

**Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire**

In the matter of:

	:	
The Tenure Hearing of Edgard Chavez,	:	
State Operated School District of	:	Agency Docket No. 269-9/12
	:	
The City of Newark, Essex County	:	

Decision Upon Remand

Appearances:

**On behalf of State Operated School District of
The City of Newark, Essex County:**

Brenda C. Liss, Esquire
& Fiona E. Cousland, Esquire
Riker Danzig Scherer Hyland Perretti LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962

On behalf of Edgard Chavez:

Jason E. Sokolowski, Esquire
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, NJ 08608

Introduction

This matter arises from tenure charges of inefficiency against Edgard Chavez, (Respondent) by State Operated School District of the City of Newark, Essex County (the District) and an original October 9, 2012 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and

Disputes pursuant to N.J.S.A. 18A:6-16 as amended by *P.L. 2112, c. 26*. Following said referral, the undersigned conducted a hearing on the matter on November 23, December 20 and December 21, 2012 and January 18, 2013, and issued an Award dated February 6, 2013 finding that the District had shown by a preponderance of the evidence that the tenure charges filed against Respondent are true. By decision dated May 19, 2015 the Appellate Court remanded the matter to the Department of Education to:

determine the appropriate standards to be used by arbitrators when adjudicating tenure hearings, thus determining a consistent procedure for teachers in positions similar to [Respondent ...] who have received tenure charges after the effective date of TEACHNJ, alleging poor performance that occurred prior to the implementation of the statute's new standards.

By letter dated June 1, 2015 the Department of Education remanded the matter to the undersigned stating:

As directed by the Appellate Division decision issued May 19, 2015, the Commissioner is returning to you herewith the file in the above-captioned matter for you to review the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, subject to determination by you of each of respondent's defenses and any motions filed with you.

Following remand to the undersigned, the parties waived further hearings in the matter and agreed upon a briefing schedule whereby each party was given the opportunity to file an initial brief and each party was given the opportunity to file a responsive brief. After a period of holding the matter in abeyance pending a related matter, both the District and Respondent filed initial and responsive briefs, upon the receipt of which by the undersigned the matter was deemed fully submitted.

This Award is made following my careful consideration of the full original record in this matter and the arguments of the parties following remand including my careful review of the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, subject to my careful consideration and determination of each of respondent's defenses.

Preponderance of the Evidence

Pursuant to the provisions of N.J.S.A. 18A:6-10 "a tenured teacher shall not be terminated or reduced in compensation 'except for inefficiency, incapacity, unbecoming conduct, or other just caus.'" Prior to the enactment of TEACHNJ charges of inefficiency as are presented here, had to be proven by the employing school district by a preponderance of the credible evidence. On remand, as instructed by the Department, I have considered this matter anew and based upon my de novo consideration of the full record in the matter, including my observations of the demeanor of the witnesses. the transcripts, admitted evidence and arguments of the parties, and my consideration of applicable law, I find; (1) the District complied with controlling pre-TEACHNJ statutory and procedural requirements relating to the subject Inefficiency Charges and (2) the subject tenure charges have been proven by the District by a preponderance of the credible evidence.

Applying the preponderance of evidence standard in effect prior to the enactment of TEACHNJ, I reaffirm and incorporate herein, all factual conclusions made in my Award in this matter of February 6, 2013. As part of my findings in my original Decision and found anew herein, the District has, by a preponderance of the evidence, established

the assertions made by the District in the subject tenure charge against Respondent.

Those assertions therein made, include:

CHARGE ONE: INEFFICIENCY

During the period from October 2010 to the present, Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher. Respondent has failed to improve in certain areas set forth below despite the provision of a ninety (90) day improvement period, and despite the provision of support and assistance. Specifically, Respondent has failed to improve deficiencies during the ninety day improvement period in the following manner:

