

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of
Felicia Pugliese
and the

State Operated School District of the City of Newark, Essex County



Agency Docket No. 272-9/12

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration provisions of the TEACH NJ statute as implemented by the Commissioner of Education of the State of New Jersey, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the Tenure Charges filed against Respondent, Felicia A. Pugliese, by the State Operated School District of the City of Newark shall be upheld. The petition of the State Operated School District of the City of Newark in the instant matter is granted, and Respondent's dismissal upheld. I so find.

February 15, 2013

A handwritten signature in cursive script that reads "Daniel F. Brent".

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 15th day of February, 2013 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.



An Attorney at Law of the
State of New Jersey

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of
Felicia Pugliese
and the
State Operated School District of the City of Newark, Essex County

Agency Docket No. 272-9/12

Hearings were held in the above-entitled matter on November 20, 2012, December 5, 2012, and January 3, 2013 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey, before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross examine witness and to present evidence and arguments. A verbatim transcript was made of the proceedings. The Commissioner of Education granted a brief extension of time because Counsel for the Respondent was unable to access his office for a week because of damage

caused by Hurricane Sandy. Both parties submitted post-hearing briefs, and the record was declared closed on January 22, 2013.

APPEARANCES

For Petitioner, State Operated School District of the City of Newark,
Essex County:

Brenda C. Liss, Esq., of Riker, Danzig, Scherer, Hyland,
and Perretti, Esqs.

For Respondent, Felicia A. Pugliese:

Richard A. Friedman, Esq., of Zazzali, Fagella, Nowak, Kleinbaum
and Friedman, Esqs.

ISSUE SUBMITTED

Should the Tenure Charges filed against Respondent, Felicia A. Pugliese, by the State Operated School District of the City of Newark be upheld?

NATURE OF THE CASE

Petitioner, the State Operated School District of the City of Newark (hereafter the District or the Employer) certified tenure charges against Felicia Pugliese, a tenured teacher employed by the District, based on allegations of inefficiency as a teacher following two consecutive years of unacceptable ratings. Respondent received a rating of “Basic” for in her 2009-2010 annual evaluation and her 2010-2011 evaluation.

Respondent was rated “Unsatisfactory”, the lowest of four possible ratings, in her 2011-2012 annual evaluation. According to the District, the issues identified in each of Respondent’s basic and unsatisfactory evaluations persisted despite remediation and counseling after many observations of her classroom performance, as well as intervention by Master Teachers and supervisors during a three month Personal Improvement Plan interval immediately before tenure charges were filed with the Commissioner of Education.

Respondent denied that she had been remiss in the performance of her duties and, in defending her job performance, asserted that she had been improperly assigned to teach Social Studies, a subject that she was not “highly qualified” to teach as required by the No Child Left Behind Act. Respondent further asserted that she had not been afforded the full

requisite ninety-day interval within which the District was required to provide remedial assistance and professional guidance designed to address her performance deficiencies, but had only been afforded eighty-seven days to address these deficiencies. Finally, after denying that her teaching performance was reasonably rated as “Unsatisfactory” in the 20011-2012 school year, Respondent contended that her performance should be evaluated under the rubric contemplated when the new TEACH NJ statute was passed. Because no new rubric has yet been promulgated, Respondent contended that the decision to refer tenure charges was premature, and thus invalid, until she had been rated as “Unsatisfactory” for two consecutive school years under the yet to be determined rubric contemplated by the new statute under which the instant case is being administered.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was brought to arbitration.

RELEVANT STATUTORY LANGUAGE

P.L. 2012, Ch. 26 (TEACHNJ) ACT

8. N.J.S.A. 18a:6-16:

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section [23] 22 of P.L. 2012 Ch. 26 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

[17] 16 (New Section) a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

* * *

[18] 17 (New Section) a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section [17] 16 of P.L. 2012, Ch. 26. The Board of Education shall adopt a rubric approved by the commissioner.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C:52:14B-1 et seq.) to set standards for the approval of evaluation rubrics for teachers, principals, and vice-principals. The standards at a minimum shall include:

***** * *

[23] 22 (New Section)

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. , c. (C

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

[24] 23. (New Section) a. In the event that the matter before the arbitrator pursuant to section [23] 22 of this act is employee inefficiency pursuant to section [26] 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;

(4) the district's actions were arbitrary and capricious.(b) In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

(d) The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

[25] 24. (New Section) The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedures Act," P.L.1968, c.410 (C.52:14B-1 et seq.), in accordance with an expeditious time frame, to set standards for the approval of evaluation rubrics for all teaching staff members, other than those included under the provisions of subsection b. of section [18] 17. of P.L. , c. (C.) The standards at a minimum shall include: four defined annual rating categories: ineffective, partially effective, effective and highly effective.

