

**PURSUANT TO THE REFERRAL BY THE
COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY**

IN THE MATTER OF THE TENURE HEARING OF NOEL GORDON	: : BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : :
BY THE SCHOOL BOARD OF THE CITY OF ENGLEWOOD, BERGEN COUNTY	: AGENCY DOCKET NO. 25-1/19 : : DECISION ON MOTION TO DISMISS

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

APPEARANCES:

On behalf of Noel Gordon
Andrew L. Schwartz, Esquire
Schwartz Law Group, LLC

On behalf of Englewood Board of Education
Dennis McKeever, Esquire
Sciarrillo, Cornell, Merlino,
McKeever & Osborne, LLC

On January 25, 2019, the Englewood Board of Education (“Board”, “Petitioner”, or “District”) filed Tenure Charges of unbecoming conduct, incompetence and other just cause consisting of one hundred and thirty-six (136) separate paragraphs (some with sub-parts) against Respondent Noel Gordon (“Dr. Gordon” or “Respondent”). The charges against Dr. Gordon emanated from irregularities found in student transcripts at Dwight Morrow High School (“DMHS”) and Academies@Englewood.

The instant sworn Tenure Charges is the third occasion in which the District filed charges against Respondent. By Resolution, on February 16, 2017, the Board placed numerous employees,

including Dr. Gordon, on paid administrative leave until the completion of an internal investigation regarding, *inter alia*, transcript irregularities.

After the investigation, on September 20, 2017, the District filed a consolidated set of Tenure Charges against eight (8) employees. The Commissioner of Education (“Commissioner”) dismissed the charges, Agency Docket Number 216-9/17, declaring them “procedurally defective,” sealing all records on November 9, 2017 because identifying student information was included in support of the charges. The dismissal was without prejudice to refile. (R- 1)¹

On January 29, 2018, the District filed separate charges against each employee, including Dr. Gordon. Those charges, Agency Docket Number 24-1/18 were dismissed on August 13, 2018, by Arbitrator Joseph Licata for failing to comply with specific requirements of *N.J.A.C. 6A:3-5.1(b)(1)* and failing to adhere to the Commissioner’s prior directives. Again, the dismissal was without prejudice to refile. (R-2) In both dismissals, the Board was directed to reinstate Dr. Gordon with full back pay and benefits.

Dr. Gordon’s employment, however, was effected by the Board’s determinations to abolish positions - a Reduction In Force (RIF). At the expiration of the 2016-2017 school year, during the investigation, the Board abolished the Position of Director of Guidance, Testing and Evaluation. Dr. Gordon also held tenure as a Vice Principal. Nonetheless, On June 1, 2017, Dr. Gordon was informed, “Please be advised, however, that due to the pendency of the investigation and your status of being on paid suspension, no formal assignment shall be designated at this time for the 2017/2018 school year.” (R-4)

During the following school year, on May 1, 2018, Superintendent of Schools Robert L.

¹Respondent’s Exhibits attached to the Motion to Dismiss are identified as R-.

Kravitz conveyed the following notification to Dr. Gordon:

“Please be advised that at the May 3, 2018 Englewood Public School District Board of Education meeting, I will be recommending a reduction in force to the Englewood Board of Education. My recommendation is based upon reasons of economy and other just cause. Your employment position will be impacted by this recommendation, and effective for the 2018-2019 school year, your position will be eliminated.

Your employment with the District will, therefore, conclude on June 30, 2018. COBRA information will be provided to you by the Business Office, Department of Human Resources.

This is a difficult decision to make, one that I have given careful and deliberate thought, and one that is not made lightly.

I thank you for your service and dedication to the Englewood Public School District.”
(R-3, emphasis supplied)

On May 3, 2018, by Resolution, the Board abolished the position of Vice Principal, effective July 1, 2018, “for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause.”
(R-3)

On July 1, 2018, after the Board’s approval of the RIF, Dr. Gordon was removed from the payroll, from insurance programs and ceased receiving pension contributions. He retains no District property nor has any access to District emails or technology.

On or about July 25, 2018, Dr. Gordon filed a Petition of Appeal, with the Commissioner (thereafter amended), claiming, *inter alia*, tenure entitlement to various positions held by non-tenured and/or less senior staff members. The Petition is before the Honorable Danielle Pasquale, A.L.J. with the Office of Administrative Law.

In his Brief in Support of the Motion to Dismiss, Dr. Gordon argues the “Tenure Hearing Law”, *N.J.S.A. 18A:6-10 et seq.* applies only to school district employees under tenure. And, as Dr.

