341-17

NEW JERSEY DEPARTMENT OF EDUCATION

Agency Docket No.: 199-9/17
Ralph H. Colflesh, Jr., Esq.
Arbitrator

IN THE MATTER of TENURE CHARGES AGAINST SUZANNE KULIK by BOARD OF EDUCATION of the TOWNSHIP OF GLOUCESTER,

Appearances
For Petitioner, the Board:
Daniel H. Long, Esq.
Wade, Long, Wood & Long, LLC
Laurel Springs, New Jersey
For Respondent, Suzanne Kulik:
Cosmas P. Diamantis, Esq.
Zeller & Wieliczko, LLP
Cherry Hill, New Jersey

DECISION and ORDER on STANDARD OF REVIEW

Pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ" or "the Act"), P. L. 2012, c. 26, NJSA 18A:6-115 *et seq*., and regulations adopted thereunder by the New Jersey Department of Education, the undersigned Arbitrator was appointed to hear and determine the above captioned matter which was appealed to arbitration by Respondent in this matter, Suzanne Kulik ("Kulik") after the Commissioner of Education did not find that the evaluation process that resulted in Kulik having been evaluated as less than

"effective" for two consecutive years had not followed the standards for such evaluations set forth in the Act and its attendant regulations.[1]

On October 6, 2017 a pre-hearing conference was conducted by the undersigned at which time counsel for Kulik raised the issue of the appropriate standard of review to be used by the undersigned. Kulik's counsel reasoned that since at all times material hereto she had been employed as a tenured Speech and Language Specialist and/or Speech Therapist by the District, the appropriate standard to be applied by the undersigned should not be the limited criteria set forth in NJSA 18A:6-17.2. Rather, counsel contended, the correct standard applicable to her case is the traditional "just cause" standard employed by tribunals in tenure removal cases adjudicated prior to the 2012 passage of the TEACHNJ Act ("the Act") under the still extant Tenured Employees Hearing Act.

At the conclusion of the October 6 conference, the undersigned agreed to accept a Motion by Respondent to arbitrate the case under the traditional, pre-TEACHNJ "just cause" standard and further agreed to accept written arguments and supporting documents from both parties in favor of and opposed to Respondent's Motion[2]. Pursuant thereto, a schedule was established for simultaneous submission of moving and opposing papers as well as the simultaneous submission of reply briefs. All papers were submitted by October 30, 2017, and this Motion is ready for a ruling.

Respondent's basic argument is that the position she held at all times material hereto was not that of a "teacher, principal, assistant principal and vice-principal" recited in the Act at NJSA 18A:6-17.3, which was Section 25 of the Act, and for that reason, Respondent believes the process and timelines for filing charges and responses to the Commissioner of Education that are

[1] Prior to the Commissioner's involvement, the Superintendent of the Petitioner District , having reviewed the charges and the evaluation process used in Kulik's last two years of teaching, found that there was probable cause to credit the evidence underlying the charge and that the charge merited dismissal or reduction in salary. The District Superintendent certified the charge to the Commissioner as required by NJSA 18A:6-11 and NJSA 18A:6-17.3.

[2] The undersigned also sought and secured from the Commissioner's Office an extension in time for hearings and an Award.

set forth under Section 17.3 Section do not apply to her. The Commissioner's Office ultimately agreed with Respondent on that issue.

More important for purposes of this Motion, Respondent further argues that the limits on defenses before an arbitrator set forth at NJSA 18A:6A-17.2 for a removal based on inefficiency, which is the case here, do not apply to Respondent for the same reason, *i.e.*, that NJSA 18A:6-17.3, which is Section 25 of the Act, only pertains "in the case of a teacher, principal, assistant principal, and vice-principal."[3]

Indeed, they are the only positions named at NJSA 18:6-17.3, and Respondent argues that elementary standards of statutory construction mandate that the plain language of the statute control, citing, *inter alia*, *Jen Elec., Inc., v. County of Essex,* 197 NJ.6217 (2009); *Real v. Radir Wheels,* Inc., 198 N.J. 511 (2009); *M. S. v. Millburn Police Dept.,* 197 N.J. 236 (2008).

Respondent further reasons that NJSA 18A:6-17.2, pertaining to teachers, principals, assistant principals and vice principals as per NJSA 18A:6-17.3 is an express exception to the more general scope of tribunal review in tenure removal cases found at NJSA 18A:6-11.