- a. The Respondent has failed to design coherent instruction. This area has not improved. Respondent failed to demonstrate that students followed his instructions; Respondent failed to provide clear objectives for lesson plans: Respondent failed to give students the opportunity to actually grasp lessons; Respondent failed to provide clear instructional objectives for lesson plans; Respondent failed to design lesson plans that have a logical progression: Respondent did not differentiate instruction: Respondent failed to understand how the instructional program is differentiated for different groups of students; Respondent did not model activities. See Exhibits C, F, G, H, I, L, M, R, V, W, X, and BB.¹
- b. Respondent has failed to establish a culture of learning. This area has not improved. Respondent did not engage the entire class in answering questions; Respondent allowed student folders to be poorly maintained; Respondent failed to manage class time properly; Respondent failed to impose consequences for large percentage of students who failed to do homework; Respondent failed to emphasize a commitment to learning; Respondent failed to provide specific goals, rewards, and consequences to modify behavior of disruptive students; Respondent failed to give students the opportunity to actually grasp lessons; Respondent failed to demonstrate that students' work is valued by continuing the lesson before they complete work; Respondent failed to engage students in group work; Respondent has failed to to develop positive relationships with his students; Respondent failed to create an environment that reflected his expectations for student achievement; Respondent failed to control classroom and limit student conversations; Respondent failed

¹ Referenced exhibits are omitted from the quotation.

to engage students and encourage students to work collaboratively; Respondent did not update student work posted in the classroom; Respondent failed to control physical violence in the classroom; Respondent failed to implement classroom procedures and routines, asked a student to tell other students to go back to assigned seats; Respondent failed to manage classroom, students permitted to walk around, leave class; Respondent violated classroom management; Respondent violated behavioral contracts; Respondent failed to post classroom expectations for student behavior; Respondent failed to reinforce positive behavior; Respondent failed to consistently monitor classroom behavior by moving about the room; Respondent failed to create an environment conducive to learning; Respondent's failure to control his classroom disrupted other classrooms; Respondent displayed insensitivity towards students. See Exhibit E, G, H, I, J, M, P, U, V, Y and BB.

- c. Respondent has failed to use question and discussion techniques with flexibility and responsiveness, This area has not improved. Respondent failed to use questioning and discussion techniques to produce high level questions and foster participation from all students; Respondent failed to use question and discussion techniques in even manner; See Exhibit H, I, and V.
- d. Respondent has failed to engage students in learning. This area has not improved. Respondent failed to provide specific goals, rewards, and consequences to modify the behavior of disruptive students; Respondent failed to engage students in group work; Respondent failed to engage students and encourage students to work collaboratively. See Exhibit E, G, H, I, M, P, V, and Y.
- e. The Respondent has failed to provide feedback to students. This area has not improved. Respondent failed to provide feedback to students in the form of exit slips, exemplars, open-ended questions, journal responses, or quizzes; Respondent failed to provide students with specific feedback; Respondent failed to provide written feedback; Respondent failed to give accurate, substantive, constructive, specific and timely feedback; Respondent failed to provide students with feedback, instead relied on secondary teachers or students themselves to provide feedback. See Exhibit E, I, K, P, V, and X.
- f. Respondent has failed to attain student achievement that meets or exceeds performance benchmarks. This area had not improved. Respondent failed to give students the opportunity

- to actually grasp lessons; Respondent failed to adequately instruct students. See Exhibit H, I, K, and V/
- g. The Respondent has failed to maintain accurate records. This area has not improved. Respondent failed to adhere to plan book; Respondent failed to make plan book and schedules congruent and visible; Respondent failed to maintain student folders; Respondent failed to efficiently and effectively maintain instructional records; Respondent failed to keep accurate records of lesson plans. See Exhibit A, K, L, P, V, and BB.
 - h. The Respondent has failed to demonstrate promptness and attendance. *This area has improved.* (Emphasis in original)
 - i. The Respondent has failed to demonstrate knowledge of content and pedagogy. This area has not improved with respect to pedagogy. Respondent failed to demonstrate that he knew how to teach substantive content of lessons. See Exhibit H, R, and V.
 - j. The Respondent has failed to demonstrate knowledge of students. This area has not improved. Respondent failed to develop positive relationships with his students and has failed to differentiate the instructional program to meet the diverse needs of his students. See Exhibits H, R, and V.
 - k. The Respondent has failed to assess student learning. This area has not improved. Respondent failed to provide assessments of students beyond homework review, classroom participation, and teacher observation; Respondent failed to informally assess students while working; Respondent failed to assess students beyond classroom participation and teacher observation; Respondent has failed to use the results of summative assessments to inform instruction; Respondent failed to assess students work. See Exhibit F, H, P, R, V, W, and X.
 - l. The Respondent has failed to manage student behavior. This area has not improved. Respondent failed to demonstrate that students followed his instructions; Respondent failed to impose consequences for a large percentage of students who failed to do homework; Respondent failed to provide specific goals, rewards, and consequences to modify the behavior of disruptive students; Respondent failed to control the classroom and limit student conversations; Respondent failed to control the classroom – one student slapped another after an argument; Respondent failed to implement classroom procedure and routines, asked students to tell other students to go back to assigned seats; Respondent failed to control the classroom – the students are up and around, not in class; Respondent violated classroom management; Respondent

