, hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." The oral statements of the students made on the audio recording admitted into evidence here were hearsay statements and do not fall into one of the recognized exceptions to the rules precluding the admissibility of hearsay.

Rule 803 does permit the admission of a prior witness but that individual must be a witness at the instant hearing. In the present matter, none of the students interviewed were called as witnesses by the District. Thus, the out of court recorded statements do not fall under the prior exception to the hearsay rule.

In certain circumstances, hearsay will be admissible if the declarant is unavailable to testify. The Board of Education here has not even asserted

let alone proven that the students were not available. There has been no evidence presented that the relevant students were unavailable nor was the testimony taken at a prior trial. Most significantly, the Respondent has never had an opportunity to cross-examine these witnesses. The out of court statements of the students who did not testify are hearsay evidence that would not be admissible in a court proceeding. It is inappropriate to admit these statements or the truth of the matters asserted without an additional residuum of competent, admissible, non-hearsay evidence to support the assertions for which the hearsay is offered.

Counsel orally moved to dismiss the charges against the Respondent. However, pursuant to R4:6-2, when a judge considers a motion at the end of the presentation of an opponent's case, such a motion is considered a motion for judgment pursuant to R4:40-1. A motion to dismiss pursuant to R4:6-2 would be a motion on the face of the pleadings. Thus, the motion presented herein by the Respondent after the presentation of the Board's case is essentially a motion for a judgment dismissing the tenure charges against the Respondent with prejudice.

Whenever the significant rights of an individual may be affected in any type of legal proceeding, the rules of fundamental fairness have been applied by judges, administrative hearing officers and arbitrators. The law uniformly requires that for a proceeding to be fair, an employee must have the ability to cross-examine his or her accuser and testimony must be taken under oath. Here, all the evidence presented by the District constituted hearsay evidence. There was not one piece of direct, non-hearsay evidence that in May 2012, Respondent provided assistance to students on the NJ ASK test. Accordingly, this arbitrator must enter a judgment in favor of Respondent and dismiss the charges against her with prejudice.

The District

As conceded by Respondent in her brief, hearsay evidence is admissible in this proceeding. It is well settled that an arbitrator has wide latitude to determine the admissibility and relevance of evidence. The choice of accepting or rejecting a witness' testimony or credibility rests with the

arbitrator as a finder of fact. Freud v. Davis, 64 N.J. SUPER 242, 246 (App. Div. 1960).

The New Jersey Administrative Code permits the use of hearsay in administrative proceedings such as this. N.J.A.C. 1:1-15.5(a) provides in relevant part:

“Hearsay evidence shall be admissible in a trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate, taking into account the nature, character and scope of the evidence, the circumstances of its creation and production and generally its reliability. While generally, in order to accord hearsay evidence its full weight, there must be a residuum of legally competent evidence to support each ultimate finding of fact, known as residuum rule.” N.J.A.C. 1:1-15.5(b)

Thus, to the extent the recordings at issue were hearsay, they are admissible and have been admitted into the record. The arbitrator may therefore rely upon them as he sees fit. Contrary to the Respondent’s arguments, the recordings have been supported by a residuum of evidence and thus the rule is satisfied. The Respondent relies upon Dolan, *Supra*, however, in Dolan, the entire allegation was based solely upon an unsigned, unsworn letter allegedly submitted by a fellow employee stating that Dolan instigated a fight. The City presented no other evidence and did not call the letter writer as a witness in the hearing.

Here, unlike Dolan, the District introduced a significant amount of documentary and testimony evidence, including recordings of the student interviews, the testimony of both OFAC investigators, an OFAC supervisor and a District employee, all of whom testified that Respondent’s conduct was unbecoming and improper and the reasons why the OFAC witnesses made such a determination. In addition, the District introduced a document signed by the Respondent herself indicating that she maintained test security which live testimony at the hearing unequivocally disputed. Thus, a residuum of evidence was provided by the District, far more than the student records as

the Respondent would have the arbitrator believe, which allows the arbitrator to consider the content of those recordings when viewed in relation to the other evidence submitted. Furthermore, the Respondent had the opportunity to confront her accusers. The tenure charges were filed by Ms. Rotger de Parra who testified competently and credibly as to why she took such action. The charges themselves were based on the investigation conducted by OFAC which concluded that Respondent breached testing security and protocol. Both of the OFAC investigators testified as well as their superior. All of those witnesses were Respondent's accusers and were cross-examined by Respondent's counsel at the hearing.

