

STATE OF NEW JERSEY  
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Elena Brady:

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THE STATE OPERATED SCHOOL DISTRICT  
FOR THE CITY OF NEWARK

Agency Dkt No.  
270-9/14

Petitioner,

- and -

ELENA BRADY

Respondent.

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**DECISION ON  
MOTION TO  
DISMISS AND  
STAY PROCEEDINGS**

Before: Joyce M. Klein, Arbitrator

Appearances:

**For the Petitioner:**

Ramon E. Rivera, Esq.  
Christine M. Michaelson, Esq.  
Scarinci & Hollenbeck

**For the Respondent:**

Richard A. Friedman, Esq.  
Zazzali, Fagella, Nowak,  
Kleinbaum & Friedman, P.C.

The State Operated School District of the City of Newark (the "District") served Respondent Elena Brady ("Respondent") with Notice of Inefficiency on or about August 22, 2014. Debora R. Weaver, Principal at the District's Lincoln School filed notice of "charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 against the Respondent. Based upon this notice, on September 18, 2014, District Superintendent Cami Anderson certified tenure charges against Respondent and filed those charges with the Department of Education.

On October 1, 2014, Respondent filed a Motion to Dismiss and Stay Proceedings with the Acting Commissioner of Education. Also on October 1,

2014, Respondent filed an answer to the tenure charges. On October 8, 2014, M. Kathleen Duncan, the Director of Bureau of Controversies and Disputes advised the parties that "the case is being referred" to the arbitrator "as required by statute."

On October 23, 2014, the District filed a brief in Opposition to Respondent's Motion to Dismiss and Stay the Proceedings. On October 27, 2014, the District provided a supplemental statement including an attached October 24, 2014 letter of clarification from Assistant Commissioner Peter Shulman. On November 5, 2014, Respondent filed a brief in response to the District's Opposition to its Motion to Dismiss and Stay Proceedings, as well as the District's October 27, 2014 supplemental submission. On November 17, 2014, the District submitted a sur-reply addressing new exhibits not included in the initial Motion to Dismiss. On November 18, 2014, Respondent submitted a final letter brief addressing new exhibits submitted by the District. On November 20, 2014, I held oral arguments at the State Board of Mediation in Newark, at which time both parties were given a full opportunity to present their arguments. Also on November 20, 2014, Arbitrator Simmelkjaer issued an Award addressing a similar Motion to Dismiss in IMO Tenure Hearing of Neil Thomas, Agency Docket No. 244-9/14 (Arb Simmelkjaer, November 20, 2014). Respondent filed a brief submission addressing the relevance of that Award on November 24, 2014, whereupon the record on the Motion to Dismiss was closed.<sup>1</sup>

### **BACKGROUND**

The District began a teacher evaluation pilot program in the 2011-2012 school year that included seven schools out of approximately 65 non-charter pre K-12 schools. The District acknowledges that evaluations conducted in the 2011-2012 pilot year did not count for official purposes but informed the development of the teacher evaluation process that was adopted, implemented and approved in 2012-2013.

The TEACHNJ Amendments to New Jersey tenure laws were "approved August 6, 2012, in the 2012-2013 school year." N.J.S.A. 18A:6-117. Following the passage of TEACHNJ, the District implemented its evaluation framework District-wide in 2012-2013.

The District adopted this evaluation rubric as part of its performance evaluation system that was designated the Newark Public Schools Framework for Effective Teaching. That framework included new "levels of performance" of highly effective, effective, partially effective and ineffective. The District began to implement the framework during the 2012-2013 school year and used the new

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<sup>1</sup> Both parties subsequently submitted emails reiterating their positions.

"levels of performance." Other aspects of the framework, including the implementation of School Improvement Panels, which were not created or implemented until the 2013-2014 school year.

In October of 2012, the District and the Newark Teachers Union (NTU) representing the District's teachers entered a Memorandum of Agreement (MOA) for a successor collective negotiations agreement. That MOA included:

Section I. A. NPS will implement a new evaluation system beginning SY 2012-2013. In accordance with the Teacher effectiveness and Accountability for the Children of New Jersey ("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.

The MOA also provided that "NPS shall implement a new educator evaluation system with four summative rating categories beginning in school year 2012-2013" and provided for a merit based compensation system dependent upon the new evaluation framework.

The tenure charges filed by the District against Respondent include a partial evaluation dated October 5, 2012, a formal evaluation dated January 8, 2013, an evaluation dated March 19, 2013, a formal evaluation dated May 28, 2013 and an annual evaluation dated June 10, 2013. Respondent received an ineffective rating for the annual evaluation in 2012-2013.

For the 2013-2014 school year, Respondent received a Corrective Action Plan (CAP) dated October 8, 2013, a long observation dated November 18, 2013, a short observation dated January 30, 2014, a mid-year review summary form dated February 14, 2014, a long observation dated March 24, 2014, an annual evaluation dated May 15, 2014 and a short observation dated June 27, 2014. Respondent received an Ineffective rating for the annual evaluation in 2013-2014.

Based upon Respondent's summative evaluations for the 2012-2013 and 2013-2014 school years, District Superintendent Cami Anderson certified tenure charges against Respondent on September 18, 2014. On October 1, 2014, Respondent filed a Motion to Dismiss and Stay Proceedings with the Acting Commissioner of Education.

On October 2, 2014, the Director of the Department of Education's Bureau of Controversies and Disputes advised both parties that the Department had "decided to send the motion out with the file for the arbitrator to decide." On October 8, 2014, the Director of the Bureau of Controversies and Disputes

referred this case for arbitration, advising the parties that the tenure charges "have been reviewed pursuant to N.J.S.A. 18A:6-17.3c" and "the Commissioner is unable to determine that the evaluation process has not been followed."

### DISCUSSION

Initially, the parties disagree over my authority to decide the Motion to Dismiss. The District asserts that only the Commissioner has the authority to make a determination of whether the evaluation process was followed and emphasizes that the arbitrator's authority is limited to the express provisions of N.J.S.A. 18A:6-17.3(c). Respondent counters by emphasizing that the Commissioner delegated the authority to decide the Motion to the arbitrator.

The District argues that the Commissioner of Education determined that it followed the evaluation process in accordance with N.J.S.A. 18A:6-17.3. The District argues that N.J.S.A. 18A:6-17.3 provides that the Commissioner of Education is solely authorized to determine if the District followed the evaluation process. Citing subsection (c), the District emphasizes that it requires that the Commissioner rather than the arbitrator determines whether the evaluation process was followed.

