

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

In the Matter of the Tenure Arbitration Between:

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

“Petitioner

and

VA’LORIE JAMES

“Respondent”

Agency Docket No. 181-6/16
[Va’Lorie James]

**OPINION AND
AWARD ON
MOTION FOR
SUMMARY
DISMISSAL**

**BEFORE
ARNOLD H. ZUDICK
ARBITRATOR**

Appearances:

For the Petitioner

Robert Tosti, Esq.
Purcell, Mulcahy, Hawkins,
Flanagan & Lawless, LLC

For the Respondent

Nicholas Poberezhsky, Esq.
Caruso Smith Picini, P.C.

PROCEDURAL HISTORY

This is a Decision on the Respondent's Motion for Summary Dismissal. On April 11, 2016, Dr. Mario Santos, Principal of the Petitioner's East Side High School, served the Respondent (James) pursuant to *N.J.S.A.* 18A:6-11, with a Notice of Tenure Charges. Santos alleged that the Respondent was guilty of being chronically absent, being absent without leave, and being chronically tardy, all of which he claimed warranted James' dismissal or reduction of salary. Santos also alleged that James is guilty of conduct unbecoming a teaching staff member for refusing to follow the Petitioner's (District) "sign in" procedures and for failing to fulfill her proctor responsibilities for State required testing. Santos claimed such conduct constituted insubordination.

On or about May 15, 2016, Respondent submitted a response to those charges. On June 27, 2016, the Petitioner's State District Superintendent having considered the charges, supporting evidence and the Respondent's submission, concluded that the charges, if credited, were sufficient to warrant Respondent's dismissal or reduction of salary, and he (the Superintendent) certified the charges to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-11 for a hearing in accordance with *N.J.S.A.* 18A:6-16.

Based upon the Superintendent's June 27, 2016 certification, the Respondent was suspended pursuant to *N.J.S.A.* 18A:6-14 effective June 28, 2016. That suspension was without pay for 120 calendar days from that date. It is unclear whether the suspension continued with pay beginning on the 121st day after such certification and/or whether or when James returned to work.

On July 25, 2016, the Department's Bureau of Controversies and Disputes (Bureau) determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary and it referred the matter to Arbitrator David Gregory pursuant to *N.J.S.A.* 18A:6-16.

Although the sequence of events is not entirely clear thereafter, apparently, Arbitrator Gregory preferred to consider the matter through motion rather than conduct a hearing which prompted the Respondent to file its original Motion for Summary Dismissal on or about September 19, 2016. By letter of October 21, 2016 to the Bureau, the Petitioner expressed its reluctance to proceed by "motion only" and requested the case be transferred to another arbitrator.

Apparently, subsequent to the Petitioner's October request the parties engaged in settlement discussions. By January 25, 2017, however, the Petitioner notified the Bureau that settlement had not been reached and it renewed its request that the case be assigned to a new arbitrator.

This matter was formally assigned to me on February 16, 2017. On or about that date I received the Respondent's revised Motion for Summary Dismissal. After a request for an extension of time to which the Respondent consented, the Petitioner filed its response to that Motion on March 20, 2017.

BACKGROUND

The Respondent was a tenured social worker with the District in 2016 when on January 15, 2016, the Petitioner filed tenure charges against her alleging chronic absenteeism, tardiness and conduct unbecoming for allegedly failing to follow District signing in and out procedures encompassing the 2007-2008, 2008-2009 and 2014-2015

academic years. The District alleged that during the 2008-2009 and 2014-2015 school years James was warned several times about her excessive absenteeism and tardiness, and that her conduct could lead to disciplinary action. The District also alleged James engaged in conduct unbecoming by failing to appear to fulfill her proctor responsibilities for scheduled testing. The District's allegation included a claim that James was tardy 31 times by June 1, 2009 in the 2008-2009 school year; that she was tardy approximately 20 days by January 2015 in the 2014-2015 school year; and, that by May 2015 she had 18 absences in the 2014-2015 school year.