[26] 25. (New Section) a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of the law to the contrary, in the case of a teacher, principal, assistant principal, and vice principal:

(1) The superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

(d) The only evaluations which may be used for 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. , c. (C.) ().

[27] 26. (New Section) The commissioner shall have the authority to extend the timelines in the tenure charge process upon a showing of exceptional circumstances.

DISCUSSION AND ANALYSIS

Respondent's defense to the charges of inefficiency is predicated primarily on two assertions. First, that Respondent was improperly assigned to teach Social Studies because she was not "highly qualified" by virtue of her background and training to teach a subject area with which she was unfamiliar, thus placing her at a disadvantage that precluded the District from deeming her performance to be unsatisfactory. Second, Respondent contended that the tenure charges should be dismissed because the TEACH NJ Act refers to a new rubric for evaluating teachers, and no such rubric has been promulgated or approved by the Department of Education. Neither of these assertions can be sustained as a basis compelling invalidation of the tenure charges at issue in the instant case.

There is no requirement evident from the wording in the TEACH NJ statute, nor has any evidence of relevant legislative history been placed

into the record of the instant case, upon which the Arbitrator could legitimately conclude that the Legislature intended when TEACH NJ was passed to create a state-wide hiatus of at least two years in preferring tenure charges for inefficiency. If Respondent's interpretation of TEACH NJ regarding such a hiatus were to be sustained, there must be compelling evidence supporting this position. There is no such evidence. that the absence of the new rubric, assuming there would be a single mandatory rubric, would estop all school districts in the State of New Jersey from moving forward to file tenure charges and thereafter terminate the employment of teachers who have demonstrated incompetence or unsatisfactory job performance for a period of at least two years until after a new rubric had been promulgated. This circumstance would be untenable for the administration of effective education of New Jersey's elementary and secondary school students, and inconsistent with the clearly articulated thrust of the new legislation. Moreover, the justification for suspending all tenure proceedings for at least two years cannot be reasonably inferred, nor can such estoppel be implemented by an Arbitrator, without specific language in the statute, applicable regulations, or the relevant legislative history. To hold otherwise would be to usurp the power of the legislature in this regard.

The submission of the instant matter to arbitrators, as explicitly authorized specifically by TEACH NJ, constitutes unambiguous evidence

that the new statute is applicable to the instant case. The Arbitrator must determine whether the tenure charges brought by the District demonstrate that Respondent failed to perform in a satisfactory manner for two consecutive years, the criterion established by the statute. Even under prior applicable standards governing tenure charges, a teacher whose job performance was demonstrably unsatisfactory for an extended period could be removed from a tenured position. Transferring the authority to determine whether such unsatisfactory performance from the Commissioner of Education and Administrative Law Judges to a designated panel of arbitrators appointed pursuant to TEACH NJ cannot be construed to raise a bar of two or more years to litigating on-going cases involving tenure charges for incompetence. Consequently, this aspect of the defense offered by Respondent cannot be sustained.

The second major element on which Respondent's defense was predicated is that she was arbitrarily and capriciously assigned to teach social studies, a subject area in which she was not competent to teach by virtue of her education, professional preparation, or prior qualification as "highly qualified" as defined by the federal No Child Left Behind Act. Petitioner has argued persuasively that the distinction of being "highly qualified" in a subject area is not a necessary prerequisite for assigning a teacher to an area within the teacher's certification. Respondent is licensed to teach K-8 subjects, including social studies and history.

Moreover, Petitioner has demonstrated that Respondent is “highly qualified” as defined strictly by the No Child Left Behind Statute because she is a college graduate who majored in Sociology, a field reasonably related to Social Studies. Thus, that she has not passed an examination to become “Highly Qualified” to teach Social Studies is not determinative of the propriety of assigning her to teach this subject within the grade levels covered by her teaching license.

Even if Petitioner’s reliance on the relationship between the disciplines of Sociology and Social Studies were deemed too tenuous because the latter discipline involves history, ethnology, anthropology, government studies, political science and related fields that may be beyond the focus of a traditional undergraduate Sociology major, the assignment of Respondent to teach middle school or elementary school Social Studies was neither arbitrary nor capricious under the TEACH NJ statute because Social Studies is a subject that falls within the scope of her licensure. Regardless of the degree of connection between her undergraduate major concentration and the subject of Social Studies, the assignment to teach Social Studies has not been demonstrated to require that Respondent absorb arcane material that was beyond her ability to understand at the grade levels she was assigned to teach, especially given the credible testimony about the resources provided by

the teacher's guides to the textbooks used by Respondent and the other materials readily available to her on the internet or through the District.

