

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

In the Matter of the Tenure Arbitration Between:

**SCHOOL DISTRICT OF THE CAMDEN
COUNTY TECHNICAL SCHOOLS**

“Petitioner”

**DECISION ON
MOTION TO
DISMISS**

and

BRETT FETTY

“Respondent”

Agency Docket No. 173-7/19
[Brett Fetty]

**BEFORE
ARNOLD H. ZUDICK
ARBITRATOR**

Appearances:

For the Petitioner
David C. Patterson, Esq.
Maressa Patterson, LLC

For the Respondent
Andrew L. Schwartz , Esq.
Schwartz Law Group, LLC

PROCEDURAL HISTORY

On July 17, 2019 the School District of the Camden County Technical Schools [Petitioner or District] served Brett Fetty [Respondent or Fetty] with a Notice of Tenure Charges pursuant to *N.J.S.A.* 18A:6-11. Charge One alleged Conduct Unbecoming; and Charge Two alleged Other Just Cause. On or about August 1, 2019, the Respondent, in accordance with *N.J.A.C.* 6A:3-5.3(a)(1), filed a Motion to Dismiss [Motion] the tenure charges with the Office of Controversies and Disputes in lieu of filing an answer. I was appointed the Arbitrator to adjudicate this matter on August 7, 2019. A conference call was held with the parties on August 8, 2019 which resulted in the Petitioner filing its response in opposition to the Motion on August 23, 2019. This is a Decision on the Respondent's Motion to Dismiss the tenure charges filed by the Petitioner.

BACKGROUND

Brett Fetty has been employed by the District since July 1, 2013. He served as Assistant Principal at the District's Gloucester Township Campus from July 1, 2013 until June 30, 2016; and has served as the Principal of the District's Pennsauken Campus from July 1, 2016 through June 30, 2019. Based upon its tenure charges the District is seeking to demote Fetty from a Principal to an Assistant Principal (presumably to revoke his principal certification) and reassign him to the Gloucester Township Campus. On or about July 16, 2019, Fetty was suspended without pay pending this matter.

In its Statement of Charges the District alleged in Charge One, that Fetty engaged in unbecoming conduct by his allegedly repeated verbal abuse and malicious conduct and disparaging and humiliating remarks, particularly about a female administrator that created a hostile work environment and violated District Policies and Procedures. The

District elaborated, alleging that Fetty made such remarks to and about staff members; he allegedly berated a female administrator in front of staff and subordinates thereby undermining her authority; and it alleged he treated female and male staff members differently.

The District also alleged in Charge One that Fetty's conduct demonstrated his failure to perform in accordance with the Multidimensional Principal Performance Rubric because his conduct allegedly negatively impacted morale and the school environment. The District further alleged Fetty failed to provide a safe, efficient and effective learning environment; that he associated accountability with threats and made decisions based upon his own self interest.

Finally, the District also alleged in Count One that Fetty's conduct failed to adhere to and follow the goals stated in the principal's job description. The District alleged Fetty failed to foster an effective learning environment; failed to foster staff and personnel relationships; failed to solve problems effectively; and, failed to maintain superintendent relationships and execute administrative regulations.

In Charge Two the District alleged that the above alleged Conduct Unbecoming constituted Other Just Cause warranting that Fetty be removed from his principal position and be reassigned as an assistant principal with his mandatory participation in the employee assistance program and with counseling. The District concluded Charge Two arguing that Fetty's increment for the 2019-2020 year be withheld and that his suspension without pay; continue during the pendency of the charges.

In its Statement of Evidence the District primarily relies upon nine documents. But it also stated that there may be other supporting evidence that exists beyond those nine documents and it “reserved” the right to supplement the evidence.

Exhibit 01 is the June 19, 2019 memorandum of written “charges/recommendations” by Superintendent Patricia Fitzgerald to the District’s Board of Education. In her memorandum Fitzgerald relies upon written statements by 10 staff members sent to the District’s Affirmative Action Officer, Kathleen Cassidy, regarding Fetty’s alleged conduct. Fitzgerald summarizes remarks made by staff members about Fetty in their statements to Cassidy, but Fitzgerald does not name any of those staff members.

Fitzgerald refers to Cassidy’s summation of staff members statements to her [which is Exhibit 03], and Fitzgerald refers to comments she made in Fetty’s evaluation. Fitzgerald concludes that Fetty’s performance did not comply with the Principals Multi-dimensional Rubric; and that he violated the District Healthy Workplace Environment Policy (No. 3351) and its’ Code of Ethics Policy (No. 3211).