On February 18, 2016, the Respondent filed her answer to the January 2016 tenure charges. The Respondent alleged that since her hire in 2001, she never earned less than a "satisfactory" or "effective" annual evaluation or observation rating. The Respondent's answer alleged James stays late after class and performs volunteer work and it labeled the charges as arbitrary and capricious. It argued that the claims of James' alleged excessive absenteeism, tardiness and unbecoming conduct during 2014-2015 should be excluded from the tenure charges because all such issues were previously resolved between the parties. It also argued that the allegations of absences and tardiness in 2007-2008 and 2008-2009 were trivial and too far removed to support tenure charges.

The Petitioner did not certify the January 2016 tenure charges to the Commissioner and no further proceedings or action were taken on those charges. The charges giving rise to the Respondent's February 2017 Motion in this case were filed on April 11, 2016, which were similar to but more expansive than the charges filed against her in January 2016 which were not certified. In the April 2016 charges the Petitioner essentially alleged the same charges as it had in the January or original charges, that

James was chronically absent and chronically tardy, but it also added allegations covering the 2007-2008 through the 2015-2016 school years up to and including March 17, 2016.

The Petitioner alleged that by March 2008 James had been absent 9 days to that point in the 2007-2008 school year and was warned about excessive absenteeism and not following proper sign in procedures in 2008. The April 2016 charges also alleged that in 2009 James was tardy 31 times by June of that year and that she had been warned about “unauthorized punching”, or signing in at a different location without permission that same year.

The April 2016 charges alleged that James was absent 351 days or an average of 39 days per year since 2007. In those charges the Petitioner included the following list of days tardy for James:

<u>School Year</u>	<u>Days Tardy</u>	<u>School Year</u>	<u>Days Tardy</u>
2007-2008	44	2012-2013	13
2008-2009	71	2013-2014	56
2009-2010	70	2014-2015	38
2010-2011	106	2015-2016	20 (until 3/17/16)
2011-2012	101		

Those charges further alleged that James was late 38 days in the 2014-2015 school year and was warned in January 2015 about being tardy 20 days. The Petitioner alleged that after a March 2, 2015 agreement to fine James one days pay for excessive absenteeism and tardiness it warned her again for excessive absenteeism

The April 2016 charges also alleged that on May 14, 2015, James was warned about both excessive absenteeism and tardiness and she was docked a day’s pay for allegedly being absent without leave (AWOL) on that day. The charges noted that James was warned discipline, including tenure charges would be filed against her.

The Petitioner concluded its April 2016 charges alleging that: James was warned about failing to comply with sign-in and out procedures in 2008 and 2009; she was warned on November 24, 2014 that her unauthorized punches could lead to discipline; and, that she had failed to fulfill her proctor responsibilities on April 30 and May 5, 2015.

In its May 13, 2016 Answer to the April charges, the Respondent argued that the number of absences and days tardy alleged by the Petitioner were misleading and inaccurate. It claimed that many of the alleged absences actually were summer days and it claimed that 286 of the 351 days of alleged absences were incorrect.

The Respondent also claimed that many of the absences alleged by the District included time not subject to discipline such as FMLA time. The Respondent alleged James had 126 occasional absences from 2007-2008 through 2015-2016 or an average of 14 absences per year.

The Respondent also noted that 204 of the alleged days tardy from 2007-2008 through 2015-2016 were within 5 minutes of the start of school. Respondent acknowledged 31 days tardy during 2008-2009, but claimed James needed to provide care for her mother prior to the start of classes. Respondent also claimed that most of her absences in 2014-2015 were taken for legitimate medical reasons and she denied being AWOL on May 14, 2015.

Finally, the Respondent denied she failed to fulfill the proctor assignment and she denied being insubordinate.

POSITIONS OF THE PARTIES ON THE MOTION

RESPONDENT

The Respondent presented five arguments to support its Motion. In Point I it argued that all of the tenure charges be dismissed with prejudice because the Petitioner failed to comply with *N.J.S.A.18A:6-13*.