A different conclusion might be drawn if a teacher with an undergraduate degree as a Sociology major, an English major, or some other humanities major were assigned to teach courses in chemistry, physics, or mathematics requiring specialized scientific knowledge or advanced skills to explain and teach algebra or calculus. The difference between technical subjects-- such as chemistry, physics and mathematics-- and humanities subjects could render such an assignment improper. Such a conclusion cannot, however, be drawn in the instant case, where the subject matter was within the scope of Respondent's licensure. Consequently, the District could reasonably expect her to master and teach the material using sound pedagogical techniques to fashion and deliver lessons that differentiated among the widely varying degrees of reading competence in her classes.

Respondent may be ill prepared to teach social studies, but she satisfied the legal criteria for being "highly qualified" as a category defined by federal statute. If Respondent had protested this assignment more vigorously at the outset, perhaps further accommodation in terms of supplemental training could have been arranged. However, Respondent cannot raise this perceived unfairness or legal impediment

as a bar to valid criticism of her teaching after tenure charges have been preferred based on her unsatisfactory job performance.

Moreover, Petitioner has established that Respondent's shortcomings were not related primarily to her lack of substantive knowledge in the field of social studies, but were attributable to the inadequacy of her pedagogical techniques. The ability to control a classroom of students and to create lesson plans that target students with varying reading levels does not depend merely on the breadth and depth of a teacher's knowledge of history, government or other areas of Social Studies. These tasks require knowing the capabilities, learning styles, deficiencies, and interests of the students for whom she is responsible. The faults for which the Respondent was cited in the tenure charges pertained to her inability to structure her class time and her presentations in a way that engaged her students, rather than her inability to absorb sufficient details of American history or other social studies topics from the textbooks, guides, and other materials available to her. Her failure to create and deliver in a coherent and organized manner lessons designed for her students to perform appropriate individually tailored or small group organized tasks that incrementally increased their skills with each lesson has been demonstrated by the testimony and documentary evidence submitted by Petitioner.

During the arbitration hearings, Petitioner introduced extensive documentary evidence buttressed by credible testimony from the Respondent's Building Principal and other witnesses reviewing in detail the rubrics used to evaluate Respondent each year. The basis of the scoring and for the evaluation of Respondent's classroom performance were explained and justified in a manner that demonstrated persuasively the valid educational framework for the evaluation and the absence of personal animus or improper bias underlying the evaluation. The Petitioner's conclusions about Respondent's performance were neither arbitrary nor capricious.

To be fair, Respondent was facing an arduous and daunting challenge of teaching multiple preparations at different grade levels in a subject area that relies heavily on the student's having sufficient reading skills to master and absorb the material. All of her classes were comprised of a majority of students reading far below grade level, and the mix of students in each class presenting widely divergent reading levels exacerbated the difficulties she faced on a daily basis. Her challenge of having to prepare for classes at several grade levels was compounded by the necessity of preparing multiple projects within each class because of the variation in her students' reading skills. These tasks required diligence, as well as sophisticated teaching skills, extraordinary personality traits to hold their attention, and substantial organizational

skills to overcome the wide diversity of reading levels of the students in each of her classes. According to the credible testimony offered at the arbitration hearings to support Petitioner's charges, simply lecturing while trying to hold the attention of the entire class was not successful.

Teaching in children who are far below grade level in their reading skills is a daunting task requiring highly skilled professionals in order to succeed. Doing so in heterogeneous groupings is even more difficult. The record in the instant case, including testimony of master teachers who were assigned to assist Respondent and who observed her teaching skills, as well as by District administrators who observed Respondent in her classroom, support the District's conclusion that Respondent was not a sufficiently skilled professional teacher and that her job performance was consistently below the requisite standard of satisfactory performance over a protracted interval.

Respondent was able to mask her ineptitude in handling large groups of students with multiple levels of sub-standard readers in the past because her previous assignments had created a safe harbor by assigning her to positions comprised primarily of one-on-one contact or small group interaction. Even here, however, the evidentiary record in the instant case has demonstrated by credible testimony describing actual in-person observations of her classes and analyzing statistical

results chronicling the improvement of her students that her performance was below an acceptable level of competence in those situations. After Respondent was exposed to evaluation in a large class with the most challenging assignment – to teach material requiring good, preferably grade level, reading skills in order to absorb the material to students who were substantially below grade level, Respondent’s performance was exposed as being patently unsatisfactory.