Exhibit 02 is the District’s Healthy Workplace Environment Policy. It provides that employees are entitled to a healthy workplace environment where employees are treated with dignity and respect and an environment devoid of threatening, intimidating or humiliating conduct by another employee. Under the Policy employees can submit a report of Policy violations to the Superintendent.

Exhibit 03 is Cassidy’s summary of the ten staff statements submitted to her allegedly regarding Fetty’s conduct. Cassidy is both the District’s Manager of Human

Relations and its Affirmative Action Officer. Cassidy referred to those staff statements as Staff Members A through Staff member J.

Cassidy explained that she spoke to four female staff members on May 22, 2019, and asked them to submit written statements. Subsequently, six other staff members submitted statements concerning Fetty. Two of those ten staff members are no longer employed by the District. Cassidy noted that she asked all of the staff members if they wanted to file affirmative action claims (against Fetty), but they all declined to do so. Cassidy wrote that all of those staff members still employed by the District requested that their statements remain confidential allegedly because they feared Fetty's retaliation.

Exhibit 04 includes the ten staff member statements submitted to Cassidy. None of those statements are signed. Rather, they are designated as A through J.

Exhibit 05 is an excerpt from Fitzgerald's June 20, 2018 evaluation of Fetty. Fitzgerald notes in that document that Fetty should use professional wording in all staff communications, and he should not make any negative comments to or about staff or administrators.

Exhibit 06 is the District's Code of Ethics Policy. It provides that staff will adhere to the highest ethical standards.

Exhibit 07 is the District's Multidimensional Principal Performance Rubric.

Exhibit 08 is the District's Job Description for Principal. It includes the requirement that a Principal provide; a "safe, secure and caring environment", and, enforce the Code of Conduct.

Exhibit 09 is the District's Policy No. 4381, Protection Against Retaliation. It provides that the District will not take retaliatory action against any employee that has disclosed behavior that the employee believes is in violation of law or rule.

POSITIONS OF THE PARTIES

RESPONDENT

The Respondent's Motion to Dismiss the Charges was filed on August 1, 2019. It argued two reasons for dismissal. First, because the Petitioner relies upon an incomplete statement of evidence that deprives Respondent of the right to prepare a complete defense; and Second, because the statement of evidence primarily relies upon ten written but unsworn and anonymous statements. The Respondent argues that TEACHNJ prohibits such unspecific and indefinite charges and individually, and particularly when combined, those reasons require the charges be dismissed.

The Respondent's first reason for dismissal refers to the Petitioner's remark in its statement of evidence that "there may be other supporting evidence that exists beyond the documents attached with this submission". The Respondent argues that the above remark indicates that the District's evidence was incomplete when the charges were filed and thus violated the intent of both *N.J.S.A.* 18A:6-11 and the regulation in *N.J.A.C.* 6A:3-5.1(b)(1).

N.J.S.A. 18A:6-11 provides in pertinent part that when a tenure charge is filed it shall include a "written statement of evidence under oath to support such charge". The regulation in *N.J.A.C.* 6A:3-5.1(b)(1) conforms to the Statute and requires that charges be specific; and that they be accompanied by a supporting statement of evidence with complete copies of all documents referenced in the statement of evidence.

N.J.A.C. 6A:3-5.1(b)(1) specifically provides:

1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement.

The Respondent contends that the Petitioners reference to the possible existence of other evidence not included in its statement of evidence; and, its reliance upon ten unsigned and anonymous employee statements lacks the required specificity required by law. Relying upon several prior decisions, the Respondent therefore argues that the Petitioner has failed to comply with both the Statute and the Regulation.

In *In re Neal Gordon/Endlgwood Board of Education*, Docket No. 24-1/18 (8/13/18), Arbitrator Licata granted a motion to dismiss due to the Board's failure to comply with *N.J.A.C.* 6A:3-5.1(b). The Arbitrator held in pertinent part that:

The sworn tenure charges must align with the sworn statement of evidence and the sworn statement of evidence must include all documents identified therein. At p.11

In *In re Marie Ebert/School District of the City of Newark*, Docket No. 267-9/14 (1/30/15), Arbitrator Denenberg granted a motion to dismiss due to the Board's failure to comply with the requirements of *N.J.S.A.* 18A:6-17.1(b)(3). That Statute provides in pertinent part:

Upon referral of the case for arbitration, the employing board of education shall provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

In the *Ebert* case the Respondent had not been provided with certain requested documents or with summaries of witness testimony. Arbitrator Denenberg held that a district and all its evidence must be thoroughly prepared before tenure charges are filed. She concluded that the tenure charges in that case were premature, and dismissed those charges due to the District's failure to disclose all evidence to the Respondent when the charges were referred to arbitration.

