

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF THE TENURE CHARGE)
OF INEFFICIENCY)

- against -)

NEIL THOMAS)

- filed by -)

STATE-OPERATED SCHOOL DISTRICT OF)
THE CITY OF NEWARK)

AGENCY DOCKET NO. 244-9/14)

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

Brenda C. Liss, Esq.
Riker, Danzig, Scherer, Hyland & Perretti, LLP

FOR THE RESPONDENT

Kathleen Naprstek Cerisano, Esq.,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, PC

BACKGROUND

By letter dated September 3, 2014, on behalf of the State District Superintendent, the law firm of Riker, Danzig, Scherer, Hyland and Perretti, LLP, specifically Ms. Brenda Liss, Esq., submitted a tenure charge of inefficiency against Neil Thomas (hereinafter the "Respondent") to David Hespe, Commissioner, New Jersey Department of Education.

The tenure charge of inefficiency was filed by the State District Superintendent ("District") pursuant to Section 25 of the Teachers Effectiveness and Accountability for the Children of New Jersey Act ("TEACH NJ"), N.J.S.A. 18A: 6-17.3. This section provides for the filing of such charges based upon ratings of ineffective or partially ineffective during two consecutive annual evaluations. In the case of Mr. Thomas, these tenure charges of inefficiency are based upon the two (2) "partially effective" ratings which he received on his annual summative evaluations for the 2012-2013 and 2013-2014 school years.

According to the District, since the "matter presents no 'exceptional circumstances' warranting deferral the charge was filed with the State District Superintendent pursuant to N.J.S.A. 18A: 6-17.3(a)(2)."

On behalf of the District, original copies of the following documents were submitted to the State Education Commissioner: Notice of Inefficiency Charge, Statement of Evidence and Certificate of Service. In addition, "for the Commissioner's information and to complete the record, a copy of the State District Superintendent's Determination to certify the charges to the

Commissioner and to suspend Respondent for 120 days, effective September 4, 2014, N.J.S.A. 18A: 6-17.3(b) and N.J.S.A. 18A: 6-14" was submitted.

By letter dated September 15, 2014, the law firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, PC, specifically, Ms. Kathleen Naprstek Cerisano, Esq., filed a "Motion to Dismiss the Tenure Charges Pending the Commissioner's Decision pursuant to N.J.A.C. 6A: 3-5.3 and to defer transmittal of the charges to the arbitrator pending a determination by the Commissioner of this Motion pursuant to N.J.A.C. 6A:3-5.5."

According to the Respondent, "these charges are legally, procedurally and factually defective, unwarranted, arbitrary, and capricious and must be dismissed as they do not comply with the standards imposed by TEACHNJ, P.L. 2012, c. 26."

In his legal argument, the Respondent, pursuant to N.J.A.C. 6A: 3-5.3, asserts that "the charges should not be transmitted to an arbitrator and should, respectfully, be dismissed by the Commissioner, as a matter of law. The regulation cited provides in relevant part:

Except as specified in N.J.A.C. 6A:3-5.1(c), within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. *If the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly...*(emphasis added)

By letter dated September 22, 2014, the undersigned was appointed as the arbitrator in the instant case by M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, Department of Education, State of New Jersey,

pursuant to P.L. 2012, C. 26 signed into law by Governor Christie on August 6, 2012.

By letter dated September 3, 2014, the District, on behalf of the State District Superintendent, submitted a tenure charge of inefficiency against Neil Thomas ("Respondent"), a tenured teacher in the Newark State-Operated School District. On September 15, 2014, the Respondent submitted a Motion to Dismiss/Stay Arbitration Pending Commissioner's Decision. By letter dated October 13, 2014, the District submitted its brief in Opposition to the Motion to Dismiss. On October 20, 2014, the Respondent submitted a reply to the brief submitted by the District in Opposition to the Motion to Dismiss. On October 28, 2014, the District submitted a Sur-reply to the reply brief of the Respondent as well as addressed the decision of Arbitrator Bluth in *I/M/O Tenure Charge of Sandra Cheatham, State-Operated School District of the City of Newark*, Agency DKT. No. 226-8/14. On November 4, 2014, the Respondent, submitted a Sur-sur-reply to the District's Sur-reply.

STATEMENT OF FACTS

The tenure charge of inefficiency filed against the Respondent is based solely upon the annual summative evaluation ratings he received for the 2012-2013 and 2013-2014 school year pursuant to N.J.S.A. 18A:6-17.3. Section 25 of TEACHNJ, N.J.S.A. 18A:6-173 mandates the filing of an inefficiency charge by the Superintendent in instances where a teacher is "rated ineffective or partially ineffective in an annual summative evaluation" for at least two years. N.J.S.A. 18A:6-17.3(1) and (2). Section 25 further precludes any discretion in the matter

by mandating that an inefficiency charge be filed. Section 25 further provides, however, that “[t]he only evaluations that may be used for the purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.).” See N.J.S.A. 18A:6-17.3(d).

In 2012-2013, the Respondent received two (2) formal observations, a mid-year evaluation, and an annual summative evaluation. Neither of the two formal observations the Respondent received in 2012-2013 were announced, and neither of the observations conducted were preceded by a pre-observation conference. In 2013-14, a corrective action plan was collaboratively developed and implemented, and Respondent received six (6) formal observations, one peer validation observation, a mid-year evaluation, and an annual summative evaluation. (See, Respondent’s Answer to Notice of Tenure Charge of Inefficiency).

The Respondent has been a teacher in the District for fourteen (14) years. During the first twelve (12) years, he was consistently rated “proficient” by the District. During his first two years as a teacher at the Lafayette Street School, he was rated “proficient” by Maria Merlo, the principal who has recommended the instant inefficiency charges.

TEACHNJ required all New Jersey Public School districts to develop “evaluation rubrics” in order to assess the performance of their teachers, and to obtain approval for their “rubrics” from the New Jersey Department of Education (“NJDOE”) by December 31, 2012. N.J.S.A. 18A:6-123(c).

To comply with the mandate, the School District adopted an evaluation rubric as part of a performance evaluation system known as the Newark Public Schools Framework for Effective Teaching ("Framework"), to be implemented beginning in the 2012-13 school year. (Certification of Larisa Shambaugh dated October 10, 2014, §2) ("Shambaugh Cert.").

To facilitate the development of the rubrics, the statute states:

"Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis. N.J.S.A. 18A:6-123(e).

The District alludes to a teacher evaluation "pilot" it implemented in 2011-12 that involved seven NPS schools, and was "not counted for purposes of tenure charges." The District notes that the NJDOE "approved the NPS teacher evaluation rubric on or about October 4, 2012. Shortly thereafter, the School District and the Newark Teachers Union ("NTU"), of which Respondent is a member, agreed to the implementation of the new teacher evaluation system beginning in the 2012-13 school year." A Memorandum of Agreement ("MOA") dated October 18, 2012 between NPS and the NTU states:

NPS will implement a new evaluation system beginning SY 2012-13. In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A: 6-117 *et seq.*, teachers will receive an annual summative evaluation rating that designates them as highly effective, effective, partially effective or ineffective.

NPS shall implement a new educator evaluation system with four summative rating categories beginning in school year 2012-2013.

(Shambaugh Cert., ¶6 and Ex. D, Section 2A(4)). "Pursuant to this provision, any movement on the salary scale would be determined by employees' ratings based

on the new evaluation system.” (Shambaugh Cert., ¶6 and Ex. D, Section 2 Contract Modifications B.)

“In accordance with the MOA, and to implement its Commissioner-approved teacher practice evaluation rubric, in 2012-13 NPS began rating teacher performance using the four categories required by TEACHNJ: highly effective, effective, partially effective, and ineffective...”

“The regulations in effect at that time provided that tenured teachers were required to receive one observation per year without specifying whether the observation would be announced or unannounced – and an annual summative evaluation. See N.J.A.C. 6A:32-4.4, repealed by R. 2013 d. 046 (Liss Cert., Ex. G). Accordingly, tenured teachers in the School District, including Respondent, received at least one observation in that school year. At the end of that school year, in accordance with the MOA, teachers who received annual summative performance ratings of “highly effective” or “effective” received bonuses. A total of \$1.3 million in bonuses was paid to 190 teachers at the end of the 2012-13 school year.” (Shambaugh Cert, ¶8, Ex. D Section II.B)(District brief @ 5-6).

In the following year, 2013-2014, “the State Board of Education adopted regulations that, for the first time, specified the required evaluation procedures for teaching staff members.” The District notes that the October 2013 regulations required that any teacher with a corrective action plan (“CAP”) such as Respondent be observed at least four times per school year; with at least one of the observations announced, including a pre-observation conference; with the remaining two observations announced or unannounced.