Petitioner need not ignore Respondent’s persistent failure to achieve even moderate success in meeting these goals over a protracted period after she was transferred from a laboratory setting where she dealt one-on-one with students to an assignment where she had to control a much larger group of students. This full classroom assignment exposed her inadequacies in a way that had not been as evident in her previous teaching assignments. Nevertheless, there is no reasonable basis in the evidentiary record compelling a conclusion that the District’s evaluation of her teaching performance as “Basic” in 2010-11 and “Unsatisfactory” in 2011-2012 was fundamentally flawed, was tainted by any animus or improper motive, or was the result of any action that was arbitrary or capricious.

Whether anyone short of a Master Teacher could have succeeded under these circumstances is speculative. Nevertheless, the District is entitled to cull teachers whose performance is demonstrably unacceptable by prevailing standards over a two-year period. Respondent foundered despite receiving the minimal level of help required by the TEACH NJ statute. After the limited intervention she was offered, Respondent remained unable to organize and to prepare suitable strategies reasonably designed to reach and engage multiple levels of students in her charge and to express these strategies and goals adequately in class lesson plans; to maintain decorum in her classroom; or to engage most of her students most of the time. These crucial deficiencies were chronicled in detail and communicated to Respondent during her evaluation period.

The District provided some help by assigning a Master Teacher to guide Respondent. However, Respondent was apparently so overwhelmed by her situation that she was unable to absorb and integrate the Master Teacher's suggestions and pedagogical tenets into her teaching performance. The consequence of these shortcomings is indeed unfortunate. Nevertheless, Petitioner is entitled to remove from service a teacher who has demonstrated over time an inability to implement the sophisticated, multi-group or individualized teaching strategies necessary to fulfill the District's obligations to its students.

At issue is not simply the results achieved in terms of testing or other observation of her students' progress, but rather the Respondent's manifest and continuing failure to fashion and deliver pedagogically sound, multi-level differentiated instruction within her classes to convey material that Respondent should have been able to absorb adequately and communicate clearly to her students through a variety of sophisticated techniques, particularly including small group and individualized projects or activities reasonably tailored to the reading levels and comprehension abilities of her students. Ample opportunity to avail herself of the resources placed at her disposal did not rectify the shortcomings chronicled by Petitioner in describing Respondent's job performance during the two year interval that is the direct subject of the tenure charges.

Respondent contends that the ninety-day evaluation and assistance interval was impermissibly truncated because she only received eighty-seven days, some of which occurred in the last week of the school year. The number of days was truncated because Respondent declined to accept her ninety-day Professional Improvement Plan (PIP) until her Union representative, who was absent due to illness, returned to work and could accompany Respondent to a meeting where the PIP was conveyed. While this reluctance to proceed without her Union representative present is understandable, the ensuing delay cannot

reasonably be leveraged into the basis guaranteeing Respondent employment for the following school year. By proffering the PIP in time for the full ninety day interval, the District was in substantial compliance with the statutory interval if Respondent had accepted the PIP on the day it was first available and offered. Thus, this technical shortcoming does not provide a valid basis for disqualifying the District's compliance with the procedural requirements established by TEACH NJ.

In summary, Respondent is a well-intentioned teacher, but was unable to address the nature of her inadequacies regarding lesson preparation to create and implement sophisticated, multi-level presentations that were accessible by students with varying sub-standard levels of attainment in reading and comprehension skills. Respondent's classroom control and student engagement techniques were reasonably deemed by the District to be demonstrably lacking consistent control of her classroom. Respondent repeatedly failed to maintain a classroom environment in which her students were reasonably focused on well delineated, age and skill appropriate tasks developed, organized, and presented in a manner designed to foster learning and skill improvement. She was apparently overwhelmed by the daunting task she confronted.

No personal animus toward Respondent has been asserted or established. Therefore, although Respondent may be adversely affected by the District's evaluation and decision to prefer tenure charges, the removal of Respondent by revoking her tenure was neither arbitrary nor capricious. Nor did the District's action violate any of the criteria established by TEACH NJ that would have invalidated the revocation of tenure and the discharge of a tenured teacher for unsatisfactory teaching performance. Consequently, the defenses asserted by Respondent cannot be sustained.

Based on the evidence submitted, the Tenure Charges filed against Respondent, Felicia A. Pugliese, by the State Operated School District of the City of Newark shall be upheld. The petition of the State Operated School District of the City of Newark in the instant matter is granted, and Respondent's dismissal upheld. I so find.

February 15, 2013

Daniel F. Brent, Arbitrator