The result was the same in *In re Tara Trongone/School District of the City of Gloucester City*, Docket No. 173-6/16 (9/12/16); and in *In re Kevin Karp/Barnegat Township Board of Education*, Docket No. 102-4/16 (5/26/16) where arbitrators granted motions to dismiss when the respective employers failed to comply with *N.J.S.A. 18A:6-11* and *N.J.A.C. 6A:3-5.1(b)* in part by relying upon unsigned and unsworn statements made to superintendents who did not directly participate in the related investigations.

Relying upon the above cited decisions the Respondent here makes the point that the District's comment in its statement of evidence that there may be other supporting evidence demonstrates that the District is not ready to proceed as required by TEACHNJ. Similarly, the Respondent contends that the Petitioner's reliance on unsworn and unnamed statements places it (the Respondent) in an unfair position forcing it to guess the identity of its accusers. The Respondent maintains that the District was obligated upon filing the charges to disclose the identity of the staff members upon whose statements Cassidy and Fitzgerald relied.

PETITIONER

In its brief opposing the Motion the Petitioner raised three arguments. First, it represented that it reference in its original statement of evidence that there may be additional evidence was a mistake; and, that there is no other evidence or documents to be submitted in this case other than its previous submission and the new affidavits by Fitzgerald and Cassidy submitted with this response which includes the names of the staff members who provided statements to Cassidy. In her most recent affidavit Fitzgerald certifies that the remark in the District's original statement of evidence that there may be additional evidence was an error, and that the statement of evidence provided with the tenure charges (apparently, now with the inclusion of staff member names on the statements in Exhibit 04) is complete.

Second, the Petitioner argued that it should be permitted to "correct or amend" its tenure charges by providing the identity of the staff members who wrote statements about Fetty to Cassidy. The District noted that Fitzgerald's most recent affidavit indicates that those names should have been included in its original statement of evidence and were added to those statements as attached to her most recent affidavit. The District contends that since those names are now provided it removes any prejudice to the Respondent's ability to respond to the charges.

Third, the Petitioner argued that Fitzgerald's original affidavit and most recent affidavit should be accepted because she did have first-hand knowledge of and was directly involved in participating in the investigation that led to the tenure charges against Fetty, and that both her statements were sworn. Additionally, the District argued that Cassidy's now sworn affidavit submitted with its (the District's) response to the Motion

should be accepted as a correction or amendment to the tenure charges because it supports Fitzgerald's certifications and the letters submitted to both of them by the staff members.

The Petitioner concludes its response arguing that the cases relied upon by the Respondent have different fact patterns than this case, and that with the additional information provided in its response to the Motion, the Respondent is no longer prejudiced in proceeding to develop its case.

DISCUSSION

I remind the parties that the Motion before me does not concern the merits of the Petitioner's charges, but rather the procedural issue of whether the Petitioner's filing of the charges complied with both the statute and the rules. Consequently, I can not consider in this Decision whether Fetty made any inappropriate remarks to other staff or violated the rubric, his job description or District policies. My Decision here is limited to whether the charges were properly filed.

An initial view of the Petitioner's original statement of evidence reveals that the District's mention that there may be other evidence; and its reliance on anonymous written statements certainly creates doubt about the specificity and reliability of its charges. Standing alone, anonymous statements do not comply with the decision in *In re Gordon* above because since they are not sworn statements, they cannot be considered part of or included in the sworn statement of evidence. Such anonymous statements present an untenable position for any respondent; hindering his or her ability to prepare a legitimate defense. Therefore, such anonymous statements seem to violate the intent of *N.J.S.A.* 18A:6-11; *N.J.S.A.* 18A:6-17.1(b)(3); and, *N.J.A.C.* 6A:3-5.1(b)(1).

Although the wording of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6A:3-5.1(b)(1) requiring a statement of evidence supporting the charges may not clearly enunciate what needs to be included therein, the same cannot be said about *N.J.S.A.* 18A:6-17.1(b)(3). That provision clearly requires that the employing board of education provide “all evidence” including “statements of witness, and a list of witnesses” to the affected employee or his/her representative. Subsumed within the requirement to provide “all evidence” and “statements of witnesses” is the need to provide the names of the authors of any statements a board relies upon. Anonymous statements are of no reliable or probative value and their submission in a statement of evidence is a failure to comply with the statutory requirement.