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

Notwithstanding the provisions of N.J.S.A. 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 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.

The Department also cites N.J.S.A. 18A:6-16 which provides that the Commissioner has the authority to determine the sufficiency of a tenure charge "to warrant dismissal or reduction in salary of the person charged" and is required to refer the case to an arbitrator if such a finding is made. The District contends that the Commissioner is prohibited from referring the matter to an arbitrator "when a motion for summary decision has been made prior to that time, the Commissioner may retain that matter for the purposes of deciding the motion." Because the Respondent did not file a motion for summary decision with the Commissioner, the District argues that the Commissioner may only dismiss the

charge if it is insufficient to warrant a penalty or retain the matter if a motion for summary decision is filed. In this instance, the District points out, the Commissioner determined that the charge was sufficient to warrant a penalty and transmitted it to the arbitrator for hearing. Citing I/M/O the Tenure Hearing of Edgard Chavez and State Operated School District of the City of Newark, Essex County, Dkt. No. 269-9/12 Arb. Brown (February 6, 2013) page 12, the District points out that Arbitrator Brown recognized the Commissioner's statutory authority providing that "[b]ecause the charges have been deemed sufficient by the commissioner, I find I need not determine whether or not the District complied with claimed controlling procedures and process, or whether the District was required to comply with a tiered evaluation system ..."

The District also cites the legislative history, which places authority to determine whether the District followed the evaluation process squarely with the Commissioner rather than the arbitrator. The District points out that both the Senate and Assembly statements associated with the TEACHNJ Act provide as follows:

If the charge is forwarded to the commissioner, the individual against whom the charges are filed will have 10 days to submit a written response to the charges to the commissioner, and the commissioner, unless he determines that the evaluation process has not been followed, is required to forward the case to the arbitrator within five business days following the period provided for the response to the charges.

The District argues that the legislature provided the Commissioner with the authority to reject tenure charges that did not follow the evaluation process and to make a determination that the evaluation process was followed, in which case, the Commissioner is required to transmit these charges to an arbitrator for hearing.

In this instance, the District emphasizes that on October 8, 2014, the Commissioner transmitted the charges to be arbitrated stating "upon review, the Commissioner is unable to determine that the evaluation process has not been followed..." The District contends that because the Commissioner transmitted the tenure charges to the arbitrator, the matter must proceed to a hearing on the merits. The District maintains that the October 8, 2014 letter constitutes a final administrative decision on behalf of the Commissioner where he effectively denied the Respondent's Motion to Dismiss. The District suggests that the proper mechanism to appeal this determination in accordance with N.J.S.A. 18A:6-9.1 is before the Appellate Division.

The District contends that the only authority statutorily vested in the arbitrator is limited under N.J.S.A. 18A:6-17.3 to determinations of 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 consideration of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
- (4) the district's actions were arbitrary and capricious.

The District maintains that based upon these criteria, the arbitrator is required to determine that any error in the evaluation process "materially affected the outcome of the evaluation" in the relevant school year and such determination cannot be made without considering the full record. N.J.S.A. 18A:6-17.2(b). The District argues further that if the arbitrator has the authority to determine the validity of the evaluation process, the Respondent's Motion to Dismiss fails to satisfy that standard because the tenure charges were filed in accordance with N.J.S.A. 18A:6-10. In this instance, the District points out that Respondent's motion was submitted pursuant to N.J.A.C. 6A:3-5.3(a)(1). The District notes that the standard for a motion to dismiss before the Commissioner has provided in N.J.A.C. 6A:3-1.10 provides:

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.

Accordingly, the District asserts that the Commissioner had the opportunity to dismiss the tenure charges but instead referred the charges to an arbitrator for hearing on the merits.

Addressing the District's claim that by transferring this case to the arbitrator, the Commissioner made a substantive determination that applicable New Jersey statutes and regulations were not violated, Respondent argues that this is a frivolous argument. Respondent emphasizes that the Commissioner did not make any decision or findings, either factual or legal, in forwarding the matter to the arbitrator. Respondent emphasizes that for a decision of the

Commissioner to be valid, it must be included in a written decision that sets forth findings of facts and conclusions of law sufficient for a reviewing court to understand the basis for the decision. Respondent suggests that the District's position would require the parties to engage in substantial litigation before the Commissioner before tenure charges were transferred to an arbitrator, which would conflict with TEACHNJ's goal of speedy resolution of tenure charges.

Respondent argues that both statute and regulations provide the Commissioner with the authority to delegate the Motion to Dismiss to the arbitrator for decision. Specifically, Respondent points out that N.J.S.A. 18A:6-16 provides the Commissioner with the discretion to refer a summary judgment motion to the arbitrator and likens this motion to one for summary judgment because it is based upon undisputed facts. Further, Respondent points out that nothing in N.J.S.A. 18A:6-17.3 precludes such a motion before the arbitrator.

Respondent cites N.J.A.C. 6A:3-1.5(g) as further authority for the Commissioner to delegate the Motion to Dismiss to the arbitrator.

Respondent points out that a legal prerequisite to arbitration of charges of inefficiency pursuant to Section 25 of TEACHNJ is compliance with evaluation procedures. Noting that the District concludes that the Commissioner's act of transmitting the case to the arbitrator constituted the Commissioner's "ruling" on the sufficiency of the charge, Respondent points out that the Commissioner simply decided to refer the case, including the Motion to Dismiss, to the arbitrator and, in this instance, the referral does not reflect a determination of whether or not the evaluation process was followed. Respondent contends that neither the law nor the transmittal to the arbitrator, prohibit the ruling on the challenge of the efficiency charge. Acknowledging that the Commissioner had the discretion to decide the Motion, Respondent emphasizes the October 2, 2014 e-mail from the Director of the Bureau of Controversies and Disputes in which the Commissioner exercised his discretion to refer the matter to the arbitrator for a resolution of the Motion to Dismiss. Respondent maintains that in the Director's second letter to the parties, she indicated that "the Commissioner is unable to determine that the evaluation process has not been followed" and referred the case to the arbitrator. Respondent maintains that this referral is 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), as well as an arbitrator's authority to determine procedural arbitrability.

Initially, the District's claim that the Commissioner's action in appointing an arbitrator constitutes a substantive decision on the merits of Respondent's Motion does not account for the lack of factual or legal findings. Rather, the Department of Education's Bureau of Controversies and Disputes conducted the review necessary to advise the parties that "the Commissioner is unable to determine that the evaluation process has not been followed."