According to the District, different legal requirements were applicable in 2012-13 and 2013-14, with respect to the number of observations required, whether they had to be announced or unannounced and whether they had to be accompanied by pre-or post-observation conferences.

The District notes that the Department's first set of regulations implementing TEACHNJ became effective on March 4, 2013. "Those March 2013 'Education Effectiveness' regulations required school districts, inter alia, to train evaluators, establish a school improvement panel in each school, and complete trainings on the teacher and principal practice instruments in the summer of 2013." The March 2013 regulations also addressed the evaluation of tenured teachers.

"Specifically, N.J.A.C. 6A:10-2.3 (March 2013) required school districts to adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members. The March 2013 regulations did not, however, specify the number and type of observations to be conducted. *See id.*"

"In the fall of 2013, the State Board of Education adopted a second set of 'Educator Effectiveness' regulations. Those regulations became effective October 7, 2013. *See* 45 N.J.R. 2211(a) (Liss Cert., Ex. E). The October 2013 regulations specified, for the first time, the required evaluation procedures for teaching staff members under TEACHNJ. They included an entirely new subchapter entitled 'Components of Teacher Evaluation,' N.J.A.C. 6A:10-4.1 *et seq.*, requiring that all tenured teachers be observed at least three times per school year; that teachers with a corrective action plan ('CAP') receive one

additional observation; that at least one of the observations for any teacher with a CAP be announced, with a pre-observation conference, and that at least one observation be unannounced; and that the remaining two observations may be announced or unannounced. N.J.A.C. 6A:10-4.4 (October 2013) (Liss Cert., Ex. E).”

Preliminary Statement

Whereas the District maintains that it complied with the legal requirements that changed from 2012-13 to 2013-14, while the “same Department-approved teacher performance evaluation rubric was in effect and implemented in both school years,” the Respondent, on the other hand, contends that “the District is prohibited from utilizing Thomas’ 2012-13 annual evaluation as a basis for the filing of tenure charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3 as the implementation regulations governing such regulations were not in full force and effect during the 2012-2013 school year.”

Respondent Position

The Respondent, in his Motion to Dismiss the filing of tenure charges of inefficiency, has articulated its legal argument in three points. The Respondent’s first legal point focuses on the Commissioner’s authority to dismiss the inefficiency charge pursuant to N.J.A.C. 6:3-5.5, supra. In its second legal point, the Respondent has argued that “[t]he utilization of an annual summative evaluation for the 2012-2013 school year is plainly inappropriate pursuant to applicable law and Commission guidance and renders these tenure charges filed against Thomas by the District fatally flawed.” According to the Respondent, the

full implementation of TEACHNJ did not go into effect until the beginning of the 2013-2014 school year, in October 2013, and therefore the District's reliance on evaluations conducted during the 2012-13 school year was premature.

The Respondent alludes to the regulations implementing TEACHNJ, N.J.A.C. 6A:10-1.1 et. seq., the provisions governing the content of evaluation rubrics and components, N.J.A.C. 6A:10-4.1, the procedures on rubric approval by the Commissioner, N.J.A.C., 6A:10-5.1, and the procedures concerning the timing, form, nature and nature of teacher evaluations and observations, N.J.A.C. 6A:10-4.4, among other requirements, to conclude that neither the Legislature in enacting TEACHNJ in August 2012 nor the Commissioner in establishing the regulatory scheme adopted in October 2013 intended that the Act be implemented or that teachers become subject to evaluation before the 2013-2014 school year.

While the Respondent acknowledges that TEACHNJ allowed for the adoption of evaluation rubrics by December 31, 2012 (about midway between the 2012-13 school year), he takes issue with the District's position that "the utilization of evaluations under those rubrics for tenure charges is warranted or appropriate."

The Respondent contends that "the utilization of the preliminary evaluation rubrics (by no later than January 31, 2013) was merely a 'pilot program' to test and refine those evaluation rubrics – not full implementation of same." See N.J.S.A. 18A:6-123 ('Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation

rubric’). To the contrary, N.J.S.A. 18A:6-123(e) specifically provides that the implementation does not occur until the 2013-2014 school year. Id. (“[b]eginning with the 2013-2014 school year, a board of education shall ensure “implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district.””)

Further facts adduced by the Respondent that the 2012-2013 school year is inapplicable to the filing of tenure charges under the Act, is the establishment of “the entire teacher evaluation and observation process by the Commissioner” after October 2013 and the commencement of the 2013-14 school year. Moreover, the District did not have a School Improvement Panel (“SIP”) at Thomas’ school during the 2012-13 school year. Inasmuch as both N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-3.1 both require that each school within a District establish a SIP that conducts evaluations and oversees the mentoring program, the establishment of the SIP in March 2014 precludes its functioning during the 2012-13 school year.

Given the intent of the evaluation and observation statutory regulatory scheme “to bring both teachers and evaluators up-to-speed on the new system and its requirements during the 2012-13 school year, with formal implementation of those commencing at the beginning of the 2013-14 school year,” the Respondent argues that “it stands to reason that the District’s failure and/or inability to meet the standards of that regulatory scheme during the 2012-13 school year renders formal judgment on teachers’ performance for that year, through tenure removal proceedings, inappropriate and unlawful.”

In his Motion to Dismiss, the Respondent relies on information disseminated by the NJDOE delineating the process for filing inefficiency charges under TEACHNJ and the new evaluation system (AchieveNJ), including, inter alia, that a district's evaluations and observations for purposes of commencing tenure charges comply with all applicable statutory or regulatory requirements as set forth in the guide entitled "Summary of Legal Requirements for Evaluation and Tenure Cases" as follows:

The TEACHNJ Act outlines a new process for filing inefficiency charges under the new evaluation system (AchieveNJ). This guide outlines the actions required in law before bringing an inefficiency tenure charge based on the new tenure revocation process..." (emphasis added).

Given documentation that the District's charge is "facially deficient" because it includes only one deficient summative evaluation for the 2013-14 school year as opposed to the two (2) consecutive deficient annual evaluations as required by N.J.S.A. 18A:6-17.3," the Respondent urges the Arbitrator to dismiss the tenure charges at issue.

From the Respondent's perspective, the NJDOE's "own statutory and regulatory guidance for tenure cases precludes consideration of evaluations conducted prior to full implementation of both the TEACHNJ Act and Achieve NJ for the 2013-2014 school year." Since the Respondent's 2012-13 annual summative evaluation is precluded from consideration by the Commissioner or an arbitrator, "the District lacks the required two consecutive deficient performance evaluations necessary to bring tenure charges pursuant to N.J.S.A. 18A:6-17.3. As a result, these charges should, respectfully, be dismissed."

In its third point, the Respondent maintains that “Dismissal of the Charge is warranted by the District’s failure to provide Thomas with the observations mandated by N.J.A.C. 6A: 10-4.4.” Contrary to this provision, the Respondent further relies on the undisputed fact that he “only received two (2) observations during the 2012-13 school year, neither of which were announced and neither of which included a pre-observation conference.”

Since the District, prior to filing an inefficiency tenure charge pursuant to N.J.S.A. 18A:6-17.3, must first comply with all of the requirements established by the Commissioner and/or the NJDOE. Non-compliance precludes consideration of the charge as follows:

N.J.S.A. 18A:6-17.3(c) provides as follows:

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

Given the foregoing statutory language, the Respondent argues that when a District has filed tenure charges alleging inefficiency based upon teacher evaluations but has failed to follow the prescribed evaluation process, “the commissioner is statutorily prohibited from forwarding those tenure charges to an arbitrator for resolution, and must dismiss the charges instead.”

The Respondent discerns a “quid-pro-quo in the Act in that “teachers are more readily subject to removal based upon only two (2) years of inadequate

performance, subject to a speedy and far more limited review and defenses available under prior law...in exchange for the streamlined discharge procedure [that] was well-defined, transparent, and with uniform observation and evaluation guidelines, processes and procedures – necessary to protect the rights of teachers from arbitrary and/or retaliatory actions by their school districts and administrators.”

District Position

As an initial matter, the District maintains in its letter dated October 13, 2014 that a letter from the Department of Education to counsel that “upon review the Commissioner [was] unable to determine that the evaluation process has not been followed” (Liss Cert. Ex. B) and his referral of the case to arbitration provide(s) strong indication that the School District follow its evaluation process with respect to Respondent. The Commissioner’s referral and the additional evidence submitted herewith compel a finding that NPS met all applicable requirements for evaluating Respondent’s performance in the past two school years and, therefore, the motion to dismiss should be denied.”