violated behavioral contracts; Respondent failed to post classroom expectations for student behavior; Respondent failed to reinforce positive behavior; Respondent failed to consistently monitor classroom behavior by moving about the room; Respondent's failure to control the classroom disrupted other classrooms. See Exhibit H, J, P, V, Y, and BB.

- m. The Respondent has failed to manage classroom procedures. This area has not improved. Respondent failed to demonstrate his students' recorded homework in a binder; Respondent failed to demonstrate a clear and organized method for checking homework; Respondent utilized students to give instructions, resulting in physical violence; Respondent failed to establish procedures and routines that result in orderly and safe environment for students. See Exhibit H, P, V, and BB.
- n. The Respondent has failed to communicate clearly and accurately. This area has not improved. Respondent failed to provide clear instructional objectives for lesson plans; Respondent failed to adequately instruct students. See Exhibit H, K, R, and V.
- o. The Respondent has failed to reflect on teaching. This area has not improved. The Respondent has failed to reflect on teaching practices to adjust lesson plans to needs of students. See Exhibits H and V.
- p. The Respondent has failed to contribute to the School and District. *This area has improved.* (Emphasis in original)
- q. The Respondent has failed to grow and develop professionally. This area has not improved. Respondent has failed to develop positive relationships with his students. See Exhibit H and V.
- r. The Respondent has failed to energize the physical space of the classroom. This area has not improved. Respondent failed to keep the classroom organized and clean. Respondent failed to display student work. See Exhibit H, P, U, and V.
- s. The Respondent has failed to communicate with families. *This area has improved.* (Emphasis in original)
- t. The Respondent has failed to implement District Policies (Discipline, Dress Code, Homelessness, Child Abuse Prevention, Student Attendance, Fire Drill, PRC/504, etc.). This area has not improved. Respondent failed to implement the district discipline policy, I&RS/504, and dress code; Respondent failed to follow staff guidelines. See Exhibit C, H, and I.

In reaching such conclusions, I have carefully considered each of Respondent's defenses and determined that such are not sufficient to support a finding that the tenure charges are not established by a preponderance of the evidence or that the penalty imposed should be reduced or modified.

Respondent's Primary Defenses

The District Failed to Provide Respondent a Full 90-day Improvement Period and the 90-day Plan was Inadequate

On March 26, 2012 Respondent was served with tenure charges and provided a ninety-day improvement plan. Respondent asserts that the District was thereafter required to, and failed to, comply with the guidelines and rubrics contained in the District's 2009-10 and 2010-11 Teacher Observation and Performance Guidebooks, including requirements of a modified professional development plan, teacher meetings with the school's principal and administrators to have the plan explained, monitoring of the plan, a minimum of ten observations including 6 informal and 4 formal with at least one observation occurring each week and a written analysis of how Respondent improved and did not improve by the principal. Because Respondent's 90-day plan did not comply with such mandates, Respondent asserts, the District is precluded from pursuing its tenure charges against Respondent.