The District's suggestion that the Commissioner's October 8, 2014 determination to send this case to an arbitrator constituted a final administrative decision effectively denying the Motion to Dismiss is contradicted by the Director of the Bureau of Controversies and Disputes' communication with the parties advising that the Department had "decided to send the motion out with the file for the arbitrator to decide." After advising the parties of that determination, the file, including the Motion, was transmitted to the arbitrator pursuant to N.J.S.A. 18A:17.3(c) with the provision that "the Commissioner is unable to determine that the evaluation process has not been followed."

The use of the language that "the Commissioner is unable to determine that the evaluation process has not been followed" means only that the Commissioner cannot make a determination that the District did not follow the evaluation process. In other words, the Commissioner is expressly not making a finding. The Commissioner's review is designed simply to determine whether the petitioner's filing demonstrates a sufficiently complete record of the charge and certification to forward to the arbitrator for review pursuant to the criteria in N.J.S.A. 18A:6-17.2.

The Senate and Assembly legislature statements associated with TEACHNJ, which emphasize that the Commissioner has five business days to forward the case to an arbitrator "unless he determines that the evaluation process has not been followed" similarly suggests that the Commissioner's review is limited to the sufficiency of the charges before sending the case to the arbitrator. Any other interpretation would limit the Commissioner to five business days to address the serious and consequential issues raised by both parties. As the legislative statements indicate, the legislature intended that these issues be referred to the arbitrator for decision pursuant to N.J.S.A. 18A:6-17.3(c).

Further, N.J.S.A. 18A:6-16 provides the Commissioner with the authority to delegate such motions:

Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's behalf in the proceedings shall examine the charges and certification. ... 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 22 of P.L. 2012, c. 26 (C. 18A:6-17.1) 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. (Emphasis added).



In other words, N.J.S.A. 18A:6-16 requires the Commissioner to review the charges and certification and if the "charge is sufficient to warrant dismissal ..." of the teacher, the Commissioner is required to refer the matter to an arbitrator.

N.J.S.A. 18A:6-16 provides further, if Respondent files a Motion for a Summary Decision then the Commissioner "may" decide the motion. In this instance, the relevant facts are not in dispute, thus rendering the Motion to Dismiss akin to a motion for summary judgment. If a summary judgment motion is filed, the Commissioner retains the discretion to decide the motion or to refer it to an arbitrator. Here, the Commissioner exercised that discretion when the parties were advised that the motion was sent out "for the arbitrator to decide." Under these circumstances, the Commissioner properly exercised his discretion to delegate decision on the Motion to the arbitrator. Accordingly, Respondent's Motion to Dismiss is properly before me for decision.

Respondent's Motion to Dismiss seeks dismissal of the District's tenure charges based upon the fact that the charges rely solely on Respondent's summative evaluation ratings for the 2012-2013 and 2013-2014 school years. Respondent argues that the 2012-2013 school year was a pilot year and the new tenure charge procedures for cases of inefficiency were not in place until the 2013-2014 school year. Therefore, Respondent contends that, as a matter of law, 2012-2013 evaluations cannot be used to measure her performance under TEACHNJ. Respondent challenges the District's assertion that the pilot program it conducted during the 2011-2012 school year that preceded the existence of the TEACHNJ Act allows it to proceed with the charges. Respondent argues that the legislature clearly intended the 2012-2013 school year to serve as a pilot year for administrators and staff.

Because summative evaluations from the 2012-2013 school year cannot be used to support tenure charges for inefficiency, Respondent argues that the District has not alleged viable tenure charges and they must be dismissed. Respondent argues that the regulations that established guidelines and procedures for the timing and conduct of teacher evaluations and observations pursuant to TEACHNJ and AchieveNJ were not effective until October of 2013. N.J.A.C. 6A:10-11, et. seq. Respondent emphasizes that under TEACHNJ, the 2013-2014 school year was the first year that evaluations would count for the purposes of tenure charges.

Respondent maintains that the District's reliance on laws adopted in August of 2012 in the 2012-2013 school year to support its argument that the new law automatically applies is flawed. Addressing the District's argument that the law went into effect in the 2012-2013 school year, Respondent points to the different implementation dates included in N.J.S.A. 18A:6-123. Specifically,

Respondent cites N.J.S.A. 18A:6-123(d) which requires boards of education to implement a pilot program "to test and refine the evaluation rubric" ... "no later than January 31, 2013". Subsection (e) provides for the implementation of approved rubrics, providing, "[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric ..."

Respondent emphasizes that the 2012-2013 school year represents a date that precedes the full effective implementation date of the revised tenure act. Because the District filed inefficiency charges pursuant to N.J.S.A. 18A:6-17.3 based upon evaluations issued in the 2012-2013 and 2013-2014 school years, the tenure charges are fatally flawed and thus should be dismissed pursuant to the statute.

Respondent argues that the 2012-2013 school year was intended to serve as a test run for all tenure related issues including retaining tenure and completing evaluations and observations under the new evaluation procedures and revocation of tenure. Respondent contends that the revised evaluation law and regulations went into effect for the start of the 2013-2014 school year. According to Respondent, the District's participation in a pilot program during the 2011-2012 school year is of no consequence.

Emphasizing that N.J.S.A. 18A:6-123(d) requires a district to implement a pilot program to "test and refine the evaluation rubric" by January of 2013, Respondent points out that this is approximately 5 months into the 2012-2013 school year and implementation of the evaluation rubric was not mandated until the start of the 2013-2014 school year. Further, Respondent emphasizes that the regulations governing the new evaluation rubrics were not effective until March of 2013, seven months into a ten month long school year. Respondent suggests that the District could not comply with regulations that did not exist until three quarters of the way through the 2012-2013 school year.

Further, Respondent points out that the Commissioner did not establish evaluation and observation guidelines and processes until October 2013 and the District did not have a School Improvement Panel (SIP) in place in Respondent's school until March of 2014. Respondent maintains that N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-31 require the District to establish a School Improvement Panel to "oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation ..." Respondent argues that the District's failure or inability to meet the standards of the evaluation and regulatory scheme for the 2012-2013 school year renders formal judgment of Respondent's performance for that year under TEACHNJ tenure removal proceedings inappropriate and unlawful.