The District addresses the two objections raised by the Respondent in his Motion to Dismiss, which it characterizes as follows: “(1) his 2013 annual evaluation does not ‘count,’ for the purposes of the inefficiency tenure charge against him, because it was the product of a ‘pilot’ evaluation system; and (2) the School District’s ‘failure to comply with the requirements not yet in effect during the time period at issue should somehow provide a defense to his tenure charge.”

With respect to the Respondent's first objection, the District responds that "[t]he School District's 2012-13 Teacher Evaluation System was not a 'Pilot.'" According to the District, its pilot program occurred in the 2011-12 school year rather than the 2012-13 school year and therefore the 2012-13 school year summative evaluation could be considered for a tenure charge of inefficiency under TEACHNJ.

Referring to N.J.S.A. 18A:6-123(d), ("Beginning no later than January 31, 2013, a board of education shall implement a pilot program..."), the District argues that the Act did not require districts "to treat 2012-13 and only 2012-13 as a 'pilot' year." The Act also required school districts to implement their evaluation rubrics by the beginning of the 2013-14 school year at the latest. N.J.S.A. 18A:6-123(e) ("Beginning with the 2013-14 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric...") (emphasis added). Although "the provision provided the latest date by which the districts were required to test and implement their new rubrics, they did not prohibit implementation of approved rubrics earlier than the stated deadline. Nothing in TEACHNJ or its regulations provides that evaluations performed in 2012-13 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-14, for purposes of triggering tenure charges under N.J.S.A. 18A: 6-17.5."

In addressing the Respondent's second objection, namely that both of the observations received in 2012-13 were unannounced, the District notes that "he disregards the fact that different regulatory requirements were in effect in the

2012-13 and 2013-14 school years with respect to the required number of observations and whether pre-observation conferences were required.” Since the requirement to perform at least one announced observation per year of each tenured teacher, preceded by a pre-observation conference, did not exist until October 2013, after the end of the 2012-13 school year, the District contends that the unannounced observations Mr. Thomas received in 2012-13 violated no legal requirement.

Assuming arguendo the 2012-13 observations did not comply with the Act, the District argues that “this fact alone certainly would be insufficient to warrant dismissal of the tenure charge against Respondent.” Further assuming that if the Arbitrator were to find that “none of the teacher’s observations in that year had been announced in advance amounted to a failure to ‘adhere substantially to the evaluation process’ such a finding would not be enough to dismiss the charge.” See N.J.S.A. 18A: 6-17.2(a)(1). Only a finding by the Arbitrator that the error “materially affected the outcome of the evaluation,” in the relevant school year, would suffice for purposes of dismissing the charge. N.J.S.A. 18:6-17.2(b). As the District puts it, “Given the total number of observations conducted and the voluminous evidence of Respondent’s inefficiency, the supposed error of providing only unannounced observations in 2012-13 it cannot, in itself, support dismissal of the charge prior to hearing.”

In its reliance upon the Memorandum of Agreement (“MOA”) it negotiated with the Newark Teacher’s Union dated October 18, 2012, the District argues that “even if Respondent’s asserted statutory interpretation had any validity, he is

a member of the NTU and therefore bound by this MOA and should be precluded from asserting claims that are contrary to its terms.”

Finally, the District contends that even if the requirements of TEACHNJ Section 25 have not been met, the charge should still proceed to a hearing under Section 8, N.J.S.A. 18A:6-16. “TEACHNJ includes two different provisions under which tenure charges may be brought: Section 8, N.J.S.A. 18A:6-16, as well as Section 25, N.J.S.A. 18A:6-17.3. Section 25 provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effective; Section 8 provides for charges when those specific conditions have not been met but dismissal is nonetheless warranted on the basis of inefficiency or any of the other grounds specified in the statute.” See N.J.S.A. 18A:6-10.

After citing several arbitration decisions where arbitrators have considered tenure charges of inefficiency in non-mandatory Section 8 cases, the District concludes that in the event the Arbitrator finds that the case cannot proceed to hearing under Section 25, because the required conditions have not been met, in the alternative, the case should proceed to hearing under Section 8. Since, in the District’s view, the enactment of TEACHNJ was not intended by the Legislature to provide a “safe harbor” for inefficient teachers for two years or more following August 2012 and teachers were on notice during this period “that ineffective performance will not be tolerated,” adherence to every procedural requirement imposed by the Department because those requirements were not yet in effect at the relevant time,” should not pose an impediment to a school district’s ability to dismiss a teacher where inefficiency is proven.

Respondent's Reply to the District's Opposition to the Motion to Dismiss

Following a brief review of the legislative history of TEACHNJ, particularly its "reform to prior tenure law by linking tenure decisions (both acquisition and revocation) to effectiveness ratings and streamlining the tenure hearing process through the use of arbitrators rather than administrative law judges for all tenure charges transmitted to the Commissioner on or after August 6, 2012," as well as the filing of tenure charges of inefficiency based upon consecutive annual summative ratings in which a teacher is rated ineffective or partially effective, the Respondent argues that "it is imperative that school districts "do not jump the gun."

The Respondent rejects the District's assertion that the 2011-12 pilot program exempts it from applicable law because "the obvious flaw in that argument is that the so-called 2011-12 pilot program actually occurred prior to the passage of TEACHNJ and is, therefore, meaningless under the law. In fact, it is obvious that the purpose of the 2011-12 pilot program was to assist in the development of what later became and was ultimately passed as the TEACHNJ ACT."

The Respondent notes that "the purpose of the pilot year was to train certified teaching staff members and evaluators on the evaluation instruments and procedures and for the NJDOE to prepare and finalize its regulations, which later became known as Achieve NJ and which did not become effective until October 2013."

The Respondent alludes to the statute to establish that “the 2012-13 school year was intended to serve as a test run for purposes of all tenure related issues – not only criteria for attaining tenure, but also for completing evaluations and observations under the new evaluation procedures and rubrics, and for the revocation of tenure.” The pertinent language pertaining to the pilot program reads:

- d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric. N.J.S.A. 18A:6-123.

In the Respondent’s view, “voluminous NJDOE issued grievance as well as fundamental principles governing waiver of statutory rights, and the deference that is regularly accorded administrative agencies in interpreting their own regulations.”

The Respondent maintains that the District has been unable to cite “a single statutory, regulatory provision, or piece of DOE guidance which suggests that the District is in any way exempt from the law to which all other districts are subject.”

Insofar as the District’s reliance on its MOA with the Respondent’s Union, NTU Local 481 is concerned, and its claim that this agreement allows it to utilize the 2012-13 school year for the purpose of bringing Inefficiency Charges, the Respondent disputes the existence of any language in the MOA that supports that proposition, notwithstanding references to the “‘highly effective’ or ‘effective’ ratings received during the 2012-13 school year pertaining to the award of performance bonuses or other salary decisions...”

The Respondent further takes issue with the District's contention that the inefficiency charge should proceed on an alternative basis. Since the only tenure charge filed against the Respondent is an Inefficiency charge pursuant to N.J.S.A. 18A:6-17.3 based upon ratings of "partially effective" on annual summative evaluations for 2012-13 and 2013-14, no other alternative basis for proceeding against Mr. Thomas is discernible. In the event the District opts to reinstate the Respondent and proceed on the basis of one (1) year of allegedly deficient performance, "against a seasoned educator who, prior to 2012-13 had nothing but exemplary evaluations," the Respondent contends that in the meantime the instant case should be dismissed.

The TEACHNJ Act sets forth a detailed procedure for filing tenure charges alleging inefficiency and at each stage, the Respondent notes that it contains language providing that "a board of education and/or the Commissioner shall forward the charges "unless [they] determine that the evaluation process has not been followed." N.J.S.A. 18A:6-17.3(b) and (c)...Similarly, the law prohibits the Commissioner of Education from referring those charges to arbitration if the evaluation process has not been followed." The regulatory guidance issued by the NJDOE states:

[a]t all levels of review, the deciding entity must determine whether the district followed the proper procedural requirements as established by the district, the TEACHNJ Act, and subsequent regulations.

In the Respondent's opinion, the statutory and regulatory language is "unambiguous that when a district's failure to comply with the procedures is clear on the face of the tenure charges, dismissal of the charges is required because

the prerequisite to having those charges adjudicated in an arbitral forum has not been met.”