The Respondent argues that the District did not provide Respondent the exacting individualized assistance necessary during the 90-day improvement period and that the plan was inadequate. Respondent asserts in this regard that Respondent was not given the opportunity to provide his input into the drafting and formulation of the plan as required,

and that instead the plan was unilaterally drafted by principal Merlo. Nor was the plan specifically developed to address Respondent's alleged deficiencies and, instead, consisted of resources provided to teachers generally, including PD360 videos, books related to teaching and pedagogical skills and meetings with administrators and other math teachers. There was no on-going assistance throughout the 90-days given to Respondent other than meetings with the principal and vice principal to go over Respondent's weekly lesson plans from late March to mid June 2012. Respondent also maintained that he was not provided a full 90 days under his improvement plan. In this regard he explained that the plan did not begin after March 26, 2012 – the date principal Merlo met with him to go over the plan - and school ended for the year on June 24, 2012. In the interim, there was one day off for Memorial Day, one week off due to spring break, a week of testing for NJASK, a couple of field trips and days of very hot weather in June. Additionally, Respondent argues, there is no evidence that Respondent received any assistance from the District beyond the middle of June 2012.

As for Respondent's performance during the 90-day period, the record establishes that he did improve and that as a consequence, Respondent argued, the District should have concluded that Respondent successfully completed his improvement plan. In this regard, he used support from District Administrators and co-employees to improve his classroom management such as creating behavior modification contracts for problem students; at the suggestion of principal Merlo he created a sign in/out sheet for his students; he improved the organization of his classroom; at least one co-worker teacher assigned to assist Respondent in the classroom testified that Respondent improved in his classroom instruction, grading and management; and although principal Merlo expressed

concern about the performance of Respondent's students in Learnia standardized tests and how such would translate into scores on NJASK, the record establishes that Respondent's students performed well on the math portions of NJASK.

As for District claims that it had concerns about Respondent's alleged failures to provide differentiation of instruction as part of the Connected Math Program, the fact is he was never offered formal training in such. As for claims relating to his lesson plans, Respondent asserted, the evidence establishes that during his 90-day period his plans improved measurably. The fact is, Respondent argued, that throughout his two years at the school and including during his 90-day plan, all of Respondent's lesson plans were approved by school administrators. Finally, "basic" ratings in evaluations are passing, Respondent asserted, and he received basic ratings throughout the 2010-11 and 2011-12 school years with the lone exception of an unsatisfactory observation by District Administrator Oliveira in May 2012. Thus, there was no reason for Respondent to receive his first ever unsatisfactory annual evaluation in his twenty years of teaching in the District from principal Merlo on June 1, 2012.

Discussion

Contrary to the argument of Respondent, the 90-day plan provided Respondent satisfied the 90 day required length of such plans. Under the law applying to pre TEACHNJ inefficiency charges the 90 days are calendar days and there is no dispute that Respondent was employed as a teacher at the Lafayette Street School a full 90 days while being subject to his 90-day plan. Additionally, the plan was detailed and was tailored and aligned to address Respondents numerous deficiencies, presented professional growth

goals and provided much more than the weekly meetings about lesson plans claimed by Respondent. In this regard, the evidence establishes that during the 90-day period master teacher Fitzgerald continued her visits to Respondent's classroom to assist and model for Respondent, Respondent was given opportunities to observe other teachers and, contrary to any claim that the school's administration meetings with him were inadequate, on the witness stand Respondent testified that during his 90-day plan the principal and two vice principals were coming to his classroom too often.

When Respondent was presented the 90-day improvement plan, he met with Principal Merlo and by his own admission was told he had to improve in the ways indicated in the plan and that if he did not show significantly improvement, one possible consequence would be certification of tenure charges. As for the development of the plan itself, the record establishes that the plan was originally drafted by Merlo, but contrary to the Respondent's assertions in his post hearing briefs, I find that Respondent was given the opportunity to have input into the plan and modify the plan and that he declined (thereby waiving) the opportunity. In this regard, on direct examination about his initial 90-day plan meeting with Merlo, Respondent was asked:

Q: Were you informed if you wanted you could add anything to the plan at all?

A: Probably, she did. Probably, she did.

Q: And did you partake in that?

A: No. I took it as constructive criticism.