Citing IMO Sandra Cheatham and School District of the City of Newark, Agency Dkt No. 226-8/14 (Arb. Bluth October 16, 2013), Respondent emphasizes that the arbitrator found that the charge alleging inefficiency pursuant to N.J.S.A. 18A:6-17.3 was insufficient because the TEACHNJ law was not enacted until August of 2012 and not implemented until October of 2013. Further, Respondent points out that the Cheatham award found that the District presented no evidence that it was exonerated from the Act and thus the charges were premature. (Cheatham pps. 10-15). Relying further on the Cheatham Award, Respondent asserts that it provides a logical analysis of the statute and is entitled to great weight.

The District argues that Respondent's Motion to Dismiss must be denied and a decision must be rendered on the merits as prescribed by statute. Initially, the District maintains that its evaluation of Respondent for the 2012-2013 school year is valid because TEACHNJ was in full force and effect before the 2012-2013 school year. Emphasizing that the District's pilot program was for the 2011-2012 school year rather than the 2012-2013 school year, the District asserts that its evaluation process that was implemented in the 2012-2013 school year is covered by TEACHNJ. The District notes that the legislature specifically adopted and approved TEACHNJ on "August 6, 2012 in the 2012-2013 school year" and thus, there is no question that evaluations in that school year can be used towards determining if tenure charges are warranted.

The District emphasizes that TEACHNJ required school districts to institute pilot programs to test their new evaluation rubrics by January 31, 2013 at the latest. The District cites N.J.S.A. 18A:6-123(d) which provides "beginning no later than January 31, 2013, a board of education shall implement a pilot program..."

The District argues that TEACHNJ did not require districts to wait a year to implement the evaluation rubric if the rubric had already been adopted and approved. Similarly, the District argues that TEACHNJ did not require school districts to treat 2012-2013 as a "pilot" year. Rather, the District notes that N.J.S.A. 18A:6-123(d) and (e) provided deadlines by which districts were required to test and implement their new rubrics but did not prohibit earlier implementation of approved rubrics. The District contends that there is nothing in TEACHNJ or its regulations that provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric need be treated differently from those performed in 2013-2014 for purposes of triggering tenure charges pursuant to N.J.S.A. 18A:6-17.3.

The plain language of TEACHNJ does, as emphasized by the District, include an effective date of August 6, 2012, and the statute provides that it is to take effect "in the "2012-2013 school year." There can be no doubt that the

statute became effective for purposes of developing new evaluation rubrics and allowing the Department of Education an opportunity to draft new rules in compliance with the requirements of TEACHNJ. However, the statute also includes express deadlines for developing and implementing new evaluation rubrics and procedures. The District's use of the 2012-2013 school year summative evaluation in its determination to bring tenure charges against Respondent must be evaluated in light of the statute as a whole and subsequent rules adopted by the Department of Education.

The District's reliance on the August 6, 2012 effective date of the statute together with the requirement of N.J.S.A. 18A:6-123(d) that a board of education implement a pilot program "beginning no later than January 31, 2013" provides the District with discretion to implement a new evaluation rubric before January 31, 2013, but does not take the remainder of the statutory and regulatory scheme into consideration. Specifically, N.J.S.A. 18A:6-123(e) provides for the implementation of approved rubrics "[b]eginning with the 2013-2014 school year." Specifically, N.J.S.A. 18A:6-123(c), (d) and (e), when read together, contemplate a gradual implementation with subsection (c) requiring that a board of education "adopt a rubric approved by the Commissioner by December 31, 2012." Subsection (d) provides for the implementation of a pilot program based on that rubric by January 31, 2013 and Subsection (e) provides for its implementation in the 2013-2014 school year: N.J.S.A. 18A:6-123(e) provides, "[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators..."

This statutory scheme reflects the legislature's expectation that the requirements of TEACHNJ would be developed during the 2012-2013 school year and implemented during the 2013-2014 school year. Although TEACHNJ was adopted and approved on August 6, 2012 and took effect in "the 2012-2013 school year", the statute anticipates a gradual development and approval of rubrics by December 31, 2012 and adoption of the pilot programs by January 31, 2013 with full implementation of the evaluation rubric "[b]eginning with the 2013-2014 school year." That the statute was in effect and included deadlines in the 2012-2013 school year does not necessarily lead to the conclusion that a district that implemented a pilot program prior to the effective date of the statute on August 6, 2012 has license to implement the evaluation rubric on other than a pilot basis prior to the statutory commencement of the new evaluation rubric "[b]eginning with the 2013-2014 school year." N.J.S.A. 18A:6-123(c) and (d) both provide deadlines for implementation with subsection (c) providing that an evaluation rubric be approved and adopted "by December 31, 2012." Similarly, subsection (d) requires implementation of a pilot program "beginning no later than January 31, 2013." In contrast, N.J.S.A. 18A:6-123(e) provides a start date for implementation of the approved rubrics "[b]eginning with the 2013-2014 school year." This difference between providing statutory deadlines for interim

steps that must be completed before implementation of the new evaluation rubrics and a statutory start date for the actual implementation of the approved and adopted evaluation rubric is significant. Further, the start date for implementation includes mandatory language providing “[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric ...”

This statutory timeline is reinforced by the regulations governing the implementation of TEACHNJ which were not effective until March of 2013. These rules include provisions for the adoption of evaluation rubrics, evaluation procedures and provisions for creation of a corrective action plan for a teacher receiving a partially effective or ineffective rating and the composition and responsibilities of School Improvement Panels.

Thus both the statute and rules suggest that the 2012-2013 school year, which was the first year that TEACHNJ was in effect, was to be a developmental year for preparing to fully implement the newly adopted requirements for evaluation rubrics to be used for both the acquisition of tenure and the revocation of tenure for inefficiency beginning in the 2013-2014 school year. That the District participated in a limited pilot program available in approximately seven of its sixty-five non-charter Pre-K-12 schools in the 2011-2012 school year, is not sufficient to support a finding that the summative evaluations from the 2012-2013 school year based upon an approved evaluation rubric are to be considered under the new requirements for charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3.

This conclusion is supported by the bulk of the guidance issued by the Department of Education. Both parties argue strenuously regarding the relevance of Frequently Asked Questions (FAQs) and other guidance provided by the Department of Education on its website and by Assistant Commissioner of the Department of Education Peter Shulman in his October 24, 2014 letter to the District.

