

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearings of:

LEON MASHORE, EDWARD BROWN,
GAY S. BROWN, BRIAN MEDLEY,
STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF CAMDEN

Agency Docket #303-10/14;
290-9/14; 300-10/14;
291-9/14

Walt De Treux, Esq., Arbitrator

Decision Date: 12/23/14

Appearances: For Respondents Mashore, E. Brown, G. Brown – Robert M. Schwartz, Esq.; Andrew W. Schwartz, Esq., *SCHWARTZ LAW GROUP LLC*;
For Respondent Medley – Wayne Oppito, Esq., *NJ PRINCIPALS AND SUPERVISORS ASSOCIATION*
For Petitioner School District – Louis R. Lessig, Esq.; Benjamin S. Teris, Esq.; Lauren E. Tedesco, Esq., *BROWN & CONNERY, LLP*

Introduction and Statement of Relevant Facts

On June 25, 2013, the State of New Jersey assumed operation of the Camden City School District pursuant to the State Intervention Statute, N.J.S.A. 18A:7A-45. As part of the takeover, the State District Superintendent directed an evaluation of each building principal and vice-principal during the 2013-14 school year. The State-appointed officials employed an evaluation instrument, approved by the New Jersey Commissioner of Education, that was intended to comply with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ") evaluation criteria, N.J.S.A. 18A:6-123, and its related regulations, N.J.A.C. 6A:10-1.1 et seq.

The principals and vice-principals were evaluated in four domains – instructional leadership, cultural leadership, organizational leadership; and effectiveness of teacher evaluation. In each area, the administrators were scored “ineffective,” “partially effective,” “effective,” or “highly effective.” The ratings earned a score of 1 (“ineffective”) to 4 (“highly effective”). The scores were averaged for a total score on the 1 to 4 scale with a corresponding rating.

During the 2013-14 school year, principals and vice-principals in the Camden City School District were evaluated three times. Respondents Mashore, E. Brown, G. Brown, and Medley received ratings of “ineffective” or “partially effective.” After the conclusion of the school year, the State District Superintendent brought tenure charges against Respondents, seeking their removal for inefficiency. The Commissioner of Education found that the charges, if proven, are sufficient to warrant dismissal and referred the case of each Respondent to an Arbitrator for a tenure hearing.¹

On November 7, 2014, prior to receipt of the Commissioner’s assignment of the Mashore case to Arbitrator Edmund Gerber, Counsel for Respondent Mashore filed a Motion To Dismiss, arguing that the tenure charges “were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5.” In short, Respondent

¹ The tenure case of Brian Medley was referred to Arbitrator Joseph Licata; the case of Edward Brown to Arbitrator James Mastriani; the case of Leon Mashore to Arbitrator Edmund Gerber, and the case of Gay Brown to Arbitrator Walt De Treux.

asserted that the District did not comply with the legal requirements of TEACHNJ regarding evaluations.

The Commissioner's referral of the Mashore case to Arbitrator Gerber overlapped Respondent Mashore's motion. Counsel for Respondents Medley, E. Brown, and G. Brown indicated their intention to file similar motions in each Respondent's case, leading to several discussions between Counsel for Respondents and Petitioner, the four assigned Arbitrators, and the Commissioner's office.

For purposes of judicial economy and efficiency and to achieve uniformity regarding the resolution of what would be identical motions in four separate cases, Respondents and Petitioner agreed to treat the Mashore Motion To Dismiss as a consolidated motion, applicable to each of the four tenure cases, to be decided by one Arbitrator. The parties executed a consent order encompassing that agreement and submitted it to the Arbitrators and the Department of Education's Division of Disputes and Controversies.

The parties submitted written briefs in support and opposition to the Motion To Dismiss. Oral argument was heard on the motion on December 2, 2014, and Respondents filed a reply brief and Petitioner a sur-reply brief soon thereafter. The Motion was then submitted to the Arbitrator for a decision.

Issue

Should Respondent's Motion to Dismiss the tenure charges be granted or denied?

Analysis and Decision

Procedural Objection

In its Brief In Opposition to Respondents' Motion To Dismiss, Petitioner raised several procedural objections. First, it argues that the motion is untimely in that the Mashore motion was not "filed with the time allotted for the filing of an Answer." (citing N.J.A.C. 6A:3-5.3(a)(1)) Second, it contends that a motion to dismiss cannot be filed after the Commissioner has referred the charges to an Arbitrator. Finally, it asserts that the American Arbitration Association Labor Arbitration Rules do not allow for submission and consideration of dispositive motions.

The four cases present a novel legal argument and complex procedural concerns in that each of the four cases had been referred to a different Arbitrator. As identical motions would have been filed in each case, there was the likelihood of four different outcomes, beginning with the question of whether each individual arbitrator would have entertained a Motion To Dismiss or would have addressed Respondents' legal argument only after a hearing on the merits. Depending on the Arbitrators' rulings on the motion or on the ultimate issue of whether the tenure charge should be sustained, the parties would have been faced with the decision to appeal each case individually or to consolidate the cases for appeal. The possibility

of different motion and hearing procedures and of different outcomes hardly presented a model of judicial economy and efficiency.