On cross examination Respondent admitted that during the meeting with Merlo he was nervous and that he does not remember what Merlo told him about the plan. In contrast Merlo credibly testified that she explained the details of the plan to Respondent and gave Respondent the opportunity to modify the plan but that Respondent did not offer any

additions or changes to the plan. Based upon the record as a whole, I also find that Respondent was presented with an understandable explanation of the basis for criticism supporting the administration's allegations of inefficiency, and that at the beginning of the 90-day period and throughout the 90-day period Respondent was offered constructive advice on how he could meet the objectives established in his improvement plan.

I am also not persuaded by Respondent's argument that because in various of the areas of Inefficiency/Domains outlined in the 90-day improvement plan the District listed numerous professional books and "PD 360 Videos" that were generally available to other teachers, Respondent's plan necessarily cannot be found to have met the requirement that the improvement plan be individualized or designed specifically to remedy Respondent's deficiencies. There is no requirement in the law identified by Respondent to support a finding requiring that the District must offer materials to a teacher on such an improvement plan that have never been offered to any other teacher before and that are created specifically for the individual teacher and no other. Instead, the requirement that a plan be tailored to the needs of a teacher contemplates the District will use the resources the District has to assist the teacher to address the teacher's identified deficiencies. Here, the resources the District had available to address Respondent's various deficiencies included instructional videos, professional books, other teachers to model correct methods, other teachers to mentor and assist Respondent and administrators to mentor and assist Respondent, and the evidence establishes that the District used all such resources in its effort to assist Respondent.

Moreover, the videos and books referenced in Respondent's plan were not random selections or irrelevant to Respondent's needs. Instead, such books and videos

were pointedly related to Respondent's specifically identified deficiencies. For example, Respondent's Improvement Plan identified as an Area of Inefficiency/Domain; "Failure to use question and discussion techniques with flexibility and responsiveness (3b)" and listed, among other things, two 360 videos in the related "Support Activities and Resources" section of the plan. The two identified videos included one entitled, "Questioning to Stimulate Learning and Thinking" and the other was entitled, "Effective Questioning in the Mixed Ability Classroom."

Nor are the areas in which Respondent improved and the levels of his improvement enough to satisfy the goals of the plan, as the Respondent asserts. In such regard, it is not enough that Respondent's work was deemed adequate only after his deficiencies were remedied by another teacher or by an administrator. For example, the fact that Respondent's lesson plans may have been determined adequate after modification by other teachers or administrators does not establish that Respondent was drafting adequate lesson plans; or that because another teacher assisted Respondent in drafting behavior contracts that Respondent successfully modified student problematic behavior, or that merely because Respondent viewed the recommended 360 videos that he was successful in addressing the underlying related deficiencies. Again, by way of example in the deficiency discussed above relating to Respondent's "Failure to use question and discussion techniques with flexibility and responsiveness (3b)," notwithstanding that Respondent may have viewed the two listed videos such does not alone establish that he successfully satisfied the "Professional Growth Goals" listed therein. There, Respondent was directed that: "-Teacher will submit high level questions with weekly lesson plans" and "-Teacher will consistently provide adequate wait time for

students to process and respond to questions posed.” Thus the videos identified in the plan were not ends in and of themselves, but rather were offered to Respondent as tools to assist him in his efforts to “submit high level questions with weekly lesson plans” and “consistently provide adequate wait time for students to process and respond to questions posed.”

The District’s Tier Policy Defense

The Respondent argued that effective with the 2009-2010 school year and continuing through the 2011-12 school year, the District adopted the “Tier Implementation Guidelines” and that the District failed to comply with the requirements of those guidelines relating to Respondent. First, Respondent asserts, he should not have been subject to tenure charges when he was evaluated as “basic” for the 2010-11 school year and “unsatisfactory” for the 2011-12 school year. Instead, he should have been considered under “Tier 3” of the process. Additionally, Respondent argued, a 90-day improvement period under the Tier Guidelines requires the school administrator to monitor the teacher as evidenced by 10 observations, weekly observations, including 6 informal and 4 formal observations. The District is bound by its own policy under controlling law, Respondent argued. Here, during his 90-day improvement period Respondent was given only two observations: a formal observation on April 20, 2012 by an interim vice principal in which he was rated “basic” and a formal observation on May 30, 2012 by District Administrator Oliveria in which Respondent was rated in only two of four domains, and rated “unsatisfactory.” Where, as here, according to Respondent, the District is under the supervision of a State District Superintendent, the Superintendent stands in the shoes of the Board of Education and is thereby bound to comply with its

adopted policies unless and until such are repealed or superseded. Respondent did not have two consecutive years of unsatisfactory annual evaluations, and, as a result, he may not be subject to tenure charges. Principal Merlo may not, as she attempted to do here, simply ignore District policy, Respondent maintained.