That statute provides as follows:

Dismissal of charge for failure of determination by board.
18A:6-13. If the board does not make such a determination within 45 days after receipt of the written charge, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

The Respondent contends that pursuant to the above statute the District is prohibited from pursuing the April tenure charges against James because it took no action on the charges filed in January 2016 within the time provided by the Statute. Noting that the initial charges were filed on January 15, 2016 and answered on February 18, 2016, the Respondent argued that the District was required to certify charges by April 4, 2016.

Arguing that the District simply disregarded the original tenure charges, the Respondent contends that the District was attempting to circumvent the rules by refiling tenure charges in April 2016 based upon the same underlying allegations of excessive absenteeism, tardiness and conduct unbecoming that it alleged in the January 2016 charges. According to the Respondent, the TEACH NJ statutory requirements must be strictly followed and enforced, and it claims that arbitrators have enforced such compliance with the statute's deadlines. Noting that *N.J.S.A. 18A:6-13* uses the word "shall"; the Respondent argues its wording indicates a mandatory intent that charges be dismissed when no further proceedings were taken thereon.

The Respondent argues that based upon the statute's wording her rights were violated by the District's re-filing of charges in April. Therefore, it contends that those charges should now be dismissed with prejudice by operation of law.

In Point II of its Motion the Respondent, relying upon the Doctrine of Industrial Double Jeopardy, argued that since James' salary was docked on March 2, 2015 by a Memorandum of Agreement (MOA) between the parties, and because her pay was docked again on May 14, 2015 for allegedly being AWOL, that she cannot be punished a second time for the same offenses that have already resulted in discipline. The Respondent relied upon arbitration decisions governed by TEACH NJ to support its argument. See, *In re Jill Buglovsky*, Agency Docket No. 265-9/12, final decision (12/21/12) confirmed, *Buglovsky v. Randolph Twp. B.E.*, Docket No. MRS-C-13-13 (7/16/13); *In re Nikita Clarke-Huff*, Agency Docket No. 290-9/15, final decision (11/16/15); and, *In re John Carlomagno*, Agency Docket No. 180-8/13, final decision (12/20/13).

The MOA referred to above was an agreement between the District and James and the Newark Teachers Union signed on March 2, 2015. It noted that James had (to that point) arrived late on 27 occasions during the 2014-2015 school year and had been conferenced and warned regarding her excessive tardiness. The parties to the MOA agreed that James would be fined one days pay (\$458.32) which was for March 2, 2015, which would constitute full and final resolution of all issues regarding James' unsatisfactory attendance during the 2014-2015 school year. The docking of her pay for allegedly being AWOL on May 14, 2015 obviously occurred after the MOA was signed.

The Notice provision near the end of the MOA puts James on notice that future excessive tardiness:

. . . will result in more harsh disciplinary consequences up to, and including, withholding of increments, tenure charges and removal from employment.

The MOA concludes with a paragraph explaining the “Binding Nature of Agreement” which states that neither James nor her Union can appeal the MOA and that Section concludes with the following pertinent language:

. . . all issues encompassed by the within Agreement are fully and forever resolved by and between the parties.

In the *Buglovsky* case the teacher had been charged with inappropriate conduct and misuse of a board computer and internet during work time over a period of years. For conduct occurring during the 2008-2009 school year she received a written reprimand on April 27, 2009. Additional charges alleged similar and continued misconduct through 2011-2012. Relying on the decision in *Desly Getty*, OAL Docket No. EDU 08750-08 (6/14/09), and with support found in Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. pp. 923-925 (1997), the Arbitrator applied a double jeopardy theory and dismissed the 2008-2009 charges for which the teacher had already been disciplined. The Arbitrator in *Buglovsky* also found that certain employee conduct that the Board allowed to continue without discipline was no longer actionable due to the passage of time and the employee’s subsequent good behavior.