The Respondent deems erroneous the District’s reliance on the language “materially affected the outcome of the evaluation in the relevant school year” since “N.J.A.C. 6A:3-5.1(c) is clearly devoid of such a requirement, and dictates that any failure to abide by the evaluation procedures prohibits the movement of the tenure charges to the next stage of the filing process, including to an arbitration proceeding.” The Respondent notes that “the language quoted by the District is actually derived from Section 23 of the Act. N.J.S.A. 18A:6-17.2, entitled ‘Considerations for Arbitrator in rendering decision.’” It limits the issues the arbitrator can consider, and in turn, the defenses an employee can raise at an arbitration hearing. One of those defenses is whether “the employee’s evaluation failed to adhere substantially to the arbitration process. Thus, N.J.S.A. 18A:6-17.2 has no bearing on a pre-hearing motion to dismiss which seeks a ruling on a procedural arbitrability issue. To conclude otherwise would render the review positions set forth in N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1(c) a nullity.”

In contrast to the District’s prior contention that “the charges should not be transmitted to an arbitrator and should be dismissed by the Commissioner as a matter of law,” the Respondent notes that the referral of the Motion to Dismiss to the undersigned arbitrator is not only “consistent with the Commissioner’s authority to appoint a ‘designee’ to ‘examine the charge’ as provided in N.J.A.C. 6A:3-5.1(c)(5)” but also “consistent with an arbitrator’s authority to consider

questions of procedural arbitrability including ‘whether procedural conditions to arbitration have been met.’”

In reiterating its position, the District is procedurally and legally barred from using the 2012-13 year for evaluative purposes and to support an inefficiency charge based on two consecutive years of “partially effective” ratings on annual summative evaluations.

The Respondent, in further support of its position that the District’s 2011-12 pilot program had no bearing, only the subsequently enacted TEACHNJ cites a guidance document issued by NJDOE entitled “Excellent Educators for New Jersey” wherein the 2011-12 pilot in which the District participated and the 2012-13 statewide pilots are discussed in anticipation of the implementation of both TEACHNJ and its implementing regulations for the 2013-14 school year. In addition, the Respondent notes that the Newark District’s participation in the 2011-12 pilot was limited to seven schools or “barely 10% of the Newark Schools.”

The Respondent refers to an FAQ which indicates:

For example, this FAQ indicates that the new teacher and principal evaluation system will be implemented in 2013-14 (p. 1); that summative ratings would not count until 2013-14 (p. 4); that certain milestones had to be met to “prepare to implement new teacher and principal evaluations in 2013-14 (p. 6); that the pilot would use the information for full implementation in 2013-14 (p. 8, 9); that “beginning in 2013-14, growth data for all qualifying teachers...will be a part of educator evaluations (p. 14).

In addition, the 2013 Evaluation Pilot Advisory Committee (EPAC) Final Report discusses the expansion of the 2011-12 pilot to include the 2012-13 school year toward “implementation of the law for the beginning of the 2013-14

school year” (Cerisano Cert., Ex. “E”). Under Frequently Asked Questions regarding the “Summary of Legal Requirements for Evaluation and Tenure Cases,” the following exchange is noted:

“Q. Will summative ratings ‘count’ this year (2012-13) toward tenure decisions.

A. No – the only item “on the clock” is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating “clock” (i.e.: teachers needing to be rated at least effective for two of three years) will start.

The Respondent argues and cites extensive case law in support of the proposition that “[t]hese FAQs, guidelines, summaries, and reports are entitled to and must be given due deference.”

The Respondent reinforces his position that TEACHNJ preempts the parties’ MOA, despite the fact it refers to the new evaluation rubric and new rating system. Although the District may have been “ahead of the game” in that it ran its pilot program one year earlier (2011-12) and received the Commissioner’s approval of its rubric by October 2012, since TEACHNJ was not approved until August 2012, nor made partially effective until 2012-13, “the District’s pilot program could not possibly comply with or implement a law that did not exist...It is fundamental that where, as here, a statute or regulation establishes a term and condition of employment, the statute preempts the negotiated term.” See State v. Supervisory Employees Assn., 78 N.J. 54, 80-81 (1978). The Respondent further argues:

Here, while the MOA does reference the newly adopted four summative (4) ratings an employee can receive, and the evaluation

rubric adopted by the District, the MOA makes absolutely no reference to the substantive processing of tenure Inefficiency charges for the 2012-13 school year. In fact, the MOA does not mention tenure acquisition or revocation at all. Also, absent from the MOA is any indication, much less a clear and unequivocal waiver, of any union member's waiver of his rights under the law.

Finally, the Respondent urges rejection of the District's contention that "the inefficiency charges may proceed to arbitration notwithstanding its failure to comply with the evaluation procedures." Since "the charges expressly state (1) that they constitute a 'charge of inefficiency'...pursuant to N.J.S.A. 18A:6-17.3 otherwise known as Section 25 of the TEACHNJ Act and (2) inefficiency charges brought pursuant to Section 25 are bound by the statutory and regulatory requirements in the law – namely that they undergo a specific review procedure for procedural compliance, and that if this review process reveals non-compliance, the charges cannot move forward in the filing process, nor can they proceed to arbitration. These laws constitute a statutory (and regulatory) imposed prerequisite to arbitration, and they cannot simply be ignored."

In the Respondent's view, had the Legislature intended for "deficient inefficiency charges to proceed to arbitration via Section 8 of the Act, it would have so stated. Instead, it specifically imposed an obligation for each deciding entity, or its 'designee' – in this case the Arbitrator – to review the charges for procedural compliance." Moreover, the NJDOE has specifically advised districts that at a minimum "[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency tenure charge" and that "[f]ailure to adhere to these requirements can result in the tenure charge being dismissed." (Cerisano Certification, Exhibit "F" at p. 1)(emphasis added).

While the District may proceed against the Respondent on statutory grounds other than “inefficiency” – such as “incapacity” “unbecoming conduct” or “other just cause,” in accordance with the requirements of Section 8 of the Act, “it cannot file (obviously) deficient Inefficiency Charges pursuant to Section 25 of the Act...”

Unlike the tenure charges in both I/M/O Tenure Hearing of Lawrence E. Hawkins and I.M.O. Tenure Hearing of Gerald Carter , specifically alleging unbecoming conduct and/or insubordination, in addition to inefficiency, the instant case involves only alleged inefficiency pursuant to Section 25. The I/M/O. Tenure Hearing of Pugliese and I/M/O Tenure Hearing of Chavez are distinguishable in that “the charges in these cases were filed after the effective date of the TEACHNJ Act, but prior to the commencement of the 2012-13 school year. However, the TEACHNJ Act provided that its substantive provisions did not take effect until the 2012-2013 school year. This resulted in a dispute over what substantive law should apply.”

The Respondent reiterates that its motion to dismiss the charges should be granted in accordance with N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1(c) and the Respondent reinstated to his teaching position with back pay and benefits.

District's Sur-reply

In its sur-reply to the Respondent's reply brief dated October 20, 2014, the District urges the Arbitrator to “decline the Respondent's invitation to overstep his statutory role and authority of the Commissioner and decide this issue as the Commissioner's ‘designee.’” In describing the functions of the Commissioner

and the Arbitrator as “separate and distinct,” the District delineates the Arbitrator’s role, once presented with two consecutive years of “ineffective” or “partially effective” ratings, as twofold: “First, he must determine whether the respondent demonstrates any of the defenses listed in N.J.S.A. 18:6-17.2(a); second, if the respondent does so, the arbitrator must determine whether the demonstration of that defense materially affects the respondent’s evaluation.”

Although the District acknowledges that a section of the implementing regulations, N.J.A.C. 6A:3-5.1(c)(5), provides that “a ‘designee’ of the Commissioner may, in the Commissioner’s stead, ‘examine the charge’ to determine whether the school district has met its evaluation requirements,” the District construes this provision as pertaining only to an official of the NJDOE “rather than to an arbitrator for whom the statute provides an entirely different and separate role in the tenure charge process.” Moreover, the District contends that the transmission of “Respondent’s Motion to the arbitrator along with the entire case does not alter the statutory structure,” the Arbitrator, in his decision making, limited to the “statutory provisions defining and limiting the grounds on which the arbitrator may dismiss a tenure charge of inefficiency.”

According to the District’s two-prong analysis, if the Arbitrator determines that the School District failed to adhere substantially to the required evaluation process, “he must further determine whether that fact ‘materially affect[ed]’ the outcome of the evaluation that led to the tenure charge.”

The District reiterates its contention that the MOA negotiated between the District and NTU was intended to implement the new teacher evaluation

framework based on TEACHNJ beginning in the 2012-13 school year “for all relevant purposes,” including implementation of the new evaluation rubric.

The Arbitrator is urged to ignore the decision of Arbitrator Bluth in I/M/O Tenure Charge of Sandra Cheatham, State-Operated School District of Newark, Dkt. No. 226-8/14 (October 17, 2014) because “the decision misstates the School District’s arguments and is legally and factually flawed.”