Discussion

According to Respondent, at all times relevant the District was bound to comply with the procedural and other requirements contained in the District's "Achievement Through Excellence: A System of Teacher Observation and Performance Evaluation/A Guidebook for Teachers and Administrators/ 2009-2010" and the 2010-2011 version of the Guidebook. (Referred to as the 09-10 Guidebook and 10-11 Guidebook.) Respondent argues that at the time Respondent received his 2011-2012 annual summative evaluation rating of Unsatisfactory, the District was required to apply the terms of the "Tier system" established by the District in the 09-10 Guidebook; and that under that system as a result of Respondent's rating he should have been placed in "tier 3" described in the 09-10 Guidebook as "teachers whose teaching performance is such that charges do not need to be filed until after two years of unsatisfactory annual evaluations." According to the Respondent, under the "Guidelines For Tenure Charges Process" contained in Appendix K-4 of the 09-10 Guidebook, during a 90-day improvement period a teacher "is monitored by school administrator. Ten (10) observations must be conducted during the 90-days [6 informal, 4 formal]. At least one (1) observation per week of instruction must be completed during the 90-day period...." Consequently, according to Respondent, his tenure charges were premature under the tier system and, in any event, his 90-day

improvement period did not meet the requirements of the District's own policy; a policy Respondent argues was never terminated by the District.

In this regard, Respondent witness John Abeigon, Director of Organizing for the Newark Teachers Union, testified that he was the executive director of the Union running the Union's operation and managing the staff, and asserted that the 2009-2010 Guidebook was in place for the 2010-11 and 2011-12 school years; that the entire document was put in place District-wide in '10-'11 and '11-'12, and that he knew of no directives by the District that the guidelines were not in place in those years. Such included the tier system, Abeigon testified. When asked initially how he knew the Guidebook was in effect during such years, Abeigon testified; "The Newark Teachers Union was on the committee that authored parts of it."² Abeigon offered his interpretation of the tier system based upon a publication distributed by the Union; a publication (identified at the hearing as R-18) that I find does not speak for the District. Abeigon admitted that he was not present at any meetings where District administrators gave its directives to school principals in September of 2010 (regarding the 2010-11 school year) or September 2011 (regarding the 2011-12 school year) relating to evaluation of teachers or at any such meetings between principals in the District and their school staffs.

At the close of the hearing in this matter the record was left open for receipt of a rebuttal affidavit from the District relating to the tier system testified to by Respondent witness Abeigon and a responsive affidavit on behalf of Respondent. In an affidavit

² The witness did not testify that he had personal knowledge that the tier system was used by the District in the 2011-2012 school year, did not say he was on the committee that authored the guidebook and did not identify which "parts" of the guidebook were written by the Committee.

thereafter provided by the District, executed by District Assistant Superintendent Roger Leon, the Assistant Superintendent indicated that:

1. Consistent with the testimony of Abeigon, the Guidebook identified by Abeigon was distributed to teachers by principals at orientation sessions at the beginning of the 2008-2009 and 2009-2010 school years.
2. The Guidebook was distributed to teachers by principals at orientation sessions at the beginning of the 2010-2011 school year and principals were directed by the District to inform teachers that the evaluation forms and rubrics would continue to be used that school year but that the tier system would not be in use.
3. The Guidebook was not distributed to teachers during the 2011-2012 school year and instead a document entitled “Achievement Through Excellence: Teacher Observation and Performance Evaluation/A Guidebook for Teachers and Administrators/ 2011-2012” - a document that did not include a tier system - was distributed to teachers.
4. Per directives from the District administration, the tier system/procedures were not utilized in the District for the 2010-2011 and 2011-2012 school years, and

5. That principals recommending inefficiency tenure charges in 2011-2012 were directed by the District to do so without regard to the tier system.