In the *Clarke-Huff* case a teacher’s increment was withheld in 2011 based upon absenteeism extending between 1996 and a point in 2011. The teacher’s absenteeism continued from a point in 2011 through the 2014-2015 school year and the Board filed tenure charges in part based upon all of her absenteeism. The Arbitrator sustained the

Respondent's Motion to Dismiss the charges related to the absenteeism for which she had already been disciplined based upon a double jeopardy theory and barred the Board from seeking additional discipline on those matters.

In the *Carlomagno* case, charges were filed and certified during 2013 based upon the employee's conduct during the 2011-2012 and 2012-2013 school years. Relying upon both Brand and Biren, *Discipline and Discharge in Arbitration*, 2nd Ed. p.54 (2008) and Elkouri and Elkouri, *How Arbitration Works*, 7th Ed., Ch. 15.3F and the decisions in *Buglovsky*, and *I/M/O Tenure Hearing of Frank Flood, Cumberland County Technical Education Center*, Docket No. 95-5/13 (7/29/13), the Arbitrator held that under the double jeopardy theory the teacher could not be disciplined again for certain aggressive and unprofessional conduct in December 2012 for which he had already been disciplined. The Arbitrator in the *Flood* case noted that while the prior disciplined conduct could be considered for progressive discipline purposes for future discipline, the prior disciplined conduct could not be subject to additional discipline.

Emphasizing that the District's withholding of James' salary on March 2 and May 14, 2015 was a significant form of discipline covering 2014-2015, and because the Respondent noted that the District did not claim any infractions subsequent to James' May 14, 2015 suspension, it argued that charges focusing on her attendance record must be dismissed.

In Point III of her Motion, Respondent argues that all the claims of excessive absenteeism and tardiness preceding the MOA signed in March 2015 must be dismissed with prejudice based upon the Doctrine of *Res Judicata*. Basically, the Respondent is arguing that by entering into the MOA, James agreed to an unpaid suspension in

exchange for not being further disciplined for any attendance issues preceding its ratification, and that since any prior attendance issues have been resolved, then *res judicata* prevents the District from pursuing any more discipline of James based upon her prior attendance/tardiness issues.

The Respondent further argued in its brief that based upon the wording of the MOA “James would be subject to disciplinary action only for future instances of excessive absenteeism and tardiness”. The language the Respondent appears to refer to near the end of the MOA is as follows:

Ms. James is placed on notice that future excessive tardiness will result in more harsh disciplinary consequences up to, and including, withholding of increments, tenure charges and removal from employment.

In Point IV of her Motion the Respondent argues that the tenure charges must be dismissed with prejudice based upon the Doctrines of Estoppel, Laches and Waiver because the District failed to address James’ alleged attendance issues from 2008-2009 through the 2013-2014 school years contemporaneously to when the alleged offenses were allegedly committed. The Respondent argues that too much time has passed for James to be able to defend her record back to 2008. It claims she would be unable to recall or prove the circumstances of every alleged tardy or absence issue which would prejudice her ability to defend against the charges.

Relying on *Buglovsky, supra*, the Respondent argued that the Arbitrator in that case dismissed attendance related charges dating back five years that were not previously prosecuted because those charges were too far removed from the alleged offense.

Finally, in Point V of her Motion the Respondent argued that the tenure charges must be dismissed with prejudice based upon the Doctrine of Unclean Hands because the

District failed to follow the disciplinary protocol under the Attendance Improvement Plan regarding James' alleged excessive absenteeism and tardiness. The Respondent explained that the District mostly failed to hold conferences, issue warning notices or recommend disciplinary action as the Plan provided. Respondent alleges that despite the District's claim that James was tardy 348 times from 2009-2010 to 2013-2014, no conferences were held, no warning letters issued and no disciplinary action was recommended. By failing to take such timely action in accordance with the Plan the Respondent argues that the District denied James her due process protections.

The Respondent seeks dismissal of all charges with prejudice and an order reimbursing James for salary and benefits that had been withheld.