The separation of Speech and Language Specialists from the term "teachers," Respondent says, is found at that NJAC 6A:10-1.2, which sets forth the Administrative Code's definition of a teacher. There, the Code defines a teacher as "a teaching staff member who holds the appropriate standard, provisional or emergency instructional certificate issued by the State Board of Education and is assigned a class roster of students for at least one particular course." Respondent never was assigned a class roster for any course.

Respondent also argues that the thrust of the Act is to improve instruction, NJSA 18A:6-118(a). Although Speech and Language Specialists are important to instruction, Respondent says, they are not instructors in designated courses but rather assist students who may be challenged because of communications issues.

Last, Respondent cites the Department's Guide to the TEACHNJ Act and its omission of therapists specifically in certain places, despite the inclusion of "Other employees required to

[3] Under the Act a Respondent's defenses where she is accused of inefficiency are limited to proof that (a) the evaluations leading to removal failed to adhere to the Act's mandated procedures; and/or (b) the evaluations contained a mistake of fact; and/or (c) removal was motivated by political affiliation, nepotism, union activity, discrimination, or other legally prohibited conduct; and/or (d) the removal was arbitrary and capricious. (Citation needed).

hold appropriate certificates issued by the board of examiners." Respondent says that because the guidance goes on to state that the "requirements [of the Act] do not apply to every teaching staff member in the same manner" there is an implied exception for Speech and Language Specialists from the limited standard of review set forth in NJSA 18A-6-17.2. [4]

By way of answer, Petitioner argues that legislative history pertinent to the Act and guidance provided by the New Jersey Department of Education both strongly indicate that the Act, including its grounds for removal and restrictions on defenses, applies to all "teaching staff members." Petitioner then points out that that phrase is defined at NJSA 18 A:6-119 as "member[s] of the professional staff of any district [or regional or county vocational school board of education], holding office, position or employment [that requires the staff member] to hold a valid and effective standard, provisional or emergency certificate appropriate to [his/her] office, position or employment, issued by the State Board of Examiners…" It is uncontroverted that Respondent, as a Speech and Language Specialist, held such a certificate.

Further, Petitioner underscores that the Act does not provide any alternative method of arbitration or scope of review for such arbitration for specialists or any professionals covered by it. Nor does the Act anywhere suggest an alternative review regime for Speech and Language Specialists.

Turning to legislative history, Petitioner refers to the preamble of the Act at NJSA 18A:6-118 where the Legislature found and declared that:

> The goal of [the Act] is to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback *to educators*, inform the provision of aligned professional development and inform personnel decisions. (Emphasis supplied).

[4] In addition, Respondent contends that the Department of Education has already recognized that Speech and Language Specialists are not teachers because it removed Respondent from the time requirements for responding to the charges against her imposed by NJSA 18A-6-17.2 and 17.3. The Department's decision in that regard was only for purposes of allowing additional response time for Respondent. The undersigned does not view it as a decision on the appropriate scope of review in this arbitration, which is the issue of Respondent's Motion.

Petitioner also posits that statutes must be construed in a manner that avoids unreasonable results when legislative intent is considered, citing, *inter alia*, *American Fire and Cas. Co. v. New Jersey Div. of Taxation*, 187 N.J. 65 (2006); *Realty LLC v. Law*, 406 NJ Super. 423, 425 (App. Div.2009); *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312 (Law Div. 2004).

Petitioner also states that the Department's Guide to the TEACHNJ Act delineates the Act's application to various staff members, including "therapists," a category into which Respondent would be placed and that the Guide further explains that the Act applies to "teaching staff" working in the State's public schools, a phrase Petitioner interprets as having a broader meaning than simply classroom teachers.

Moreover, Petitioner argues that certain portions of the Act affecting annual ratings clearly apply to a Speech Language Specialist in that the Act requires (1) more robust evaluations; (2) a regime of four rating categories; (3) constant professional development; (4) the implementation when needed of Corrective Action Plans; (4) an extended period in which a decision to grant tenure are made; and, (5) more expedient reviews of removal decisions through arbitration. There is nothing inimical, Petitioner says, in the application of these portions to the position of Speech and Language Specialists.