The students were not the accusers. They did not report Respondent's wrongdoing on their own volition or independently submit a complaint about her conduct. The students' recollection of Respondent's conduct comprised but one part of the OFAC investigation and the related documents involved in the same should be given full weight by the arbitrator, along with other evidence in the record. Accordingly, the residuum rule is satisfied.

The District cites I/M/O Tenure Hearing of Cowan, 224 N.J. SUPER 737 (App. Div. 1988) where the Appellate Division affirmed the dismissal of a tenured teacher who is accused of various acts of misconduct, including an alleged assault conducted by the teacher. Evidence of the incident consisted of the testimony of the high school principal and his memorandum of the incident which included facts the principal had learned about from alleged eyewitnesses. The principal was not a witness to the event. The student who was the victim of the assault did not testify at the hearing, nor was there any other direct or eyewitness evidence of the assault. The Appellate Division upheld the Commissioner's finding of unbecoming conduct based on this incident noting that "the application of the residuum rule does not require that hearsay evidence of the assault be ignored." Id. at 750. The Court held that there "need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as the combined probative force of the relevant hearsay and relevant competent evidence" sustains the Commission's finding of unbecoming conduct." Id. At 71. As with the principal in Cowan, the investigators based their findings here in part on student statements but the student statements were not the

sole basis for the finding. See also Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 358-59 where an employee's termination was upheld even though no direct witness to the altercation at issue testified. Rather, only the individual who prepared the report of the incident testified.

The District also cites I/M/O the Tenure Hearing of Manuel Santiago, OAL Dkt. No. EDU-7135-99. The Board of Education filed tenure charges against a school custodian who had been arrested for possession of drugs. At the hearing, the testimony of a police officer who did not witness the alleged conduct as well as an unsworn statement of an unidentified, paid confidential informant that Santiago was involved in the distribution of narcotics. The ALJ found that Santiago had committed the conduct at issue and that he be dismissed from his position. The Commissioner found that the witness offering the hearsay evidence was reliable and that "the recommended decision does not rely solely on hearsay testimony" and therefore the introduction of hearsay evidence was proper and any reliance upon it was appropriate. In I/M/O Stephen Fox, OAL Dkt. No. EDU-7955-04 (Cmm'r 2004) the Commissioner rejected Fox's argument that hearsay evidence and statements provided to investigators and other individuals who did not testify was inadmissible because the teacher's own testimony and that of an administrator was also in the record. I/M/O Woodbridge Township Board of Education v. John Radzik, Dkt. No. 368-12/12 (Licata, 2013) a board of education filed tenure charges against a third grade teacher due to his actions against the administration of the 2010 and 2011 NJ ASK examinations. Arbitrator Licata sustained the tenure charges and ordered that Radzik be dismissed from his position. The arbitrator relied on several pieces of hearsay evidence including the OFAC report which concluded that Radzik breached testing protocol. No student who allegedly received test answers or inappropriate assistance testified. Nevertheless, Arbitrator Licata concluded that termination was appropriate based on evidence in the record.

In this matter, the lack of bias or motive on the part of the students who were in the fourth grade at the time of the NJ ASK tests and their proximity in time to the test when they gave their statements establishes the reliability

of the interviews as well as a probative value when examined in light of the residuum of other evidence produced by the District at hearing.

Even if the recorded interviews at issue are not supported by a residuum of competent evidence, they are nevertheless admissible and fully probative for their evidentiary value under an exception to the hearsay rule. N.J.R.E. 803(c) that hearsay evidence may be admitted into evidence and fully relied upon by a fact finder regardless of whether the declarant is able to testify. These include:

- Present sense impression - a statement of observation, description or explanation of an event made while or immediately after declarant was perceiving the event without the opportunity to deliberate or fabricate;
- A recorded recollection - a statement about which the witness is unable to testify about fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record;
- Records of regularly conducted activity - that is a record kept in the normal course of business and the person making that recording had actual knowledge of the event or was based upon information from a person with such actual knowledge;
- Public records, reports and findings- a statement made in writing made by a public official or not a condition or observed by the official.

The student recordings at issue meet one or all of these tests, or at least in their spirit and intent. The recordings were made several years prior to the hearing, much closer to the time of the Respondent's misconduct than the current date. Moreover, the student statements to the OFAC investigators are clearly recorded recollections of the students' accounts of the alleged conduct. The recordings were made by OFAC investigators in the regular course of their business. They were made part of OFAC's investigation file in this case. It is further submitted that the OFAC investigation reports and the evidence relied upon by the investigators are

analogous to a police report which have long been admissible into evidence pursuant to this exception.