PETITIONER

The Petitioner presented four arguments in opposition to the Respondent's Motion. In Point I of its response the Petitioner addressed the procedural argument the Respondent made regarding the impact in this case of the 45 day rule in 18A:6-13 on the District's failure to certify the original charges filed against James in January 2016. The Petitioner explained that after the original charges were filed it uncovered a history of poor attendance and, therefore, expanded its charges.

The Petitioner argued that the original charges simply were not litigated and that *N.J.S.A.* 18A:6-13 did not prevent the filing of the new charges. It cited two cases to support its argument. *In The Matter of the Tenure Hearing of Debra Suitt-Green, State Operated School District of the City of Newark*, OAL Docket No. EDU 7071-96 (October 14, 1997), the District did not find probable cause to certify charges against a teacher. The District subsequently filed charges against the same teacher based upon both the

incidents listed in the prior charges in combination with new incidents. The Respondent moved to dismiss the case relying on *N.J.S.A.* 18A:6-13 and arguing that based upon the Statute the District could not re-file charges based upon incidents previously considered and not certified. The ALJ rejected the Motion and found such prior incidents could be reconsidered. The Commissioner affirmed.

In *The State Operated School District of the City of Newark v. Victoia Jakubiak*, OAL Docket No. EDU 3961-97 (December 22, 1998), charges were initially filed on December 9, 1996 but were not certified. The charges were re-filed – same as before – on February 19, 1997. The Respondent sought to dismiss those charges based on its reading of 18A:6-13. The ALJ, citing to *Suitt-Green*, denied the Respondent’s Motion in that case. The Petitioner here seeks the same result here.

In Point II of its response to the Motion, the Petitioner here argued that the limited release language contained in the MOA does not prevent the 2014-2015 charges from being considered in this case. The Petitioner noted that the parties’ collective agreement permits fines and penalties and that the MOA language expressly contemplates potential future disciplinary action including termination. Petitioner further argued that James was disciplined in May 2015, subsequent to the MOA and that there was no basis to conclude that the totality of James’ attendance record could not be reviewed in a tenure case merely because a minor penalty had been previously agreed upon.

In Point III of its response to the Motion, the Petitioner emphasized that this case is about excessive absenteeism and that there are many cases by the Commissioner and arbitrators holding that even legitimate absences when numerous can be the basis for termination. The Petitioner cited Commissioner decisions: *In the Matter of the Tenure*

Hearing of Alicia Dugan, School District of the City of Jersey City 6/14/12 (#244-12); In the Matter of the Tenure Hearing of Lisa Rosa, School District of the City of Jersey City 9/1/11 (#368-11); In the Matter of the Tenure Hearing of Frances R. Metallo, School District of the City of Union City 5/12/03 (#244-03); and, arbitration decisions: Burke and the State Operated School District of the City of Camden, Docket No. 5-1/13 (March 30, 2015); Stapleton and the Jersey City Board of Education, Docket No. 284-9/12 (March 20, 2013); and, Lenore Francis and the Jersey City Board of Education, Docket No. 285-9/12 (January 10, 2013) to support its position that excessive absenteeism, even if based upon legitimate reasons, are grounds for termination.

The Petitioner also cited to well known treatises used in arbitration to support that position. Elkouri and Elkouri, *How Arbitration Works*, p. 822 (6th Edition); and Brand and Biren, *Discipline and Discharge in Arbitration*, 2nd Edition, p. 124 (2008).

In the presentation of Point III the Petitioner appears to argue that I should consider the merits of James' absences and how she reacted and communicated concerning those absences.

In Point IV of its response to the Motion, the Petitioner emphasized the strong public interest in monitoring teacher attendance and it argued that a full factual hearing is warranted here despite the asserted legal defenses in order to consider and weigh the facts and legal issues.

DISCUSSION

In considering all the above arguments, I remind the parties that currently the merits of the allegations against James – no matter how egregious they may appear – are not before me for determination. Rather, based upon the Respondent's Motion my

jurisdiction at this time is limited to determining what if any allegations in the April tenure charges may proceed to a hearing *de novo*. Consequently, despite the Petitioner's specific allegations, many of which the Respondent has disputed, I will not resolve the viability of those allegations in this Decision. I will, instead, only determine which, if any, allegations may proceed to hearing.