Gordon is no longer a District employee, the charges, procedurally invalid, should be dismissed.

The Board maintains the tenure laws do not prohibit a District from certifying tenure charges against a tenured “inactive employee” who has been reduced-in-force.

Accordingly, in assessing whether to grant or deny the instant Motion, the following issue must be addressed:

Whether the Englewood Board of Education can file tenure charges against Dr. Gordon after the positions to which he earned tenure were abolished by Resolutions of the Board of Education, Reduced-in-Force, said RIFs the subject of a Petition of Appeal before the Office of Administrative Law?

Title 18A - EDUCATION

The Parties identified the following provisions of *Title 18A- Education* as particularly relevant:²

18A:6-10. Dismissal and reduction in compensation of persons under tenure in public school system

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be *under tenure of office, position or employment* during good behavior and efficiency in the public school system of the state,...

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such *person*, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

18A:6-11 Written charges, statement of evidence; filing; statement of position by employee; certification of determination; notice.

²The Parties also identified numerous administrative code provisions, the recitation of which would overburden this decision.

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....

18A:6-14 Suspension upon certification of charge; compensation; reinstatement.

18A:6-14. Upon certification of any charge to the commissioner, *the board may suspend the person* against whom such charge is made, with or without pay, but, if the determination of the *charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.* Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

18A:28-9. Reduction of force; power to reduce and reasons for reduction

Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to *reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions* for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district *or for other good cause* upon compliance with the provisions of this article.

18A:28-12. Reemployment in order of seniority

18A:28-12. *If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list* in the order of seniority for re-employment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for re-employment, full recognition shall be given to previous years of *service,....*
(emphasis supplied to statutes above)

POSITION OF THE PARTIES

The Parties proffered comprehensive argument; the essence of each is as follows:

Respondent Noel Gordon

In support of his motion, Dr. Gordon maintains the *Tenure Employees' Hearing Law*, *N.J.S.A. 18A:6-10 et seq.*, applies only to school district employees under tenure. It does not apply to individuals such as Dr. Gordon who have been dismissed by way of a reduction in force pursuant to *N.J.S.A. 18A:28-9*.

Every applicable provision of the *Tenure Employees' Hearing Law* assumes employment within the district or suspended persons under salary. The *State Board of Education Administrative Code Provisions*, the implemented regulations, also refer to employees, professes Respondent. RIF statutes would be undermined if tenure charges could ensue after the abolishment of a teaching staff member's position. That Dr. Gordon has a pending Petition of Appeal before the Commissioner of Education, does not change his status from one who's employment with the district "concluded" on June 20, 2018. (R-3)

Respondent requests the instant tenure charges be dismissed, as procedurally invalid, without prejudice to refile.

Petitioner Englewood Board of Education

Tenure laws provide procedures to follow and criteria for dismissal or salary reduction. The laws do not prohibit the Board of Education from certifying tenure charges against a tenured "inactive" employee who has been reduced-in-force, avers the Board. A *person*, within the meaning of *N.J.S.A. 18A:6-10 et seq.*, who has been reduced-in-force is tenured, otherwise there would not be entitlement to a preferred eligibility list - to be recalled to the position. The Board

maintains a *person* is not isolated from tenure charges while on the preferred eligibility list.

As a tenured employee, Dr. Gordon does not lose his status regardless of whether he is an active employee or inactive employee on the eligibility list. As Respondent's tenure rights did not disappear when Dr. Gordon was reduced-in-force, the legal ability of the Board to terminate him for inefficiency, unbecoming, conduct or just cause did not disappear.

Moreover, the District asserts, every statute and administrative code regulation relating to the *Tenure Employees' Hearing Law* also applies to a tenured person who has been reduced-in-force. "The focus of tenure charges is on an inactive employee's tenure entitlement to a position in the school district and not whether the person is an active employee." (Brief at 8) Counsel concludes,

"It is Respondent's tenure status that required Respondent be on a preferred eligibility list and it is Respondent's tenure status that permits the Petitioner to certify tenure charges against Respondent. Respondent's motion to dismiss the tenure charges must be dismissed." (Brief at 10)

ANALYSIS

Whether the Englewood Board of Education can file tenure charges against Dr. Gordon after the positions to which he earned tenure were abolished by Resolutions of the Board of Education, Reduced-in-Force, said RIFs the subject of a Petition of Appeal before the Office of Administrative Law?

Contrary to the two previous tenure charges referred by the District, neither the verbiage of the charges, nor supporting evidence is the basis of the instant Motion to Dismiss. Rather, a determination of the issue before me requires an examination of statutory language and enforcing administrative code provisions.