The OFAC report and the conclusions therein constitute a public record which is defined as “a statement contained in writing made by a public official of an act done by the official or an act, condition or event observed by the official if it was in the scope of the official’s duty either to perform the act recorded or to observe the act or event recorded or make the written statement. N.J.R.E. 803(c)(8). The OFAC investigators are public employees and are charged as part of their official duties to investigate testing irregularities and teacher misconduct. These reports were part of the job responsibilities and thus are admissible into evidence under this hearsay exception, regardless of whether a residuum of competent, credible evidence exists. The District requests that the Respondent’s motion be dismissed and denied with prejudice.

Respondent’s Reply

The Respondent submitted a response to issues raised in the Petitioner’s brief.

The Respondent contends that the student recordings do not fall within an exception to the hearsay rule.

The audiotapes were not present sense impressions. A present sense impression statement must be made “while or immediately after the declarant was perceiving the event ... without opportunity to deliberate or fabricate.” The statements made by the students to the investigators were made more than two years after the NJ ASK test. They are hardly present sense impression statements. The law requires that the present sense impression statement be made a very brief time between the observation and the statement.

The Petitioner misrepresents the recorded recollection exception to the hearsay rule. This exception requires that the witness be unable to testify from memory about the incident at issue. Here, we have no idea whether these students could testify from memory or not since they did not testify.

The rule requires that during the testimony at hearing or trial, the lack of memory must be established. No student testified on behalf of the District, thus the condition precedent to admissibility under this exception has not been met.

The exception for records of regularly recorded activity and business records similarly does not apply. The Petitioner opines incorrectly that the students' statements within the recordings are admissible under these exceptions similar to a police report that would be admissible as a record of regularly recorded activity. However, the rule clearly requires that any hearsay within hearsay is only admissible if it meets an additional exception to the hearsay rule. Konop v. Rosen, 425 N.J. SUPER 391 (2012).

Respondent submits that since student statements do not meet any other exception to the hearsay rule, they are inadmissible hearsay statements and must be excluded from evidence. See also Rurode, *Supra*.

Respondent also argues that the decisional law cited by the Petitioner is inapplicable to the present matter. In every tenure case cited by the Petitioner, there was testimony from direct witnesses to the events in question or the respondent admitted his or her conduct. This is simply not the case in this matter. In Razdik before Arbitrator Licata, multiple eyewitnesses actually testified. The arbitrator considered hearsay testimony and relied upon it but only because direct admissible of the incident was also presented. In Fox, Mr. Fox admitted to kissing a student. Such a statement is direct evidence which satisfied the residuum rule.

In the present matter, the hearsay statements made by students in the recordings are not admissible under any exception to the hearsay rule. The Rudroe case cited by the Petitioner actually supports the position that out of court statements of the student witnesses are inadmissible hearsay.

Much of the evidence submitted on behalf of the Borough came in the form of written documents, unsupported by any oral testimony. Although the statements from Egbert, Ruales, and Simpson were admitted during the hearing as documents appended to the internal investigative report, the statements

themselves remained hearsay. See *State v. Lungsford*, 167 N.J. Super. 296, 310, 400 A.2d 843 (App. Div. 1979) (explaining that witness statements embedded in police report are not admissible under business record exception to hearsay rule even though report itself may be admissible). As hearsay, they could be used to corroborate competent evidence, but they could not provide the residuum of competent evidence that must support a fact material to the determination of a charge. See *Weston, supra*, 60 N.J. at 51, 286 A.2d 43. It is the duty of the finder of fact, no matter the forum chosen for a police disciplinary proceeding, to point to the competent evidence in the record supporting his or her ultimate fact-findings and conclusions drawn therefrom. The record before the hearing officer in this matter should have been scrutinized in that manner.

The Petitioner conflates the admissibility of the OFAC report with the admissibility of the recorded student statements. The OFAC report is admissible as a report prepared by the investigators who testified at the hearing. However, like Rurode, the hearsay statements contained within that report are not admissible unless they fall under a recognized exception to the hearsay rule. Here, the student statements were not made under oath and no one, let alone the Respondent, had an opportunity to cross-examine them or judge their credibility and simply do not meet any exception whatever to the hearsay rule.