In Point I of its Motion the Respondent argued that all of the charges filed by the District in April 2016 be dismissed because the District allegedly violated *N.J.S.A.* 18A:6-13 by failing to certify to the Commissioner within 45 days all the original charges it filed against James in January 2016. In its brief, the Respondent argued that tenure charges along with an employee's response must be presented to a board of education to decide whether probable cause exists to warrant the employee's dismissal or reduction in salary and if so, the charges must be certified to the Commissioner. The language in *N.J.S.A.* 18A:6-13, however, does not contain such specific requirements.

In fact, the language in that Statute does not require a board to make any determination. It merely says that if a board does not make a determination – presumably whether or not to certify charges to the Commissioner – within 45 days (of when the charges were filed), then the charges that were filed be deemed dismissed and no further proceeding or action be taken thereon – presumably on the charges filed at that time. The pertinent statutory language appears to be a mechanism to automatically dismiss tenure charges if a board has not acted on them within 45 days – presumably to prevent such charges from lingering for an extended period of time. The ending language in that Statute “no further proceeding or action shall be taken thereon” appears to refer back to the charge(s) that was (were) dismissed and appears to have been intended to ensure that

no further action be taken on that which was dismissed, once again to prevent those charges from lingering and creating doubt for the respondent. But the language in 18A:6-13 does not say a board cannot re-file previous charges. That is, the Statute does not say a board cannot serve a new filing on a respondent which includes charges that had been contained in an earlier dismissed filing.

The *Suitt-Green* and *Jakubiak* decisions support that view, holding that charges previously dismissed by operation of 18A:6-13 may be re-filed and reconsidered in subsequent charges particularly if the new charges are filed in close proximate time to the original charges. The same result was reached in *I/M/O Tenure Hearing of Sabino Valdes, Union City School District*, OAL Docket No. EDU 3620-1 (8/9/01), confirmed *Valdes v. City of Union City Board of Education*, Docket No. A-1337-04T3 (App. Div. 1/22/07), certification denied (5/15/07).

In *Valdes* the ALJ held that the Board's failure to certify charges within the time provided in *N.J.S.A.* 18A:6-13 required those charges be dismissed. But he also held that lacking any judicial decisions to the contrary and based upon Department of Education decisions, such dismissals are without prejudice to the right of the Board to re-file such charges. The Appellate Division agreed. Noting that the Board did not rule on the merits of the initial charges and the re-filing occurred within a reasonable time, the Court held:

We conclude that so long as an employee has not been prejudiced by a re-filing of charges within a reasonable period of time, the passage of the statutory time period from the filing of the initial charges should be viewed as a dismissal without prejudice. (slip opinion p. 5).

That same result is appropriate here. After the initial tenure charges were filed on January 15, 2016, the District continued to examine James' records and re-filed the charges on April 11, 2016. I find that the January charges were dismissed by operation of

law (*N.J.S.A.* 18A:6-13) but without prejudice, and that the re-filing in April occurred within a reasonable time of the initial filing. Other than the fact that the Respondent needed to continue to litigate over this matter, and noting that James has either continued to work or at least been paid (after 120 days of suspension) the Respondent did not demonstrate that it was otherwise prejudiced by the re-filing of charges.

Consequently, based upon the above discussion I find that the January 2016 tenure charges were dismissed without prejudice. Thus, the District did not violate *N.J.S.A.* 18A:6-13 by re-filing tenure charges in April 2016. Accordingly, the Respondent's Motion for Summary Dismissal based upon its first Point is denied.