In a responsive, executed affidavit, NTU Director of Organizing Abeigon indicated:

1. As he testified, it is his “understanding” that the District’s policy with respect to the “tier” implementation program was in effect District-wide during the 2010-11 and 2011-12 school years.
2. It is his understanding that the 2010-2011 Guidebook, including a tier implementation guideline “should have been” distributed to teachers by principals at the beginning of that school year and that he knew of no written or oral directive from District administration which directed or informed principals that the tier system would not be used for the 2010-2011 school year.
3. That he was told by District administrators that as late as 2011-2012 the administrators were using the 2009-2010 guidebook.
4. That the 2011-2012 guidebook could not have been distributed to teachers at the beginning of that school year as it was not disseminated until January 2012 and that the Union filed a grievance relating to the unilaterally issued

guidebook on or about January 23, 2012 and that the matter was eventually heard in arbitration on June 28, 2012.

5. Past practice and regulation require that the District consult with the Union regarding policies and procedures requiring evaluation of tenured teachers and past practice of the parties requires that unless a new evaluation model is created by October 1 of any year the prior year's model will remain in effect.
6. He knows of no directive from District administration to any principal directing that they go forward during the 2011-2012 school year with efficiency tenure charges without regard to the tier system, and that to the best of his knowledge he "believes" teachers have been led to believe in numerous District schools that the tier system was utilized in the 2010-2011 and 2011-2012 school years.

Based upon the record, I find both the testimony and written statement of Respondent's witness Abeigon on the tier system to be equivocal. He, I believe honestly as well as intentionally, repeatedly qualified his testimony about the implementation of the tier system in the 2010-2012 school years with ambivalent words rather than using affirmative, unequivocal statements and did not identify how he gained direct personal knowledge of the alleged required use of the tier system in the two school years at issue. The fact is, Abeigon admitted on cross examination that he was not present when any

principal oriented teachers at the beginning of the 2010-11 or 2011-12 school years, and that he is not aware of any directives from District administration relating to the tier systems during those years. Abeigon's statements about what "should have" occurred as a result of the District's obligations to the Union relating to changes in evaluation systems, are legal conclusions and I find the record herein is insufficient for the undersigned to determine the correctness of such legal conclusions.³ In contrast, the statement of Assistant Superintendent Leon is unequivocal; the District ended its use of the tier system prior to the 2010-2011 school year and the tier system was not in effect during the 2010-2011 school year or 2011-2012 school year. Importantly, such statements by Leon are consistent with the testimony of principal Merlo, a witness who was responsible for implementation of the District's policies at the Lafayette Street School and whose testimony that the tier system was not in use during the two school years involved herein I credit.

Based upon the record as a whole, I find; (1) that the fact that the District did not apply the tier system contained in the 09-10 or later Guidebook to Respondent does not constitute a defense to the instant tenure charges, and (2) that the 90-day improvement plan applied to Respondent was adequate.

Respondent's Highly Qualified Defense

According to Respondent, at all times relevant he was not "highly qualified" in math and consequently, his assignment to teach departmentalized middle-school math at

³ I also note that on remand the Union did not offer the results of its 2012 arbitration referenced in Abeigon's post-hearing rebuttal affidavit.

the Lafayette Street School was contrary to the No Child Left Behind Act of 2001, and as a result, he may not be found inefficient. According to Respondent, there is no evidence whatsoever, that he was Highly Qualified to teach 6th grade departmentalized math for the 2010-11 and 2011-12 school years at Lafayette Street school. The opinion of principal Merlo does not make Respondent so qualified and the District cannot deem Respondent inefficient in a position to which he was not qualified in the first place.

Discussion

I am not persuaded by Respondent's argument in this regard. Respondent identified no persuasive legal precedent to support such a finding. The penalties in the No Child Left Behind related law/regulations for having non highly qualified teachers teaching in certain schools related to issues of federal funding. The Respondent did not identify any portion of the law or regulation arguably establishing the protection for teachers as Respondent advocates herein.