For that reason, the parties wisely agreed to consolidate the Motion To Dismiss before one Arbitrator. And for that reason, Petitioner's procedural objections to the Motion are misplaced. If the Motion To Dismiss is denied for procedural reasons, Respondents still have the opportunity to raise the substantive challenges asserted in the Motion at the tenure hearings before each Arbitrator. Respondents would argue to the Arbitrators that the tenure charges "were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5." The parties would once again be faced with the possibility of four separate outcomes related to a common issue in each of the four cases – the very result they were trying to avoid by consolidating the Motion before one Arbitrator.

For that reason alone, I find that the Consent Order waives any procedural argument to the Motion To Dismiss.

Moreover, the Petitioner's procedural objections are without merit. Respondent Mashore's Motion To Dismiss was, in effect, a motion for summary decision since he had already filed an Answer. N.J.S.A. 18A:6-16 provides that the Commissioner may decide a motion for summary decision prior to referral of the case to an Arbitrator. Respondent Mashore filed his Motion on November 7, 2014, three calendar days before receiving notice of the Commissioner's referral of the case to Arbitrator Gerber. The Motion and referral may have "crossed in the mail,"

but at least at the time Mashore filed the Motion, he had not been advised that his case had been referred to an Arbitrator. Accordingly, his motion was not untimely.

As Petitioner has agreed to consolidate the remaining three cases with the Mashore case for purposes of deciding identical motions that would have been filed in each case, it cannot now argue that the Motion is untimely in those three cases.

Finally, the AAA Labor Arbitration Rules may not specifically provide for dispositive motions; but it is within the Arbitrator's discretion to allow such motions. In the present tenure cases, the four Arbitrators acknowledged and, in effect, affirmed the parties' agreement to allow the Mashore Motion to Dismiss to be applicable to all four cases.

For these reasons, the Petitioner's procedural objections are without merit.

State Intervention Statute and TEACHNJ

The State Intervention Statute, N.J.S.A. 18A:7A-45, first effective January 1988, allows the state to essentially take over a school district that is not providing a "thorough and efficient" education for its students. The state-appointed officials are charged with making sweeping changes to reverse the failed course of the district. To that end, the State District Superintendent is authorized to remove administrators and supervisors after s/he has the opportunity to evaluate their effectiveness or lack thereof.

N.J.S.A. 18A:7A-45(b) requires principals and vice-principals to be evaluated a minimum of three times within the first 18 months after the state-operated school district has been established. N.J.S.A. 18A:7A-45(c) provides, in relevant part,

"Notwithstanding any other provision of law or contract, the State district superintendent, after the completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice-principal for inefficiency, incapacity, unbecoming conduct or other just cause as defined by the criteria for principal or vice-principal performance in districts under full State intervention established by subsection a. of this section...

Accordingly, principals and vice-principals in a state-operated school district can face tenure charges after a minimum of three evaluations in an assessment cycle of not less than 12 months. N.J.S.A. 18A:7A-45(a) requires that the evaluations be based on criteria adopted by the Commissioner of Education.

As Respondents note, neither the statute nor the current regulations provide defined criteria for the evaluation of principals and vice-principals in a state operated school district. In the present case, Timothy Matheney, Chief Intervention Officer for the New Jersey Department of Education, was tasked with approving an evaluation instrument and criteria for principals and vice-principals in the Camden City School District after it became subject to state intervention. The evaluation instrument developed under his supervision "was intended to comply" with the TEACHNJ evaluation criteria, i.e., the four cited domains – instructional leadership, cultural leadership, organizational leadership, and effectiveness of teacher evaluation – on a 1 to 4 scale from "ineffective" to "highly effective." The New Jersey Department of Education's Office of Evaluation approved the evaluation instrument and criteria.

Respondents seize upon the District's use of the TEACHNJ evaluation criteria to argue that evaluation of principals and vice-principals in a state-operated school district must be governed by TEACHNJ and its requirement for a two-year assessment cycle and a corrective action plan.

TEACHNJ, N.J.S.A. 18A:6-117, *et seq.*, effective August 2012, revised the process for removing ineffective teachers from the classroom. Under TEACHNJ, districts could file tenure charges against ineffective teachers after a two-year evaluation period and a corrective action plan. In the case of *I/M/O Tenure Charge of Inefficiency of Sandra Cheatham and the School District of the City of Newark*, Agency Dkt. #226-8/14, Arbitrator Bluth held that the TEACHNJ evaluation criteria set forth in N.J.A.C. 6A:10-2.1 applied to teachers in all districts, including state-operated school districts. Respondents contend that the TEACHNJ evaluation process must be extended to principals and vice-principals in state-operated school districts.