Among the purported errors was the Arbitrator’s reliance on the Respondent’s misinterpretation of a NJDOE FAQ (Ex. #D, Resp. Oct. 20, 2014 Reply Brief). “By its own terms, the FAQ’s statement is irrelevant to any tenure charge, because it refers only to acquisition of tenure by non-tenured teachers, rather than evaluation or dismissal of tenured teachers.” As a result, the District refers to a NJDOE clarification by Assistant Commissioner, Peter Shulman that supports its use of 2012-13 evaluation ratings to support tenure dismissal charges as follows:

Through [the “FAQ” document], the Department sought to clarify when summative ratings would count towards *earning* tenure... [Such clarifications did not indicate a prohibition on school districts to use the 2012-13 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher.

In fact, the Department issued multiple publications notifying pilot school districts that any personnel consequences connected with evaluations were a matter of local decision and applicable State Law (“See EE4NJ Teacher Evaluation Framework Overview”). The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACHNJ Act and all school districts had a clear understanding of the minimum initial requirements of the TEACHNJ Act due to the standards set forth in N.J.S.A. 18A:6-123.b.

Finally, the District deems “the most fatal flaw” in the Cheatham decision was its failure to reject the Respondent’s argument that 2012-13 was, “in fact, a ‘pilot’ year in Newark...despite the pilot already having been conducted in 2011-12 in the School District.” As previously argued, the District maintains that its “pilot” year took place in 2011-12 wherein “the new rubric was tested and the teachers who were evaluated under the pilot rubric were also evaluated under the School District’s previous evaluation system.” According to the District, a second pilot in 2012-13 would have served no purpose “other than to help Respondent avoid the fate of dismissal on the basis of inefficiency.”

To allow such an “absurd result” would allow poorly performing teachers in Newark in 2012-13 to avoid evaluation and accountability “contrary to the clear and explicit provisions of TEACHNJ stating that the Act would take effect ‘beginning in the 2012-13 school year.’”

Respondent’s Sur-sur Reply

In its reply to the District’s Sur-reply, the Respondent notes that the District’s reference to the Arbitrator’s role as “designee” of the Commissioner and determines whether the Respondent has demonstrated any of the four listed defenses and whether the defenses “materially affected” the Respondent’s evaluation pertain to the hearing phase of the case and not the current pre-hearing phase. Since the Commissioner referred the Motion to Dismiss to the undersigned, as arbitrator, for adjudication, the Respondent maintains “you have the authority, and are expected, to conduct a comprehensive analysis of the arguments presented and render a determination as to whether or not the

Inefficiency Charges filed against Respondent are procedurally deficient and must be dismissed.

Insofar as the evaluation rubric or written evaluation form utilized by the District during the 2012-13 school years, the Respondent acknowledges that it was approved by the NJDOE; however, he disputes the contention that the NJDOE issued the complete set of regulations prior to the Fall 2013 and “therefore, evaluations conducted during the 2012-13 school year are not permitted to be utilized in the filing of Tenure Inefficiency Charges pursuant to N.J.S.A. 18A:6-17.3.”

With respect to the Cheatham decision, the Respondent notes that “the legal issues presented in Cheatham are identical to those present herein, the analysis adopted by Arbitrator Bluth in Cheatham is sound and consistent with the Act [and] Arbitrator Bluth properly construed and relied upon the TEACHNJ Act and his decision is well-reasoned and consistent with the Act.”

The Respondent reiterates the multiple dates for implementation of TEACHNJ, despite the effective date. The Respondent maintains that “a relevant and corollary section” to Section 25 of the Act or N.J.S.A. 18A:6-17.3 “must be analyzed in conjunction with Section 17 or N.J.S.A. 18A:6-123 which provides that N.J.S.A. 18A:6-123 (Section 17) provides that the Commissioner of Education shall review and approve evaluation rubrics submitted by school districts and that each district shall adopt a rubric approved by the Commissioner.” This section also provides that the State Board of Education shall promulgate regulations to set standards for the approval of the evaluation

rubrics, and lists numerous minimum requirements for those standards, such as four defined rating categories (ineffective, partially effective, effective, and highly effective), and a requirement of multiple evaluations of certified school employees during the school year. As noted in the District's initial opposition brief, the very first set of regulations to implement TEACHNJ were adopted by the State Board of Education on February 7, 2013 and were effective on March 4, 2013 (Liss Cert., Ex. D). As further noted in the District's initial opposition brief, this was just a starting point, and the State Board of Education adopted a second and more comprehensive set of regulations for the implementation of TEACHNJ on September 12, 2013, which became effective on October 7, 2013 (Liss Cert., Ex. E).

A review of the public comments are considered supportive of the Respondent's position "that Section 25 of TEACHNJ was not intended to be implemented until the 2013-14 school year and that the 2012-13 school year was a 'pilot.'"

The Respondent takes issue with the District's argument that its MOA with the NTU permitted it to use the annual evaluation ratings from the 2012-13 school year for the purpose of filing Inefficiency Charges pursuant to N.J.S.A.

18A:6-17.3. The Respondent continues as follows:

The NTU only acknowledged in the MOA that the District would begin to implement its new evaluation tool – with the four (4) rating categories – in the 2012-13 school year. The NTU did not, and could not, negotiate any provision in the MOA which would control the ability of the District to divest one of its members of his or her tenure rights, because tenure rights are statutory rights created by the Legislature; they are not negotiable. Moreover, as a statutory right, neither the District nor the association could enter into any

agreement which would provide its teaching staff members with fewer rights than those afforded to other teaching staff members throughout the state.

The Respondent has raised several legal and ethical issues regarding the October 24, 2014 letter from Peter Shulman of the Commissioner of Education's Office to General Counsel for the Newark Public Schools. Notwithstanding various concerns the Respondent has addressed regarding the timing and rationale for the letter, he ultimately concludes that the weight of the documentary evidence "still supports Respondent's position on this issue."

Although the Respondent has referred to the FAQ referenced in the October 24, 2014 letter, "which speaks to the summative clock starting to run in the 2013-14 school year, was intended to address inquiries from non-tenured teachers and spoke only to tenure acquisition and not tenure revocation," supra @ 2, the Respondent notes that the FAQ was "a comprehensive and lengthy publication that was made available to the public for at least the past two years until very recently (and perhaps not so coincidentally shortly after it was brought to the attention of the District in connection with Ms. Cheatham's motion to dismiss)."

After noting inconsistencies and omissions in the Schulman letter, such as "how utilization of evaluations from the 2012-13 school year is somehow unfair for tenure acquisition, but not for tenure revocation, when both are effectively terminations based upon performance" and both deemed "tenure decisions" in the Bluth Award, the Respondent cites additional NJDOE publications that reinforce "what we already know – that the 2013-14 school year was the first

school year in which the new evaluation system would count for tenure decisions – both acquisition and revocation.”

For example, in his March 28, 2012 memo to all Chief School Administrators in the State, including Newark’s District Superintendent, Cami Anderson, Mr. Schulman announced that:

“we have designated 2012-13 as a planning and capacity-building year. During this time, districts must engage in one of two options: participate in a second cohort of our pilot program, or build capacity through a defined series of steps for implementing the new system in 2013-14.”

And further in his July 30, 2012 memorandum, Mr. Schulman wrote:

“[a]s we prepare for statewide rollout of an improved educator evaluation system in 2013-14, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs...”

Based on the foregoing, the instant Arbitrator is urged by the Respondent to reject “on legal grounds alone, the October 24, 2014 letter and the District’s rebuttal to the Cheatham decision...” It is currently the role of the Arbitrator, and not the Commissioner, to interpret the statute and decide the Motion to Dismiss given “the fact that the Commissioner did not make any findings, factual or legal, before forwarding the matter to the Arbitrator.”

Irrespective of the opinion of Mr. Shulman “as to the meaning of one answer to one question presented in one NJDOE FAQ...,” the availability of the FAQ on the Department’s website for several years prior to the Cheatham decision is considered dubious but not pivotal in terms of the Respondent’s extensive documentation, including other publications issued by Mr. Shulman dating back to 2012, in support of its Motion to Dismiss.

DISCUSSION

A. Arbitrator's Authority re: Procedural Issues

As an initial matter, the Arbitrator finds that as the "designee" of the Commissioner pursuant to N.J.A.C. 6A:3-5.1(c)(5) he "shall examine the charge." Such examination, in the Arbitrator's opinion, includes a determination of whether the District has complied with the procedural requirements necessary to file an inefficiency charge under Section 25 of the TEACHNJ Act. Since the charges expressly state that they constitute a "charge of inefficiency pursuant to N.J.S.A. 18A:6-17.3" otherwise known as Section 25 of the TEACHNJ Act, the Arbitrator is authorized to ascertain whether the District has complied with the statutory, regulatory and procedural prerequisites to conducting a hearing with respect to the Respondent's alleged inefficient performance.