On October 16, 2014, Arbitrator Stephen Bluth dismissed similar tenure charges for inefficiency filed by the District in a decision known as the Cheatham Award. The Cheatham Award was based in part on an FAQ then posted on the Department’s website. That FAQ, which has since been removed from the Department’s website, stated:

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" (ie: teachers needing to be rated at least effective for two of three years) will start.

On October 24, 2014, Charlotte Hitchcock, the District's General Counsel, sought clarification of the "key arguments in Stephen M. Bluth's arbitration decision" from Timothy Matheney, the Chief Intervention Officer of the DOE. On that same date, Mr. Shulman replied to Ms. Hitchcock clarifying that the FAQ relied upon by the Respondent was issued for the purpose of providing guidance relating to teachers acquiring tenure.

Mr. Shulman's October 24, 2014 letter in response stated in pertinent part:

Included within this FAQ document was a response to questions regarding TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three years of employment. Understandably, many nontenured teachers from school districts throughout the State reached out to the Department to clarify how the law applied to their tenure acquisition and the Department responded accordingly:

No evaluation outcomes in the 2012-2013 school year will impact tenure decisions. 2013-14 is the first year where [sic] the statewide system will be in place, and the first year when summative rating "clock" (ie: teachers needing to be rated at least effective for two of three years) will start.

\* \* \* \* \*

Through this guidance, the Department sought to clarify when summative ratings would count towards *earning* tenure. As mentioned above, such clarifications did not indicate a prohibition on school districts to use the 2012-2013 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 regards to the status of Newark's evaluation rubrics during the 2012-2013 school year, please note that, on October 26, 2012, members of the Department met with Newark representatives to

review and discuss the Newark Evaluation Rubric and the associated policies that would be put into place for the 2012-13 school year. At that time, the Commissioner's representatives found that the Evaluation Rubric met the intent of the recently adopted TEACHNJ Act and were directionally aligned with the proposed regulations, which would be effective in March of 2013.

Respondent argues that Department of Education publications and guidance including the initial FAQ cited above, support dismissal of the charges. Respondent takes issue with Mr. Shulman's October 24, 2014 letter to the District's General Counsel asserting that it constitutes "an admission that the District possesses absolutely no legal support for its claim that evaluation outcomes from the 'pilot' 2012-2013 school year count for purposes of tenure decisions, including tenure revocation." Addressing the substance of the letter, Respondent claims that that FAQ was posted to the public for approximately two years and any efforts to clarify that FAQ to the District days after the Cheatham Award was issued should not be considered. Respondent suggests that the District's failure to address the Cheatham Award in its October 23, 2014 brief, but followed by an October 27 supplemental opposition letter brief attaching the October 24, 2014 letter from Mr. Shulman to the District's counsel renders the letter suspect.

Respondent emphasizes Mr. Shulman's failure to address how utilization of evaluations from the 2012-2013 school year is unfair for tenure acquisition but not for tenure revocation. Respondent notes that Mr. Shulman's letter also does not address the Department of Education's reference to both tenure revocation and tenure acquisition decisions as "tenure decisions." Respondent also notes that Mr. Shulman does not address the reference in the FAQ to the full implementation of the law commencing with the 2013-2014 school year. Further, Respondent suggests that the remainder of the FAQ support her position that the 2012-2013 school year was a capacity-building year of development and the teacher evaluation system would be implemented in 2013-2014 and not sooner.

Respondent also points to other publications issued by the State Department of Education and available to the public as recently as January 2014, reinforce that the 2013-2014 school year was the first year that the evaluation system would count for tenure decisions including both tenure acquisition and tenure revocation. Respondent cites a January 7, 2014 memo to all chief school administrators, charter school lead persons and others involved in the implementation of TEACHNJ that references the initial implementation of AchieveNJ in 2013-2014 as follows:

As districts implement AchieveNJ for the first time in 2013-2014, NJ SMART is preparing for a modified data collection to capture the

multiple measures of educator practice and student growth that are aligned to AchieveNJ....

Respondent cites Mr. Shulman's March 28, 2012 memo in which he announced to all chief school administrators and charter school lead persons that "the New Jersey Department of Education (NJDOE) recently announced that we are moving towards full, statewide implementation of a new teacher evaluation system in the 2013-14 school year." That memo provided further 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."

This memo, which remains available on the Department of Education's website, provides a series of deadlines throughout the 2012-2013 school year for the development of evaluations and rubrics, as well as lessons learned from existing pilot programs. Further, in a July 30, 2012 memo to chief school administrators and charter school lead persons, Mr. Shulman provided an education evaluator system implementation update that provides in pertinent part as follows:

As we prepare for statewide rollout of an improved educator evaluation system in 2013-2014, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs. The first of these requirements is to form a District Evaluation Advisory Committee (DEAC) to ensure stakeholder engagement in evaluation reform. We strongly advise these committees be formed as soon as possible, as they will help to drive decision-making for all other parts of the process. ... We will continue to provide information and resources for next year's capacity-building activities as they become available.

Respondent also points to the DOE's 2012 Evaluation Pilot Advisory Committee (EPAC) Interim Report. This report was issued by a committee appointed by the Department of Education to oversee the pilot program. The executive summary of this report provides that "New Jersey is preparing to implement a statewide educator evaluation system in the 2013-2014 school year." Respondent maintains that the report also provides a variety of evidence that the 2012-2013 school year was used to prepare for the implementation of the new evaluation system. Respondent emphasizes that while the District did participate in that program, its participation was limited and only seven of the District's approximately 65 Pre-K-12 schools excluding charter schools participated in the pilot.



Further, the 2012 EPAC Interim Report reflects that there "is still a great deal of work to be done" and "more clarity is needed" and "the decision to push back the full implementation to the 2013-2014 was met with universal acclaim by EPAC members." Respondent also points to the 2013 EPAC Final Report that provides that the second pilot year in 2012-13 "was critical to many of [its] policy decisions ..." That report continues referencing "the extra year for districts to learn about SGOs (student growth objectives) and prepare for implementation in SY 13-14."

Citing the "summary of legal requirements for evaluation in tenure cases" which was published by the New Jersey Department of Education in March of 2014, Respondent notes that this details the minimum requirements for bringing tenure charges, including specific requirements such as N.J.A.C. 6A:10-2.4 (evaluations procedures for all teaching staff), N.J.A.C. 6A:10-2.5 (Corrective Action Plans for all teaching staff), N.J.A.C. 6A:10-4.4 (teacher observations) which were not yet adopted in 2012-2013.