In Point II of its Motion the Respondent, relying on a theory of double jeopardy, vigorously argued that tenure charges based upon any of her conduct in the 2014-2015 school year be dismissed because she has already been disciplined for such conduct as evidenced by: 1) the MOA signed on March 2, 2015 which docked her pay; and, 2) the subsequent additional docking of her pay on May 14, 2015. The Respondent essentially made the same argument relying on a *res judicata* theory in Point III of her Motion. Respondent relied upon *Buglovsky*; *Clarke-Huff* and *Carlomango* to support her argument.

The concept of double jeopardy in the labor relations context has been frequently applied. *Discipline and Discharge in Arbitration* at p. 54 explains:

Fundamental concepts of justice and fairness require that once an employee has been disciplined for misconduct, the employee will not again be subject to discipline for the same offense. ...Double jeopardy concepts also preclude increasing the penalty for a violation after discipline has been imposed.

In its response to the Motion, the Petitioner argued that the MOA contained “limited release language” which it claims does not prevent consideration of all tenure charges. The Petitioner’s argument appears to be based on several things: 1) the language in the Notice Section of the MOA that future excessive tardiness will result in more harsh disciplinary consequences; 2) the fact that James was disciplined for conduct on May 14, 2015, subsequent to the MOA; and 3) apparently because – in the Petitioner’s words – the “minor penalty” (presumably the one day docking of pay) could not block the review of the totality of James’ attendance record.

Although the MOA seems to primarily concern tardiness, I find that the third specific agreement listed therein broadened the purpose of the MOA to include absenteeism. The pertinent language provides:

3. The parties acknowledge that this Agreement constitutes full and final resolution of all issues regarding Ms. James unsatisfactory attendance during the 2014-2015 school year.

The Petitioner seemed to dismiss the Respondent’s double jeopardy argument by claiming that the MOA language was limited and that the Respondent’s argument was unsound for several reasons. First; because the collective negotiations agreement presumably covering James, permits fines or penalties as an exception to tenure charges; second, because the MOA expressly contemplates potential future discipline; third, because James was disciplined again in May 2015; and fourth, because the agreed upon penalty was minor.

Those arguments are not persuasive to defeat Respondent’s Motion. Although the MOA does state that future excessive tardiness will result in more harsh discipline, that document clearly and unequivocally also states that said Agreement:

. . .constitutes full and final resolution of all issues regarding Ms. James unsatisfactory attendance during the 2014-2015 school year.

If the District did not intend that Agreement to cover all of James' attendance issues for the entire 2014-2015 school year, which I believe was intended to cover tardiness and absenteeism, I would think it would not have agreed to that specific language in that Agreement. The discipline for May 14, 2015 while "attendance" related, was for allegedly being AWOL which differs from tardiness or approved absenteeism, it did not negate the "attendance" language in the MOA. In fact, the discipline in May 2015 demonstrated that the District was willing and capable of taking action against James contemporaneously with an alleged infraction, something it clearly choose not to do in the years preceding 2014-2015.

The Petitioner in its brief also spent considerable time arguing why excessive absenteeism is a legitimate basis for dismissing a teacher even when the absences were "justified" and "approved". I don't doubt the Petitioner's argument in that regard or the cases cited in support thereof, but that is more an argument over the merits of the allegations in the charges and potential discipline therefrom, none of which is before me at this time. As explained earlier, I am only determining here, what, if any, allegations may proceed to hearing.

Having considered the parties' positions as well as the decisions and legal treatises cited above I find the double jeopardy concept as well as *res judicata* apply in this case, at least with respect to all attendance - tardy and absentee - allegations against James for all of the 2014-2015 school year as specifically stated in the MOA. Similarly,

double jeopardy applies for the alleged AWOL event of May 14, 2015 for which James was docked a full days pay.

Double jeopardy and *res judicata*, however, do not apply to alleged sign-in or out procedures or proctor failures that may have occurred in the 2014-2015 school year because the MOA was, by its own terms, limited to attendance issues for that year which, I find, only included absenteeism and tardiness. Nor did those legal concepts apply to the 20 alleged tardy days in the 2015-2016 school year alleged in the April tenure charges because the MOA was limited to 2014-2015.