Contrary to the District's contention that "the charges should not be transmitted to an arbitrator and should be dismissed by the Commissioner as a matter of law," the Arbitrator considers the delegation of the case to the Arbitrator, consistent with the Commissioner's authority to appoint a "designee," and thereby authorization for the designee/arbitrator to consider procedural issues as presented in the Respondent's Motion to Dismiss and the District's Opposition thereto as well as adjudicate the substantive issues should the matter proceed to a hearing on the merits.

Inasmuch as the statutory language authorizes the Commissioner to "appoint an arbitrator to hear the case and refer the case to the arbitrator, unless he or she determines the evaluation process has not been followed," the

Commissioner's transmission of the case to the Arbitrator, without determining in advance whether the evaluation process has been followed effectively delegates this function to the arbitrator/designee. N.J.A.C. 6A:3-5.1(c)(6).

Unlike the District, the Arbitrator is not persuaded that the letter NPS General Counsel received from the Department of Education stating that "upon review the Commissioner [was] unable to determine the evaluation process has not been followed" is tantamount to a finding that the District followed the requisite evaluation procedures, as opposed to its own evaluation process. Since both the statute, N.J.S.A. 18A: 6-17.3(b) and (c) and the regulatory guidance issued by the NJDOE prohibit the referral of inefficiency charges to arbitration if the evaluation process has not been followed, the Arbitrator is obligated to determine whether the charges filed against the Respondent comply with the statutory and regulatory language.

Given NJDOE guidance to districts that "[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency tenure charge" and that "[f]ailure to adhere to these requirements can result in the tenure charge being dismissed," the Arbitrator would be remiss and deviate from his statutory role were he to ignore the Respondent's procedural contentions. In this regard, the Arbitrator concurs with the Respondent when he argues that the statutory and regulatory language is "unambiguous that when a district's failure to comply with the procedure is clear on the face of the tenure charges dismissal of the charges is required because the prerequisite to having those charges adjudicated in an arbitral forum has not been met."

Moreover, as the Respondent correctly notes, N.J.A.C. 6A: 3-5.1(c) is clearly devoid of such a bypass requirement and dictates that any failure to abide by the evaluation procedures prohibits the movement of the tenure charges to the next stage of the filing process, including to an arbitration proceeding. The phrase “unless the evaluation process has not been followed” precludes the forwarding of the written charge to the Commissioner by the Superintendent or from the Commissioner to the Arbitrator.” N.J.A.C. 6A: 3-5.1(c)(4) and (6).

The Arbitrator is further persuaded that the District’s reliance on the language contained in Section 23 of TEACHNJ N.J.S.A. 18A: 6-17.2 namely, “materially affected the outcome of the evaluation in the relevant school year” is misplaced. This language is derived from the section entitled “Considerations for Arbitrator in rendering decision” and serves to delineate the issues the arbitrator can consider, including “(1) the employee’s evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a correction action plan. In the event the employee is able to demonstrate that any of paragraphs (1) through (4) of subsection of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation.”

Since the criteria provided to the Arbitrator for rendering a decision on the merits applies only to the post-hearing phase of an inefficiency charge, N.J.S.A. 18A: 16-17.2 has no bearing on the procedural issues set forth in the Respondent’s Motion to Dismiss the Charges ab initio.

The Respondent has inappropriately conflated two provisions of TEACHNJ. It has merged the provision requiring the Arbitrator as the Commissioner's designee once presented with two consecutive years of "ineffective" or "partially effective" annual summative ratings to ascertain under N.J.S.A. 6-17.3(2)(c) whether "the evaluation process has not been followed," with the post-hearing decision making role of the Arbitrator to determine whether the Respondent demonstrates any of the defenses listed in N.J.S.A. 18: 6-17.2(a).

B. The Pilot Program and Evaluation Rubric

It is undisputed that the TEACHNJ Act in N.J.S.A. 18A: 6-123(c) unequivocally states that "[a] board of education shall adopt a rubric approved by the Commissioner by December 31, 2012." Once the District's rubric is approved by the Commissioner, the statute states at N.J.S.A. 18A 6-123(d) that "[b]eginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric." Subsequently, "beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle and high schools in the district..."

It is further undisputed that the District during the 2011-2012 school year implemented a pilot that involved seven Newark schools and on or about October 4, 2012 of the following school year the NJDOE approved its evaluation rubric. Whereas the District acknowledges that its 2011-12 pilot was "not counted for purposes of tenure charges," it contends that based on the Commissioner's

approval of its evaluation rubric and language contained in its MOA with the Newark Teachers Union, it was authorized to use the 2012-2013 annual summative evaluations of the Respondent for this purpose.

In the Arbitrator's opinion, a plain reading of the statute indicates that the Legislature intended the 2012-13 school year to serve as a pilot year wherein school districts "test[ed] and refin[ed] their evaluation rubrics" in preparation for full implementation in 2013-14. Although the District got a head start in developing its rubric in 2011-12, obtained the Commissioner's approval of its rubric in October 2012, and apparently deemed the testing it conducted during this "pilot" year sufficient to obviate a "second pilot," the Arbitrator finds that the NPS pilot, while educationally useful, was insufficient for the purpose of commencing teacher evaluations comparable to those subsequently conducted under TEACHNJ or for filing inefficiency charges in 2012-13. Although the District's reliance on its 2011-12 pilot for various educational purposes is not subject to challenge, despite the fact that the NPS pilot only involved seven schools (approximately 10% of the Newark School enrollment), this preliminary pilot activity on the District's part cannot supplant the statutory scheme that designated 2012-13 as the pilot year for New Jersey school districts and 2013-14 as the implementation year, particularly for the filing of inefficiency charges based on two consecutive years of "ineffective" or "partially effective" ratings.

The statutory language contemplates that "no later than January 31, 2013" the District would implement the pilot program and during the 2012-13 school year test and refine its evaluation rubric. Not only is the District's partial

implementation of a pilot program during 2011-2012 irrelevant under what would become TEACHNJ enacted in August 2012, several of the Acts' provisions were not in place for evaluation purposes until the NJDOE's issuance of the October 2013 regulations. The District has acknowledged that the first set of regulations implementing TEACHNJ effective on March 4, 2013 included, inter alia, "the establishment of a school improvement panel in each school, and complete trainings on the teacher and principal practice instruments." It is noteworthy that at this juncture, the Respondent did not have access to a school improvement panel at the Lafayette School pursuant to the "Educator Effectiveness" regulations, and during the first year (2012-13) wherein he was rated "partially effective," the SIP did not exist. In fact, one of the two unannounced formal observations (i.e., October 13, 2013) received by Mr. Thomas and his midyear evaluation had been completed prior to the establishment of the SIP in March 2014.

The District further acknowledges that it was not until the promulgation of the second set of regulations by NJDOE in October 2013 did the required evaluation components emerge, including the requirement that all tenured teachers be observed at least three times per school year and that teachers with a Corrective Action Plan such as the Respondent receive one additional observation, and that at least one observation for a teacher with a CAP be announced, with a pre-observation conference.

The fact that the District utilized evaluation procedures in 2012-13 for filing inefficiency tenure charges that were incomplete due to the NJDOE's subsequent

regulations regarding teacher evaluations and devoid of certain CAP and observation requirements undoubtedly placed Mr. Thomas at a disadvantage. In the Arbitrator's opinion, it was not reasonable for the District to conclude that it could evaluate the Respondent in 2012-13 utilizing an incomplete set of NJDOE regulations, particularly regulations that did not delineate the number and type of formal observations a tenured teacher was entitled to under N.J.A.C. 6A: 10-4.4.

While the District may argue that its 2011-12 pilot program was comparable to those implemented in other school districts that adhered to the TEACHNJ timetable and the evaluation rubric it tested during this pilot was approved by the Commissioner, it does not suffice to claim that the Respondent received the full benefit of the evaluation procedures intended by the Legislature when the District omitted several requirements ultimately promulgated by the NJDOE. In acknowledging that it used "the regulations in effect at that time," the District admits that Respondent in 2012-13 as compared to 2013-14 was subjected to two asymmetric evaluation procedures, which the Arbitrator finds problematic and illegal under the statute.

Whereas the District contends that its 2011-12 pilot was sufficient for its evaluative purposes, the EPAC Executive Report indicates that the pilot project would continue for the vast majority of New Jersey school districts in anticipation of the 2013-14 start date. In reviewing the pilot experiences of EPAC members from "cohort one of the teacher evaluation project (2011-12)," it states:

The Evaluation Pilot Advisory Committee has been expanded in 2012-13 to include representatives from a second cohort of teacher evaluation pilot districts and a cohort of principal evaluation pilot districts. Moving ahead into the next school year, and especially

with the arrival of the TEACHNJ Act (new tenure law) in August 2012, it will be important for the Department to provide opportunities to discuss these unanswered questions and learn from the recommendations that the EPAC is able to make based on its collective knowledge.