Respondent also cites the DOE's guide to the TEACHNJ Act which provides, "the law mandates statewide implementation of stronger, more rigorous evaluation systems starting in the 2013-2014 school year."

Respondent asserts that these FAQs, guidelines, summaries and reports must be given due deference.<sup>2</sup> Accordingly, Respondent argues that the guidelines issued by the Department of Education confirm that the 2012-2013 school year cannot count toward tenure decisions.

Noting that Respondent has argued that advice from the Department of Education on a web page entitled "Educator Evaluation Frequently Asked Questions" preclude the tenure charges against her, the District argues that this page refers to the acquisition of tenure by non-tenured teachers rather than the evaluation or dismissal of tenured teachers. The District relies upon Mr. Shulman's letter to Ms. Hitchcock, the District's General Counsel, clarifying that the FAQs relied upon by the Respondent were issued for the purpose of providing guidance relating to teachers acquiring tenure.

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<sup>2</sup> Citing In Re Teamsters Local 97 v. State, 434 N.J. Super 393, 409 (App. Div. 2014), Respondent asserts that the court found that FAQ were matters of public record and properly considered under Rule 4:6-2(e) on a Motion to Dismiss. In Paterson Police PBA, Local 1 v. City of Paterson, 433, N.J. Super 416, 429 (App. Div. 2013) the Court held that "guidelines issued by the Division of Local Government Services were informal in nature and not the equivalent of an administrative agency's interpretation of a statute it is empowered to enforce which would warrant our "substantial deference," nonetheless, because the guidelines represented the practical interpretation of the statute by the agency charged with instructing local governmental units on how they were to comply with the new law, the guidelines were given substantial deference." (citations omitted).

Further, that letter of clarification also provided that the District's 2012-2013 evaluation rubric was approved by the Department of Education. The District notes that even if the Department of Education had intended its FAQs to serve as guidance on the use of 2012-2013 evaluations for purposes of inefficiency charges against tenured teachers under TEACHNJ, such guidance has no regulatory force and would constitute invalid, *de facto* rule making.

The District emphasizes that as a "State-Operated" School District under State intervention, it is an "arm of the State." Accordingly, the District suggests that seeking such clarification cannot be considered an improper communication and Mr. Shulman's letter is entitled to due weight.

The District objects to the inclusion of new documents not included in Respondent's initial Motion to Dismiss. Further, the District emphasizes that none of these documents state explicitly that the 2012-2013 school year does not count towards inefficiency. Because the documents do not provide that the District is not required to observe and evaluate teachers or provide that Respondent would not be held accountable for her teaching performance in the 2012-2013 school year, the District asserts that they are not relevant. The District also notes that the record does not establish that the District received the documents cited by Respondent or that they were implemented in the District.

Initially, the FAQs, memoranda from the Department of Education to Chief School Administrators and others and EPAC Reports all provide guidance which is due "substantial deference." Paterson Police PBA, Local 1 v. City of Paterson, 433 N.J. Super 416, 429 (App. Div. 2013). Mr. Shulman's letter to the District's General Counsel further informs the consideration of the District's efforts to rely upon its summative evaluation of Respondent from the 2012-2013 school year.<sup>3</sup> Guidance provided by the Department of Education, which has been charged with reviewing and approving newly adopted evaluation rubrics required by TEACHNJ, is relevant to the interpretation of the statutory and regulatory scheme whether or not this guidance was specifically received by the District. This guidance serves as a practical interpretation of the necessary steps school districts need to take to comply with the new requirements of TEACHNJ. Each of these documents, with the exception of Mr. Shulman's October 24, 2014 letter was available for review by the District and/or the Respondent on the Department of Education's website. The guidance and Mr. Shulman's letter must be considered and given due weight, along with the provisions of TEACHNJ and its

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<sup>3</sup> Both Mr. Shulman's October 24, 2014 letter and the eleven documents submitted with Respondent's November 5, 2014 brief, were not submitted with initial pleadings. Fundamental fairness requires consideration of Mr. Shulman's letter as well as consideration of documents responsive to that letter.

implementing rules. This guidance, by itself, while not conclusive, informs the analysis of the implementation of TEACHNJ and AchieveNJ.

The bulk of the guidance suggests, either directly or indirectly, that the 2012-2013 school year was intended as a "planning and capacity building year" in preparation for commencing new evaluation rubrics in the 2013-2014 school year. Mr. Shulman's October 24, 2014 letter to the District appears at odds with much of the guidance provided by the Department of Education, including his earlier memos to boards of education and conclusions reached by EPAC in its interim and final report.

Mr. Shulman's October 24, 2014 letter to the District serves to clarify that the District had received approval for its evaluation rubrics in October of 2012. This letter, however, does not address whether the approval of evaluation rubrics rendered the District's evaluation procedures ready for full implementation in the 2012-2013 school year pursuant to the procedures required by TEACHNJ.

The District's adoption of an evaluation rubric that the Commissioner's representatives found "met the intent of the recently adopted TEACHNJ Act" in October of 2012 does not establish that the District's implementation of the new evaluation rubric in the 2012-2013 school year was intended to apply for purposes of the tenure revocation provisions of TEACHNJ before the 2013-2014 school year.

The provisions of TEACHNJ require both a new evaluation rubric and new evaluation procedures, including a requisite number of observations, implementing a corrective action plan if a teacher receives a summative evaluating of partially effective or ineffective and implementation of School Improvement Panels. The rules explaining and implementing these requirements were not effective until March of 2013. While the District's participation in the pilot program during the 2011-2012 school year may have given it a head start on development and implementation of a new evaluation rubric that complied with the requirements of TEACHNJ, the adoption of this rubric does not permit the District to implement it and apply the provisions of N.J.S.A. 18A:6-17.3 without implementing the full panoply of procedures required by the statute.