The instant charges of January 25, 2019, were certified and referred to the Commissioner of Education by the District, almost six (6) months after the position of Vice Principal was

eliminated in a RIF, pursuant to *N.J.S.A. 18A:28-9*. Almost six (6) months after Dr. Gordon's employment in the District "concluded."

The issue herein necessitates a discussion as to whether the tenure statutes can be interpreted to apply to the Board's concept of an "inactive employee." While the Board presented creative thought-provoking argument, upon consideration of the statutory provisions of Title 18A, the enforcing administrative code provisions found in *N.J.A.C. 6A*, and the parties' argument, I **find** the Board's concept of tenure of an "inactive employee" unconvincing, not persuasive. The undersigned **finds** she lacks statutory authority to conduct a hearing, pursuant to *N.J.S.A. 18A:6-17.1, Panel of Arbitrators*, on tenure charges alleging conduct unbecoming against Dr. Gordon.

Tenure is a statutory right. As recently as April 30, 2019, the Supreme Court of New Jersey in *Zimmerman v. Sussex Cty. Educ. Servs. Comm'n*, 237 N.J. 465 reiterated, once employed for the "duration of service" required to acquire tenure, termination of a tenured individual's employment rights requires strict compliance to the Tenure Act. The Court, therein, cited *Spiewak v. Bd of Educ. of Rutherford*, 90 N.J. 68, 74-75 (1982) recognizing tenure protections, as remedial legislation, "should be liberally construed to achieve its beneficent ends."

The statutes provide two pathways to terminate a tenured individual's employment. The Board may certify charge(s) of inefficiency, incapacity, unbecoming conduct, or other just cause. Upon review, if the Commissioner determines the tenure charge(s) are sufficient, if true, to warrant dismissal or a reduction in salary, the matter is transmitted to an arbitrator appointed to hear and determine the case, according to the provisions of *N.J.S.A. 18A:6-17.1 Panel of Arbitrators*. (*see also N.J.A.C. 6A:3-5.5 Controversies and Disputes*).

A tenured employee can be also be "concluded" by elimination of the tenured position by

way of a RIF conducted in accordance with *N.J.S.A. 18A:28-9*, upon the abolishment of “any such position for reasons of economy or because of reduction in the number of pupils or of administrative change or supervisory organization of the district or for other good cause.” Thereafter, the reduced-in-force employee is listed, in order of seniority, upon a preferred eligibility list.

The language of the *Tenure Employees’ Hearing Act* is clear, unambiguous and consistent with code provisions. In order to evoke *N.J.S.A. 18A:6-10*, a “person” must be “under tenure of office, position or employment.” *N.J.S.A. 18A:1-1* expresses the word “employee”, refers to “the holder of any position or employment.” *N.J.S.A. 18A:6-11* articulates charges are made “against any employee.” It is to the “employee” that a Board must provide a copy of a charge or an opportunity to submit a written statement of position. And, upon the Board’s referral of the case for arbitration, “the *employing* Board of Education shall provide all evidence...to the *employee* or the *employees’* representative.” *N.J.S.A. 18A:6-17.1 (b)(3)*.

The Petitioner did not proffer any decisions of the Commissioner of Education or Appellate Courts to support the concept of an “inactive employee”; nor of its claim placement of an employee who was subject to a reduction in force on a preferred eligibility list until a vacancy occurs, pursuant to *N.J.S.A. 18A:28-12* and *N.J.A.C.6A32-5.1(I)*, resurrects the Board’s power to certify tenure charges.

DETERMINATION

In light of the above review, I *find* the “person” referenced in *N.J.S.A. 18A:6-10*, *Dismissal and reduction in compensation of persons under tenure in public school systems*, must be an employee of the Board of Education at the time charges are certified. The *Tenure Employees’*

Hearing Act, N.J.S.A. 18A:6-10 et seq. applies only to school district employees under tenure. The Englewood Board of Education cannot pursue tenure charges filed against Noel Gordon after the positions to which he earned tenure were abolished by Resolutions of the Board of Education, Reduced-in-Force, said RIFs the subject of a Petition of Appeal before the Office of Administrative Law.

Accordingly, Respondent's Motion to Dismiss is, hereby, *granted*, without prejudice to refile.

DATED: 7/15/19

Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on
CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person:

- (a) is named in and personally signed this document; and
- (b) signed, sealed and delivered this document as her act and deed.

DATED: 7/15/19

Kristin M. Flanagan-Kelly
NOTARY PUBLIC