Respondent Defense Relating to Progressive Discipline

The doctrine of progressive discipline applies to tenure charges and here, Respondent asserts, if any penalty is warranted at all, it should be one less severe than termination. In this regard, Respondent argues, in his twenty years with the District prior to the 2010-11 school year Respondent had never been subjected to any discipline whatsoever; his classroom observations and annual evaluations were extremely positive and during that period he never received an unsatisfactory annual evaluation. Under such circumstances, any deficiency in Respondent's teaching performance during the 2011-12 school year should be limited to some lesser form of sanction such as a Teacher

Assistance Program, increment withholding, suspension without pay or transfer. In any event, Respondent argued, under principles of progressive discipline, removal is excessive considering the gravity of Respondent's conduct.

Discussion

Respondent's progressive discipline argument has to be considered within context. It may be true that Respondent taught adults for many years in the District and received annual evaluations that did not result in tenure charges. However, contrary to the implication of Respondent's argument, he was not "set up to fail" by the District's assigning him to Lafayette Street School. There is no dispute that the adult education program in which Respondent taught for many years ceased to exist. If Respondent was thereafter going to work as a teacher for the District, considering his teaching certification is K through 8, it was not unreasonable for the District to assign him a position at an elementary school. The challenges facing Respondent under such circumstances cannot be understated. However, the fact that Respondent was faced with such a challenge does not offer him a level of protection beyond that normally associated with tenure.

In the instant matter, the evidence establishes that the District, and particularly principal Merlo, recognized that the transition from adult to elementary students would be challenging for Respondent, and the record establishes that Merlo took extraordinary steps to assist Respondent, not just during the 90-day improvement period, but rather for the entire 2010-2011 school year and the entire 2011-2012 school year. Giving Respondent the benefit of the doubt, the District waited until the last minute, so to speak,

to place Respondent on a 90-day improvement plan. Notwithstanding the extraordinary efforts of the District, the preponderance of the evidence establishes that Respondent was inefficient as asserted in his tenure charges.

Respondent's underlying theory in support of lesser discipline here is based upon principals of progressive discipline; that less severe discipline will result in desired improvements in the employee's behavior/performance. Under the circumstances here, I am not persuaded that a suspension of Respondent, a withholding of his increment or further efforts by the District to assist Respondent would result in such a substantial improvement in Respondent's performance as to warrant his retention. The District did so very much for Respondent for almost two years and did not obtain significant positive results. The opportunities offered Respondent and resources expended on his transition from adult teaching to elementary teaching that preceded his 90-day improvement period recommend against mitigation or a finding that a lesser penalty will result in the desired change in Respondent's performance.⁴ I find that lesser discipline is not appropriate here

⁴ Again, as I found in my original Decision in the matter and affirmed herein: After two years of such focused effort and assistance by the District as well as written reprimands, observations and evaluations that he never challenged, Respondent continued to struggle. Respondent continued to have difficulty with, among other things, the preparation and design of lesson plans and differentiating his plans to meet the differing needs of different groups of students; he continued to have difficulty with managing class time; he continued to have difficulty establishing and enforcing procedures and routines of his students; his classroom continued to be disrupted by student behavior; he had a difficult time creating an atmosphere in his classroom conducive to learning; and his students struggled to learn. Upon overall review of the record, and acknowledging that I have no reason to question the professional judgments and evaluations of the educators involved herein, when comparing Respondent's performance early in the 2010-2011 school year to his performance late in the 2011-2012 school year, I find that such a comparison establishes that Respondent failed to show improvement of any significance through the course of his two school years of teaching at Lafayette Street School.

Conclusion

Upon careful, de novo consideration of the full original record in this matter and the arguments of the parties following remand including my review of the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, and subject to my having careful consideration each of Respondent's defenses, I find that the District has met its burden of proving the subject tenure charges by a preponderance of the credible evidence.

Respondent's discharge is hereby sustained.



Dated: March 17, 2016

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision Upon Remand in Agency Docket Case No. 269-9/12 sustaining tenure charges on Thursday, March 17, 2016.



Timothy J Brown