TEACHNJ adopted new performance requirements for teaching staff and streamlined the process for revoking tenure from those teachers who do not meet the new performance requirements. In exchange for these requirements, the legislature adopted requirements for teachers receiving ineffective and partially effective summative ratings including required corrective action plans pursuant to N.J.S.A. 18A:6-128(b) and School Improvement Panels pursuant to N.J.S.A. 18A:6-120. As noted previously, the regulations governing the implementation of corrective action plans and School Improvement Panels were

not effective until March of 2013, or seven months into the ten month 2012-2013 school year.<sup>4</sup>

Consequently, when the language of N.J.S.A. 18A:6-123(e) which provides “[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators...” is considered in light of the provisions of TEACHNJ and its implementing regulations, whether or not the 2012-2013 school year was a “pilot” year in terms of evaluation rubric, it must be considered a “pilot” year in terms of the implementation of evaluation procedures and protections for teaching staff. Because the implementing regulations were not effective until March of 2013, the District could not and did not fully implement the evaluation rubric and procedures required for the 2012-2013 school year. Accordingly, Respondent’s 2012-2013 summative evaluation cannot properly be considered in support of the District’s tenure charges pursuant to N.J.S.A. 18A:6-17.3.<sup>5</sup>

The District is to be commended for its efforts to implement all of the provisions of TEACHNJ as quickly as possible and thus to improve the quality of education for the children in the Newark Public Schools. The District raises concern that refusing to consider evaluations from the 2012-2013 school year using the new evaluation rubric will allow poorly performing teachers a “free” year at the expense of the education of its students. As noted earlier, TEACHNJ requires teaching staff to improve their performance and students outcomes. However, the trade off required by the statute included a requisite number of observations, assistance through corrective action plans and School Improvement Panels to monitor the process. In order to consider tenure revocation under N.J.S.A. 18A:6-17.3, the procedures for providing the requisite observations, corrective action plans and School Improvement Panels must be in place to allow the teacher full opportunity for improvement prior to tenure charges. Since neither the rules nor the procedures pursuant to those rules governing observations, corrective action plans and School Improvement Plans were in place, teachers cannot be charged under N.J.S.A. 18A:6-17.3 based upon their 2012-2013 school year summative evaluations.

The District contends that the October 18, 2012 Memorandum of Agreement (MOA) with the Newark Teachers Union (NTU) which provides for

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<sup>4</sup> I note that Respondent represents that her school did not have a School Improvement Panel until March of 2014.

<sup>5</sup> The District cites IMO Tenure Charges Against Edward Newton, Agency Dkt. No. 276-9/14 where inefficiency charges based on annual summative evaluations in the 2012-2013 and 2013-2014 school years pursuant to N.J.S.A. 18A:6-17.3 were upheld. In this instance, Mr. Newton failed to respond to the charges in a timely manner and thus the matter was not contested. That the Commissioner terminated Newton based upon uncontested charges does not effect the sufficiency of the District’s implementation of TEACHNJ in the 2012-2013 school year.

summative evaluations rating teachers in accordance with TEACHNJ for the 2012-2013 school year supports its use of those evaluations to support Respondent's inefficiency charges in this case. The District emphasizes that this Agreement, which was voted on by NTU members, served to put Respondent on notice that the new evaluation system would be used in the 2012-2013 school year.

The MOA provides as follows:

Section I. A. NPS will implement a new evaluation system beginning SY 2012-2013. In accordance with the Teacher effectiveness and Accountability for the Children of New Jersey ("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.

The MOA also provided that "NPS shall implement a new educator evaluation system with four summative rating categories beginning in school year 2012-2013" and provided for a merit based compensation system dependent upon the new evaluation framework.

Respondent asserts that the parties' Memorandum of Agreement does not and cannot authorize the District to file tenure charges based upon the 2012-2013 evaluations. Acknowledging that the MOA refers to the newly adopted four summative ratings an employee can receive, as well as the evaluation rubric adopted by the District, the parties' MOA does not address the substantive processing of tenure charges for the 2012-2013 school year. Respondent emphasizes that the MOA does not mention tenure at all and cannot provide a basis to file tenure charges based upon the 2012-2013 school year evaluations. Further, Respondent notes that where a statute or regulation establishes a term or condition of employment, that statute preempts the negotiated term. State vs. State Supervisory Employees Association, 78 N.J. 54, 80-81 (1978). Respondent emphasizes that TEACHNJ does exactly that and thus, any provision in an MOA addressing tenure charges under TEACHNJ are preempted. Further, Respondent points out that any waiver of a statutory mandate or right must be plain or unambiguous and the parties' MOA does not mention tenure at all. Further, Respondent maintains that the meaning of the MOA has been determined in an arbitration involving the District in the Cheatham and Thomas cases and the District should not be given another bite at the apple.

The MOA is silent as to the application of this negotiated provision to the statutory requirements under TEACHNJ in the 2012-2013 school year. Indeed, the MOA does not address tenure at all and thus cannot be considered a waiver of statutory tenure provisions. Regardless, the statute preempts negotiations

over tenure charges. In State v. State Supervisory Employees Assn., 78 N.J. 54, 80-81 (1978), the court made clear that the "adoption of any specific Statute or Regulations setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement..."

The MOA, which provides for four summative ratings consistent with the provisions of TEACHNJ, does not, by itself, waive teachers' statutory rights under the statute. As noted, the MOA does not address tenure, tenure charges or tenure revocation. As such, the MOA cannot be found to sanction or prohibit use of the 2012-2013 school year for purposes of tenure inefficiency charges. The language of the MOA tracks the evaluation system adopted by TEACHNJ and then applies it to new merit pay provisions. In other words, one purpose of the inclusion of the new evaluation system in the MOA appears to be geared towards a new compensation system that includes merit pay rather than for the purpose of agreeing to adopt a new evaluation system to be used in tenure revocation proceedings prior to the 2013-2014 school year.

The MOA did serve to put Respondent on notice that a new evaluation rubric would be implemented during the 2012-2013 school year. Given that the inclusion of the new ratings system in the MOA is tied to new merit pay provisions, notice of implementation of a new evaluation system is not the equivalent of putting Respondent on notice that she was subject to possible tenure revocation charges under new standards and new procedures based upon the 2012-2013 school year.