The Respondent further states: "Other recommendations are still under consideration and continue to inform the Department as the state moves towards full implementation in 2013." Among the subjects under consideration were: "evaluation rubric rollout plan, increasing number/effectiveness of observations, calculation of summative ratings."

Given the fact that TEACHNJ and its implementing NJDOE regulations had not been enacted when the District concluded its pilot program in 2011-12, rather than utilize 2012-13 as a year for comprehensive testing, the District cannot rely on the evaluations it conducted to charge the Respondent with inefficiency absent adherence to the substantive evaluation standards set forth in the forthcoming TEACHNJ Act, N.J.S.A. 18A: 16-17.3.

C. NPS/NTU Memorandum of Agreement

The District has relied on a Memorandum of Agreement ("MOA") it negotiated with the Newark Teachers Union ("NTU") dated October 18, 2012 as the basis for implementing its new teacher evaluation system for the 2012-2013 school year. In pertinent part the MOA states:

"NPS will implement a new evaluation system beginning SY 2012-13. In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ") N.J.S.A. 18A 6-117 et seq., teachers will receive an annual summative evaluation rating that designates them as highly effective, effective partially effective or ineffective.

NPS shall implement a new educator evaluation system with four summative rating categories beginning in school year 2012-2013.”

The District has confirmed that “[i]n accordance with the MOA, and to implement its Commissioner-approved teacher practice evaluation rubric, in 2012-13 NPS began rating teacher performance using the four categories required by TEACHNJ highly effective, effective, partially effective, and ineffective...”

Notwithstanding the District’s decision to implement its rubric, approved by the Commissioner in October 2012, following a pilot program it conducted in 2011-12, the Arbitrator discerns no language in the statute that permitted the District to utilize its evaluation prior to the 2013-14 school year, the time period when the statute states “a board of education shall ensure implementation of the approved evaluation rubric for all educators...” The statute contains no language that would enable a District to preempt the statutory commencement, effective 2013-14, through the negotiation of a collective bargaining agreement encompassing an earlier start date. Inasmuch as the statutory and regulatory provisions that would allow a school district to remove a tenured teacher on inefficiency grounds for “ineffective” or “partially effective” performance in two consecutive years were not in effect in 2012-13, the District is statutorily precluded from removing the Respondent on this basis.

To the extent the parties’ MOA addresses the removal of a tenured teacher for inefficiency, it is preempted by the TEACHNJ Act. N.J.S.A.18A: 6-126 “Conflicts with collective bargaining agreements” states: “21. No collective bargaining agreement or other contract entered into a school district after July 1,

2013 shall conflict with the educator evaluation system established pursuant to P.L. 2012 c.36 (C. 18A: 6-17 et al.).” Despite the fact the parties’ MOA was negotiated before the effective date of the above provision, the Arbitrator maintains that the principle contained in this language should apply to the NPS/NTU MOA. As the Respondent correctly notes, in reference to the District’s pilot program, “[i]t is fundamental that where, as here, a statute or regulation establishes a term and condition of employment, the statute preempts the negotiated term,” See, State v. Supervisory Employee Assn., 78 N.J. 54, 80-81 (1978).

Assuming arguendo that the NTU could waive an individual statutory benefit on behalf of a Union member, it is well-established that such waiver must be clear, unmistakable and unambiguous. The U.S. Supreme Court held in 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009), that an arbitration clause contained in a CBA, freely negotiated by a union and an employer, which clearly and unmistakably waived the Union members’ right to a judicial forum for their statutory discrimination claims was enforceable.” See also, Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998).

New Jersey law on waiver of statutory rights is in accord. In Red Bank Regional Ed. Assn. vs. Red Bank Regional High School District, 78 N.J. 122, 140 (1978), the Court held that “when a specific statute sets a term or condition of public employment, a negotiated agreement in contravention of that statute is not authorized by the Employer-Employee Relations Act.”

In the instant case, the Arbitrator discerns no indication that the NTU in agreeing to adopt the four summative ratings that an employee could receive consistent with the Act and in accepting the District's evaluation rubric ipso facto waived teacher's rights and protections under TEACHNJ. In the absence of any specific reference in the MOA to the "substantive processing of tenure inefficiency charges for the 2012-13 school year" or even a general reference to tenure acquisition or revocation, the District's reliance on the language in its MOA to file inefficiency charges against the Respondent including 2012-13 lacks legal sanction. It constitutes a quantum leap on the District's part to equate the movement of teachers on the salary scale based on its new evaluation system as tantamount to the Respondent's waiver of his statutory rights under TEACHNJ. The fact that the terms of the MOA to which the District contends the Respondent is bound contains no language addressing tenure inefficiency charges or tenure removal amplifies its inapplicability.

The Arbitrator is perplexed by the District's reference to an "explicit premise underlying the MOA that a TEACHNJ-based teacher performance evaluation system would be fully implemented in the 2012-13 school year," ending June 2013, when the NJDOE's final regulations did not become effective until October 2013.

D. Section 25 of TEACHNJ (N.J.S.A.: 18A: 6A-17.3)

In its Summary of Legal Requirements for Evaluation and Tenure Cases, under A. Minimum Requirements to Ensure Compliance with Evaluation Procedures, the NJDOE states: "Districts must ensure the following evaluation

procedures are followed (at minimum) prior to filing an inefficiency charge. Failure to adhere to these requirements can result in the tenure charge being dismissed. These minimum requirements include, but are not limited to, effective the 2013-14 school year, three observations per year for tenured teachers, a post observation conference following each observation with 15 teacher work days and for teachers on a CAP “[a]t least one extra observation/post conference” (N.J.A.C. 6A: 10-2.5).

Having filed tenure charges of inefficiency against the Respondent pursuant to Section 25 of TEACHNJ, N.J.S.A. 18A: 6-17.3, ostensibly based on two consecutive years of “partially effective” ratings, the District was obligated to use only those “evaluations conducted in accordance with a rubric adopted by the board and approved by the Commissioner pursuant to P.L. 2012, c. 26.” Although the District’s evaluation rubric was approved by the Commissioner in October 2012, it does not follow that satisfactory completion of this requirement constitutes compliance with every component such as: the observation requirements for tenured teachers (N.J.A.C. 6A: 10-4.4); observations for teachers on a CAP (N.J.A.C. 6A: 10-2.5); the establishment of a School Improvement Panel (“SIP”) in each district that conducts evaluations and oversees the mentoring program (N.J.S.A. 18A: 6-120 and N.J.A.C. 6A: 10-3.1).

The fact that Respondent did not receive the minimum number of three (3) observations during 2012-13, with at least one announced and preceded by a pre-observation conference, but rather received only two observations, both unannounced and neither preceded by a pre-observation conference, renders his

evaluation for 2012-13 deficient. This deficiency is compounded by documentation that the District, which placed Mr. Thomas on a CAP in 2013-14, did not have a functioning School Improvement Panel ("SIP") at his school until March 2014. Since the Respondent was placed on a CAP on September 13, 2013, he was not only entitled to the additional observations he received in 2013-14 but also oversight by the SIP which would "oversee the mentoring of teachers and conducts evaluations of teachers, including an annual summative evaluation..." Had the SIP been available to Respondent during the 2013-14 school year – the year TEACHNJ was intended to be implemented – as a teacher on a CAP he would have been afforded the opportunity to correct his deficiencies with SIP assistance for an entire school year instead of three months. His final observation was conducted in May 2014 –two months after the SIP was established.

Among the support services the Respondent would have received for the school year ending 2014-15, had the District designated his first rating year as 2013-14, consistent with the implementation of TEACHNJ, are an entire year of the SIP oversight, two years of "progress toward the teaching staff members' goals as outlined in the corrective action plan, and data and evidence collected by the supervisor and/or teaching staff member to determine progress between the time the [CAP] began and the next annual summary conference..." and advanced notice of at least one of his observations in each year he was observed, as distinguished from 2012-13 where both observations were unannounced.

In the Arbitrator's opinion, the District's contention that it met the requirements that existed in 2012-13, prior to the issuance of the complete regulations governing the evaluation process and the removal of teachers on the ground of inefficiency cannot be deemed legally sufficient. As a tenured teacher entitled to the entirety of the evaluation process set forth in the statute and its implementing regulations that were in full force and effect during the 2013-14 school year – any diminution of those rights deprives Respondent of due process.