TEACHNJ does not specifically reference the State Intervention Statutes as it applies to the evaluation of principals and vice-principals in state-operated school districts. By its terms, it does not supersede the State Intervention Statute. Respondents nonetheless argue that TEACHNJ replaces the evaluation process outlined in the intervention statute for principals and vice-principals in state-operated school districts.

The State Intervention Statute requires three evaluations and an assessment cycle of not less than 12 months for principals and vice-principals in state-operated school districts, "notwithstanding any other provision of law or contract." The legislature chose not to specifically override that provision of N.J.S.A. 18A:7A-45 when it passed TEACHNJ. Accordingly, the State Intervention Statute and TEACHNJ have to be read in concert.

One of the goals of the State Intervention Statute was to allow the State District Superintendent to remove ineffective administrators and supervisors early in the process of rebuilding and revitalizing the failing district. Extending the assessment cycle for principals and vice-principals from “no less than 12 months” to 2 years would be a significant departure from the goal of the intervention statute. It is unlikely the legislature would enact such significant change without clearly stating so in the TEACHNJ statute.

Arbitrator Bluth found that the 2-year TEACHNJ evaluation period applied to teachers in state-operated school districts. The State Intervention Statute does not address the evaluation of teachers, so the Arbitrator’s ruling was not an affirmation that TEACHNJ supersedes the intervention statute. Further, TEACHNJ dramatically revised teacher evaluations in a way that the new criteria allowed for more effective removal of ineffective teachers. Applying the 2-year assessment cycle to principals and vice-principals in state-operated school districts would result in an arguably less effective removal process than currently permitted by the State Intervention Statute. Again, if the legislature so intended, it would be expected to specifically reference such a significant change in the evaluation process.

Absent specific language in TEACHNJ superseding N.J.S.A. 18A:7A-45, one must conclude that the legislature did not intend to change the evaluation process for principals and vice-principals in state-operated school districts.

Petitioner’s utilization of an evaluation instrument intended to comply with the TEACHNJ criteria to evaluate principals and vice-principals does not mandate that Petitioner adopt all aspects of the TEACHNJ evaluation process, such as the 2-

year assessment cycle. The intervention statute instructs that the Commissioner adopt the evaluation criteria. In the present cases, the Commissioner adopted the criteria from TEACHNJ. The adoption of criteria developed pursuant to another statute does not remove the evaluation of principals and vice-principals in state-operated school districts from the State Intervention Statute, particularly when the legislature has not expressly overridden the provisions of the intervention statute.

For these reasons, I find that Petitioner properly brought tenure charges against Respondents for inefficiency pursuant to the provisions of the State Intervention Statute as it relates to the number of evaluations and the length of the assessment cycle.

Corrective Action Plan and Alleged Non-Compliance with the 12-Month Assessment Cycle

Respondents also argue, either in their brief and/or reply brief, that Respondents were not trained in the evaluation rubrics as required by N.J.A.C. 6A:10-2.2 and were never given a correction action plan as required by N.J.A.C. 6A:10-2.5. Petitioner counters that Respondents had notice of the criteria by which they were to be evaluated as early as June 25, 2013 and were provided feedback and the opportunity to improve.

Additionally, at oral argument and in their reply brief, Respondents argue that Petitioner violated the requirement in N.J.S.A. 18A:7A-45 that tenure charges of inefficiency may only be filed after “not less that a 12 month assessment cycle.”

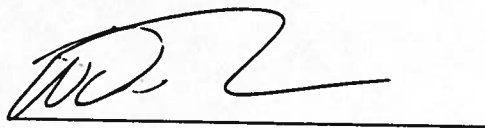
Respondents assert that Petitioner filed charges before the 12-month period had

lapsed. Petitioner first objects to Respondents raising this matter for the first time in their reply brief, and it counters the argument by asserting that it has complied with the 12-month assessment cycle requirement.

These issues – notice of the evaluation criteria, the imposition of a corrective action plan, if required, and/or the opportunity for feedback and improvement, and compliance with the timeline for filing tenure charges after an assessment period – raise genuine issues of material fact that can only be resolved through an arbitration hearing on the merits of the charges. As the parties dispute the facts giving rise to their arguments, the arguments cannot be disposed of through the present Motion To Dismiss.

Award

Respondents' Motion To Dismiss tenure charges is denied. The cases shall proceed to hearing before the assigned Arbitrators. Pursuant to the parties' Consent Order, the undersigned hereby withdraws from the Gay S. Brown case, and the Department shall appoint a new arbitrator to hear the matter.



WALT De TREUX

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DEPARTMENT OF EDUCATION**

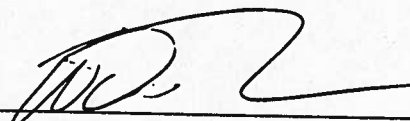
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Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.



WALT De TREUX