The District argues that the arbitrator has jurisdiction to decide this matter for inefficiency under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act. Citing both I/M/O the Tenure Hearing of Edgard Chavez, State Operated School District of the City of Newark, Essex County, Dkt. No. 269-9/12 (Arb. Brown, February 6, 2013 at p. 11) and I/M/O the Tenure Hearing of Dr. Audrey Cuff, Cumberland Regional District Board of Education, Dkt. No. 71-3/14 (Arb. Gerber, June 26, 2014 at p. 26), both finding that arbitrators have authority "to hear matters pursuant to N.J.S.A. 18A:6-16" and that "inefficiency cases must be decided upon the old standard." The District asserts that this case was pled under both Section 8 (N.J.S.A. 18A:6-16) and Section 25 (N.J.S.A. 18A:6-17.3). The District notes that while 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 other grounds specified in the statute. Citing I/M/O the Tenure Hearing of Gerald Carter, State Operated School District of the City of Camden, Dkt. No. 269-12/12 (Arb. Simmelkjaer, July 18, 2013 at p. 14), the District asserts that the standard of review for inefficiency cases requires it to prove by a preponderance of the credible evidence that Respondent "has failed to reasonably perform the duties

of his title"; has "an inability to maintain classroom decorum and discipline"; "an inability to teach a prescribed curriculum"; and "a failure to submit required information on time even after constant written reminder." (citations omitted). The District emphasizes that since the adoption of TEACHNJ, arbitrators have not hesitated to consider tenure charges of inefficiency in non-mandatory cases pursuant to Section 8. The District points out that only the Cheatham Award has declined to evaluate tenure charges for inefficiency.<sup>6</sup> The District maintains that in that case, I/M/O the Tenure Hearing of Sandra Cheatham, State Operated School District of the City of Newark, Essex County, Agency Dkt No. 226-8/14 (October 16, 2014) the arbitrator overstepped his authority and made a decision as to the appropriateness of the District's evaluation process. The District reiterates that even if the requirements for inefficiency tenure charges under Section 25 have not been met, the charge must be evaluated under Section 8 and thus, the case should proceed to hearing.

Addressing the District's efforts to proceed under Section 8 of TEACHNJ, Respondent emphasizes that the charges are grounded specifically on alleged inefficiency pursuant to Section 25 and can only be based upon that provision. Respondent maintains that if the legislature had intended for "deficient inefficiency charges to proceed to arbitration via Section 8, it would have stated." Instead, Respondent notes that in the instance where there is no procedural compliance, the legislature chose to prohibit efficiency charges to proceeding to an arbitration hearing as a matter of law. To that end, Respondent emphasizes the DOE's summary of requirements for evaluation and tenure cases where it advises districts that they "must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency tenure charge" and "failure to adhere to these requirements can result in the tenure charge being dismissed." Respondent asserts that there is no authority for deficient inefficiency charges to proceed to arbitration by using Section 8 as a fallback. Indeed, such an interpretation would render the language of Section 25 superfluous. Respondent notes that if the District seeks to proceed against her other than on grounds of inefficiency, it may do so by filing such charges in accordance with the requirements of Section 8. Respondent maintains that TEACHNJ clearly dictates that all inefficiency charges must be filed pursuant to the requirements set forth in Section 25.

Respondent notes that the other inefficiency cases where arbitrators addressed charges of inefficiency are cases filed after the effective date of TEACHNJ but prior to the commencement of the 2012-2013 school year. Further, Respondent notes that TEACHNJ provided that its substantive provisions did not take effect until the 2012 school year. As a result, arbitrators

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<sup>6</sup> I note that in the interim, the arbitrator in the Thomas Award similarly determined that he had no basis on which to consider the inefficiency charges under N.J.S.A. 18A:6-16.



have use the substantive law governing tenure cases prior to the effective date of TEACHNJ. At this point, Respondent asserts the substantive criteria of TEACHNJ apply. For these reasons, Respondent asks that its Motion to Dismiss the charges be granted and that she be reinstated to her position with the District with full back pay and all other benefits and credit.

The notice of "charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1" against the Respondent charge her with inefficiency under Section 25 N.J.S.A. 18A:6-17 rather than under Section 8 N.J.S.A. 18A:6-16 which covers tenure charges other than those of inefficiency under the new provisions of TEACHNJ.<sup>7</sup> The District's efforts to proceed under Section 8 are limited by the charges themselves, which include N.J.S.A. 18A:6-17.3 and not N.J.S.A. 18A:6-16. The District cannot seek to amend its charge to include N.J.S.A. 18A:6-16 at this juncture. As there is no basis for proceeding under N.J.S.A. 18A:6-16, I do not address whether such a proceeding would be warranted based upon the record in this case.

#### Conclusions

For the reasons stated herein, I determined that Respondent's Motion to Dismiss the inefficiency charges is properly before me for decision. The Respondent's Motion to Dismiss the tenure inefficiency charges under N.J.S.A. 18A:6-17.3 is granted. Respondent has established that N.J.S.A. 18A:6-17.3 does not provide for consideration of her 2012-2013 year summative evaluations for purposes of tenure revocation. The timeline established by N.J.S.A. 18A:6-123(c), (d) and (e) specifically requires full implementation of the new evaluation rubric "[b]eginning with the 2013-2014 school year." The regulatory scheme that became effective in March of 2013, as well as guidance issued by the Department of Education supports the finding that the 2012-2013 school year summative evaluations using the evaluation rubric required by TEACHNJ may not be used for purposes of tenure revocation pursuant to N.J.S.A. 18A:6-17.3. The District's pleadings do not include a basis for considering the tenure inefficiency charges pursuant to N.J.S.A. 18A:6-16. Accordingly, I enter the following award.

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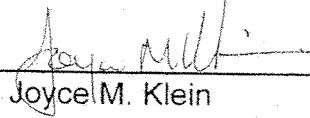
<sup>7</sup> In its sur-reply brief, the District asserts that it seeks to proceed to arbitration under N.J.S.A. 18A:6-10 which provides a tenure teacher "shall not be dismissed or reduced in compensation." N.J.S.A. 18A:6-10(b) provides a list of the reasons the grant of tenure may be revoked. Tenure charges, however, are filed pursuant to N.J.S.A. 18A:6-16 or 18A:6-17.c or both.



**AWARD**

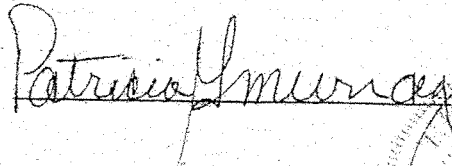
The tenure charges against Respondent Elena Brady are dismissed in accordance with N.J.S.A. 18A:6-17.3(c) and N.J.A.C. 6A:3-5.1(c). Respondent Elena Brady shall be reinstated to her teaching position with the State Operated School District of Newark with full back pay, benefits and seniority.

Dated: December 7, 2014  
Ocean Grove, New Jersey

  
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Joyce M. Klein

State of New Jersey        }  
County of Monmouth        } ss:

On this 7<sup>th</sup> day of December, 2014, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

  
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**PATRICIA G. MURRAY**  
**NOTARY PUBLIC OF NEW JERSEY**  
My Commission Expires 11/7/2018