E. Section 8 of TEACHNJ, N.J.S.A. 18A: 6-16

The District has proposed that in the event the Arbitrator finds that the requirement for filing inefficiency tenure charges under Section 25 have not been met due to procedural irregularities, the inefficiency charge should proceed to a hearing under Section 8. Whereas Section 25 mandates that a filing of inefficiency charges be based on two consecutive annual summative ratings of ineffective or partial ineffective, Section 8 allows for the removal of a teacher on other grounds such as “conduct unbecoming, insubordination, etc.” In proposing that the inefficiency charge be considered on alternative grounds, the District has cited several arbitration awards where the standard of proof was “whether the evidence in the record supported the charge.”

Although the Arbitrator is mindful of the District's commendable objective of removing inefficient teachers from the classroom and not providing them with a “safe harbor” while substantive components of TEACHNJ evaluation process were being developed, the Respondent's opposition to this approach is legally

grounded. As the Respondent correctly notes, “the charges expressly state that they constitute a ‘charge of inefficiency...pursuant to N.J.S.A. 18A: 6-17.3’ otherwise known as Section 25 of TEACHNJ.” Since the District’s inefficiency charge was not pleaded in the alternative, but rather based on TEACHNJ, it cannot amend its pleading at this juncture.

In addition, the Respondent logically argues that the District, having brought the charges pursuant to Section 25, is bound by the procedures in that section of the statute...less “[f]ailure to adhere to these requirements [] result in the tenure charge being dismissed.” Moreover, on this point, the District cannot rehabilitate charges found to be deficient under Section 25 by proposing that they be reconsidered under Section 8 as a default position. As the Respondent reasonably argues:

The District has cited absolutely no language in Section 25 of the Act – any other authority – which would indicate that the Legislature intended for deficient inefficiency charges to simply proceed to arbitration via Section 8 of the Act. Indeed, if the District’s flawed and unsupported argument is adopted, it would render the language in Section 25 superfluous.

Clearly, the District has the option of proceeding against the Respondent on grounds other than efficiency pursuant to Section 8 provided it satisfies the requirements of that process. In the absence of statutory language permitting the alternate and/or simultaneous filing of inefficiency charges under Section 8 and Section 25, the District, given the deficiencies found in its current Section 25 filing, can file either Section 25 commencing with the 2013-14 year or Section 8: inefficiency charges based on one year.

F. Arbitration Decisions

In contrast to the Cheatham decision of Arbitrator Bluth, which the District has characterized as “legally and fatally flawed” for “misstating the School District’s arguments,” the District deems relevant to the instant case several arbitration awards filed under Section 8, including I/M/O Tenure Hearing of Lawrence E. Hawkins, Agency Dkt. No. 243-10/13 (March 10, 2014) and I/M/O Tenure Hearing of Gerald Carter (Agency Dkt. No. 269-12/12 (July 18, 2013)). Since the charges in these cases were filed pursuant to Section 8, as opposed to Section 25, the Arbitrator concludes they have no bearing on the instant case. As the Arbitrator in Carter, I note that the Respondent was terminated for inefficiency, specifically grounded in unbecoming conduct as well as insubordination.

The District has further cited I/M/O. Tenure Hearing of Felicia Pugliese, Agency Dkt. No. 272-9/12 (February 15, 2013) and I/M/O Tenure Hearing of Chavez, Agency Dkt. No. 269-9/12 (February 6, 2013) as providing an alternative basis to proceed with Section 8 inefficiency charges in the instant case should the Section 25 filing be deemed deficient. However, as the Respondent has correctly pointed out, both of these cases are similarly distinguishable. “The charges in these cases were filed after the effective date of the TEACHNJ Act, but prior to the commencement of the 2012-2013 school year.” Given the filing of these charges in the interim period between August 6, 2012 and September 2012-13, an issue arose with respect to “what substantive law should apply.” The District’s filing of inefficiency charges against Mr. Thomas on September 3,

2014, well after the commencement of the 2012-2013 school year, renders comparison between Pugliese and Chavez unnecessary.

G. Educator Evaluation Frequently Asked Questions (“FAQ”)

A difference of opinion has arisen between the parties regarding the interpretation and/or meaning of the following Q and A statement contained on a Department of Education webpage (now archived and unavailable).

Q. Will summative ratings “count” this year (2012-13) toward tenure decisions?

A. No – the only item “on the clock” is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating “clock” (*i.e.*: teachers needing to be rated at least effective for two of three years) will start. (Exhibit D to Respondent’s October 20, 2014 Reply Brief).

On the one hand, the Respondent has cited this language as NJDOE guidance to school districts that “no evaluation outcomes in the 2012-2013 school year will impact tenure decisions” for both tenure acquisition and revocation, as reinforcing its position that the District’s reliance on 2012-13 for purposes of evaluating the Respondent for the filing of inefficiency charges was improper. As the Respondent argues, “[t]hese FAQs, guidelines, summaries and reports are entitled to and must be given due deference.”

The District, on the other hand, has relied on a letter from Peter Shulman, Assistant Commissioner, to Charlotte Hitchcock, General Counsel, clarifying the FAQ in pertinent part as follows:

Through [the “FAQ” document], the Department sought to clarify when summative ratings would count towards *earning* tenure... [S]uch clarifications did not indicate a prohibition on school districts

to use the 2012-13 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher.

In fact, the Department issued multiple publications notifying pilot school districts that any personnel consequences connected with evaluations were a matter of local decision and applicable State law ("See EE4NJ Teacher Evaluation Framework Overview"). The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACHNJ Act and all school districts had a clear understanding of the minimal initial requirements of the TEACHNJ Act due to the standards set forth in N.J.S.A. 18A: 6-127.b.

Although the Arbitrator finds the recent October 20, 2014 communication to the General Counsel of the NPS problematic and inconsistent with previous communications from NJDOE regarding the purpose of the 2012-13 school year, such as Mr. Shulman's memo dated March 28, 2012 to all Chief School Administrators in the State stating, inter alia, "We have designated 2012-13 as a planning and capacity-building year" supra, he maintains that a resolution of this matter is not pivotal consideration in the Arbitrator's decision.

Conclusion

In the final analysis, the Arbitrator is persuaded by the weight and probative value of the documentation provided by the Respondent in support of his position, the reasonable interpretation of the statutory language and implementing regulations, and the Arbitrator's authority as the Commissioner's designee to decide all issues in the case to conclude that the Respondent's motion to dismiss the inefficiency charges should be granted.

The Respondent has met his burden of establishing that the District has filed tenure inefficiency charges that have failed to follow the requisite evaluation process set forth in N.J.A.C. 6A: 10-4.4. The District has inappropriately utilized the 2012-13 annual summative evaluation of “partially effective” combined with the “partially ineffective” rating of 2013-14 to remove the Respondent. The Arbitrator discerns no language in the statute exempting the District from or granting it an exception to the prescribed evaluative procedures.

In the Arbitrator’s opinion, the evaluation procedures set forth in Section 25 of TEACHNJ, N.J.S.A. 18: 6-17.3., pursuant to the filing of an inefficiency charge where a teacher has been rated “partially effective” in two (2) consecutive years, have not been satisfied in the instant case. The statutory language, along with the implementing regulations, which were not in full force and effect during the 2012-13 year (See, N.J.A.C. 6A: 10-1.1 et seq.), notwithstanding the District’s reliance on its 2011-12 “pilot” program, convince the Arbitrator that the charges are “insufficient” and should be dismissed.

In the Arbitrator’s opinion, had the Legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially ineffective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures -- one consistent with Section 25 of TEACHNJ and the other consistent with Section 8, N.J.S.A. 18A:6-16 -- it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charges.

The Arbitrator, in finding that in the case of the charges filed against the Respondent, Neil Thomas, "the evaluation process has not been followed," orders the dismissal of the instant charges in accordance with N.J.S.A. 18A: 6-17.3(c) and N.J.A.C. 6A: 3-5.1(c). It is further ordered that Mr. Thomas be reinstated to his teaching position with the Newark State-Operated School District, with appropriate back pay, benefits and seniority, and any other benefits commensurate with his employment.

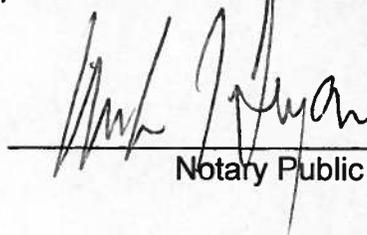
November 20, 2014


Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 20th day of November 2014 before me, came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument, which is his award.

November 20, 2014



Notary Public



William G. Deegan
Notary Public, State of New Jersey
No. 2235499
Qualified in Bergen County
Commission expires 12/21 2014