Consequently, based upon the MOA and the docking on May 14, 2015, the Motion is sustained regarding all attendance – absentee and tardy – allegations and the AWOL allegation against James for the 2014-2015 school year. The District may not proceed to hearing on any of those charges/allegations. However, the Motion is denied regarding: 1) the alleged November 24, 2014 warning about unauthorized punches; 2) James alleged failure to perform proctor duties on April 30 and May 5, 2015; and, 3) the allegation that James was tardy 20 times during the 2015-2016 school year. The Petitioner may proceed on those charges/allegations but may not expand on those specific charges.

Based upon its application of *Buglovsky*, the Respondent in Point IV of its Motion essentially argued that the District's inaction until 2016 waived any right it may have had to proceed on the 2008-2009 through 2013-2014 charges/allegations against James. I agree for the same reasons expressed in that decision. Although the Petitioner in Point IV of its response to the Motion argued public interest considerations for wanting a hearing on all of the charges it filed in April 2016, I note it was the District's burden to proceed

with timely charges which would have protected both the public interest and James' due process rights.

In this case the District has sought to litigate over absenteeism and tardiness allegedly occurring as much as eight years before the filing of the 2016 tenure charges. Here, one could infer that if James had as poor an absence/tardy record as alleged – and one which the District determined was unacceptable – the District would have taken vigorous action against James much sooner, certainly at various times during the 2008-2009 through 2013-2014 time period. But other than warning James, it does not appear that the District thought James' record serious enough to take further action during that time. James was allowed to continue working even during the time when she was allegedly continuing to accumulate an absence and tardy record. Either the District was derelict in its duty to earlier file tenure charges, or it had determined that James' conduct – though troublesome – did not justify such action. I tend to believe the latter. In either case, it appears to me that James' conduct in 2014-2015 was the catalyst for the 2016 charges and that the allegations of excessive absences/days tardy prior thereto was merely added for effect.

When considering the fact that the District, through the 2015 MOA, resolved what was alleged to have been a significant number of absences and days tardy during the 2014-2015 school year with only a one day salary penalty, and did not even address any of the alleged absenteeism and tardiness occurring prior thereto, I infer that the District did not appear to consider that such prior conduct justified serious discipline. With that in mind, and noting the significant delay between the alleged prior absences and days tardy and the filing of the instant charges, it appears to me that it would be fundamentally

unfair and violate James' due process to proceed now on conduct arising prior to the 2014-2015 school year. The District had ample opportunity between 2008-2009 and 2013-2014 to contemporaneously proceed on charges concerning conduct during those years. Having failed to do so during the appropriate time period, it waived the right to add charges from those years to the 2014-2015 charges in this case. I, therefore, sustain the Motion with respect to all allegations of conduct occurring prior to the 2014-2015 school year. The Petitioner may not proceed on any charges prior to that year.

Accordingly, based upon all of the above I issue the following:

AWARD

The Respondent's Motion for Summary Dismissal is sustained in part and denied in part.

A. The Motion is sustained regarding:

1. All alleged conduct occurring during the 2008-2009 through the 2013-2014 school years.
2. All alleged absenteeism and tardiness occurring during the 2014-2015 school year.
3. The alleged AWOL conduct occurring on May 14, 2015.

B. The Motion is denied regarding:

1. Respondent's allegation that the tenure charges could not be re-filed.
2. The alleged November 24, 2014 warning about unauthorized punches.
3. James' alleged failure to perform proctor duties on April 30 and May 5, 2015.
4. The allegation James was tardy 20 times during the 2015-2016 school year.

C. I retain jurisdiction over a possible Remedy for the matters dismissed in Section A, and retain jurisdiction for the matters remaining in Section B, numbers 2, 3, and 4. A conference call will be arranged with the parties to determine the further processing of this case.

Arnold H. Zudick
Arbitrator

Dated: April 17, 2017
Morrisville, PA

Commonwealth of Pennsylvania }
County of Bucks }

On this 17th day of April 2017, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