It appears from its response to the Motion that the District here realized that the statements in its Exhibit 04 were insufficient, and it sought to correct the problem by providing the names of the authors of those statements through Fitzgerald’s supplemental affidavit. I appreciate the District’s effort in its response to the Motion to correct (or to at least attempt to correct) its remark in its original statement of evidence that there may be additional evidence, and its effort to attempt to correct its original submission of anonymous statements. It asserts those were both errors that it was correcting with Fitzgerald’s supplemental affidavit. Fair enough, I understand why it would make sense to accept those corrections so that a hearing may proceed on the merits of the charges.

But I cannot accept Fitzgerald’s recent affidavit to correct those errors and this Motion must be granted for two particular reasons. First, a board’s obligation to submit all evidence it intends to rely upon when filing tenure charges is a statutory requirement. *It appears to me that the Legislature understood that the revocation of tenure was a*

serious matter and it (the Legislature) intended board's of education to reveal all of the evidence it would rely upon and to be fully prepared to proceed on such charges before filing tenure charges. There is no provision I am aware of in the TEACHNJ statutory scheme that provides that a board can amend or supplement its original statement of evidence after filing charges in order to subsequently comply with *N.J.S.A. 18A:6-11* and *N.J.S.A. 18A:6-17.1(b)(3)* after having originally failed to comply with those statutes. The appropriate procedure, I believe, is that such a board must refile its charges.

The decisions cited above support that position. The arbitrators in *In re Neal Gordon*; *In re Marie Ebert*; *In re Tara Trongone*; and, *In re Kevin Karp*: were vigilant about enforcing the "statement of evidence" requirements in *N.J.S.A. 18A:6-11* and *N.J.A.C. 6A:3-5.1(b)(1)* and the "all evidence" and "statements of witnesses" requirement in *N.J.S.A. 18A:6-17.1(b)(3)*. By enforcing those requirements board's of education will be consistently on notice to carefully and fully comply with those requirements when they file tenure charges.

Second, even if I were inclined to accept Fitzgerald's supplemental affidavit that there was no additional evidence for the District to present in this case; the mere providing of the names of the authors of the statements in Exhibit 04 was insufficient to cure those originally anonymous statements. The District's own statement of evidence revealed that all of the staff members who submitted statements declined to file affirmative action claims, and, apparently, they all requested that their statements remain confidential. I can only infer from that information, that those staff members were/are reluctant to give evidentiary level statements. Based upon those stated positions the Respondent can not be certain of the veracity or the accuracy of those statements with

just the names of the authors of those statements. At the very least, for those statements to have legal viability – or at least for the statements the District intends to rely upon to be included in the sworn statement of evidence as discussed in *In re Gordon* – they need to be sworn and signed by the authors of the statements

CONCLUSION

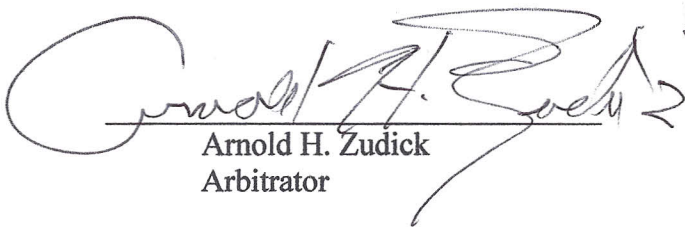
Based upon all of the above the Respondent's Motion to Dismiss the Charges is granted because the District failed to comply with the statutory and procedural filing requirements. However, this ruling is without prejudice to the District's right to re-file charges that comply with those filing requirements and procedural provisions. However, any refiling must contain sworn and signed statements from employees who claim inappropriate behavior by Fetty.

The District shall immediately reinstate the Respondent with full back pay and benefits, as if he were in a principal position, but this Decision is not intended to require the District to return the Respondent to the principal position at the Pennsauken (or at the Gloucester) Campus.

Accordingly, I issue the following:

AWARD

The Motion to Dismiss is granted without prejudice to the District's right to re-file tenure charges. The District shall reinstate the Respondent with full back pay and benefits consistent with the above Conclusion. If the charges are refilled, the District must provide sworn statements from those staff members it chooses to rely upon.



Arnold H. Zudick
Arbitrator

Dated: September 3, 2019
Yardley, Pennsylvania

Commonwealth of Pennsylvania }
County of Bucks }

On this 3rd day of September 2019, 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.



Notary Public