Finally[5], Respondent cites Petitioner's job responsibilities which include

> Provid[ing] individual and small intervention sessions with students who have [been] classified [and]
> Conducts classes in language stimulation

Petitioner contends that they are indices teaching and characteristics of a teacher's professional duties.

Opinion:

[5] Petitioner also rejects any claim that the Department's decision to relax time for Petitioner's response to the tenure removal charge is in any way relevant to this dispute.

TEACHNJ was a change of geologic proportions in New Jersey education. Its aim, as Respondent accurately represents, was to improve public education by assuring that even long-tenured teachers continue to be efficient at their profession. Given that goal, it is obvious that the Act, despite its inclusion of principals and others, was principally oriented toward the traditional classroom teacher, and I have little doubt that that position was the prototype for Assemblypersons and Senators considering the bill.

As is evident from the Act, the Legislature effected significant changes in the tenure system. At their heart is the insistence on a rigorous evaluation process with four new rating categories, partially based on "multiple objective measures of student learning" that measure "student growth from one year's measure to the next…", "specific measures" of growth, and standardized assessments, NJAC 18A:6-123, as well as a "calibration" of classroom observations "to ensure that the observation protocols are being implemented…consistently" and a district-wide model rubric for evaluations. (Id.).

All of these are consistent with the evaluation of classroom teachers on a common, district wide basis, and it would not be unexpected for the Legislature to guard against plenary attacks on the results of such evaluations.

However, while possible for use regarding specialists, the evaluative measures spoken of at NJSA 18A:6-123 are far from orthodox methods of judging the performance of individual specialists, most of whom have ever changing and highly individualized student case- loads throughout the year with few students having overlapping objectives. A specialist does not deal with typical class-size groups of students. Rather, they treat a collection of individual diagnoses under Individual Educational Prescriptions, making their achievement nearly impossible to measure by objective instruments designed and normed to assess class-wide group growth which the Legislature obviously favored.

It would hardly be surprising therefore, if the Legislature did not mandate "multiple objective measures of student learning" that provide "specific measures" of growth and the use of "standardized assessments" for specialists, despite the reasonable application of such things to teachers.

In fact, the Legislature did not. Besides never mentioning specialists in Section 25 of the TEACHNJ bill, NJSA 18A:6-17.3, which establishes the rigorous standardized, objective criteria for teachers described above, the Legislature exempted specialists from the restrictions on

defenses imposed by Section 23 of the bill, NJSA 18A:6-17.2. Section 23 itself expressly and exclusively refers only to those staff enumerated at NJSA 18A:6-17.3, *i. e.*. "teachers, principals, assistant principals and vice-principals."

As suggested above, the exemption from restricted defenses is consistent with the view that the Legislature, having placed so much faith in the standardized criteria for teachers and administrators, did not see a need to restrict the defenses of specialists during tenure removal reviews.

For me to hold that defenses for specialists is limited to those of teachers would be to import into the law something the Legislature left out for what appears to be a reasonable cause. To argue, as Petitioner does here, that because Respondent must be covered by NJSA 18A6-17.2 because she is covered by other areas of TEACHNJ is without a basis in law. As Respondent has argued, a statue's intent must begin with its plain language. *Jen Elec., supra*. Only where language is ambiguous can a tribunal seek further guidance as to the Legislature's intent.

Even were I to examine intent, I do not find that exempting specialists from restricted review vitiates the Legislature's overall goal of improving efficiency in the schoolhouse as to all professionals. Nor does it necessarily impede the Act's avowed goal of stream-lined appeals to tenure removal which is driven by the timing requirements set forth at NJSA 18A:6-17.1, -17.2, and -17.3.

Based on the above, I will enter an Order granting Respondent's Motion that the scope of review in Respondent's challenge to her tenure removal is the traditional just cause standard which would include the inefficiency with which she has been charged.

ORDER

And now this 13th Day of November, 2017 it is hereby ORDERED that Respondent's Motion is Granted and that the standard of review to be used in hearings before the Undersigned Arbitrator is that of "just cause" which must be supported by sufficient and credible evidence, subject to any and all defenses available to Respondent, including evidence supporting mitigation at the penalty stage of the arbitration proceeding.

Ralph H. Colflesh, Jr., Esq.
Arbitrator