The Petitioner argues that Ms. Rotger de Parra and the investigators are the Respondent's accusers and not the students and therefore Respondent has no right to cross-examine the students. However, Rotger De Parra and the investigators never observed the Respondent administer the test in question, they were not present in the testing room and they have absolutely no firsthand knowledge on which to competently base an accusation. The charges against Respondent must be dismissed in their entirety.

DISCUSSION

This arbitrator has always followed and applied the Residuum Rule. As stated in Cowan, *Supra*:

In our State, a fact finding or a legal determination cannot be based upon hearsay evidence alone. Hearsay may be employed to corroborate competent proof or competent proof maybe supported or given added probative force by hearsay testimony. But in the final analysis, for a court to sustain an administrative decision which affects the substantial rights of a party, there must be a residuum of competent, credible evidence in the record to support it.

In other words, a case cannot turn on hearsay.

In every case relied upon by the Petitioner, be it court decision, administrative determination or arbitration, it was acknowledged that the case cannot turn on hearsay alone. There must be a finding that there is a residuum of competent, credible evidence before sustaining a tenure charge. In Cowan, although there was only hearsay evidence of one offense which occurred in 1974, there was competent credible evidence of incidents in 1975, 1980, 1982 and 1984 and ample competent credible evidence to sustain the tenure charges. As the Respondent pointed out in Rurode, Rurode admitted that an altercation took place. This admission constituted a residuum of credible evidence. Accordingly, hearsay evidence was properly considered in assessing the respondent's degree of culpability. In Radzik, before Arbitrator Licata, there were two witnesses who testified on behalf of the Petitioner and Arbitrator Licata identified such witness testimony as "threshold testimony", clearly implying that such testimony constituted a residuum of competent, credible evidence. There is no such threshold testimony here.

The District argues the fact that the Respondent signed a document acknowledging that she supervised the test constitutes the residuum of competent, credible evidence. However, unlike Rurode, this document does not acknowledge any misconduct at all. A "residuum of direct

evidence” means some identifiable amount of direct evidence, although perhaps quite small, in support of the allegation of misconduct. Also, N.J.A.C. 1:1-15.5(b) requires that each ultimate finding of fact be supported by direct evidence.

I am satisfied that, as argued by the Respondent, the students’ recordings do not fall within any exception to the hearsay rule. They are not a present sense impression statements, do not fall within the recorded recollection exception and are not records kept in the normal course of business. Although the reports of the investigators may fall within the records of regularly conducted activity exception, the hearsay statements contained within that report, i.e. the statements and recordings of the students, as hearsay documents are hearsay and not admissible, Rurode

The audio recordings in the matter at hand are the sole reason these charges were brought against the Respondent. The investigators conclusion that Respondent impermissibly interacted with students during the taking of the NJ ASK test, is based solely upon the interviews with these students. Similarly, Rotger de Parra’s decision to accuse the Respondent and bring tenure charges rests entirely upon the student interviews. But as in Rurode those portions of the investigators reports and testimony relating to the students statements is hearsay and without a residuum of direct evidence cannot be grounds to make an affirmative finding that the Respondent engaged in the alleged activity. The fact that Rotger do Parra, not the students is the Respondents accuser, is of no moment. She has no direct knowledge of Respondent’s misconduct. She acted and relied upon on hearsay statements and those statements that are subject to the residuum rule.

The Petitioner did not produce a residuum of competent, credible evidence that Michelle Gates engaged in misconduct in administering the NJ ASK test in May 2012

Under these circumstances, it would be fundamentally unfair to sustain the charges against the Respondent without her ever having an

opportunity to cross- examine the only witnesses to her alleged improper conduct – the students.,

Accordingly, I am compelled to grant the Motion.² All tenure charges against Michelle Gates are hereby dismissed.

AWARD

The tenure charges against Michelle Gates brought by the State Operated School District of the City of Paterson, Passaic County, Docket No. 144-5/16, are dismissed. Michelle Gates shall be reinstated by the State Operated School District of the City of Paterson to her teaching position retroactively to the date of her suspension and she shall be entitled to all back salary and benefits as if she were steadily employed from that date.



Edmund Gerber, Arbitrator
September 8, 2016

² In its brief the Petitioner states that, due to a scheduling problem caused by a last minute adjournment of an earlier hearing date, its student witnesses were not available. In an effort not to burden the record and given the time constraints involved, the petitioner chose to rest its case without calling any students. However no mention of why the students were not called as witnesses was made to this Arbitrator at the hearing. The issue was first raised in its brief and is untimely.

