

STATE OF NEW JERSEY  
COMMISSIONER OF EDUCATION

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In the Matter of the Tenure Charges Against  
JODI THOMPSON  
and  
THE STATE-OPERATED SCHOOL DISTRICT OF THE  
CITY OF NEWARK

Agency Docket No.: 240-8/14

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INTERIM AWARD OF ARBITRATOR

Hearings were held in the above-entitled matter on  
October 27, November 14, November 17 and November 24, 2014  
at the New Jersey State Board of Mediation in Newark, New Jersey,  
before Daniel F. Brent, duly designated by the New Jersey Commissioner  
of Education as Impartial Arbitrator pursuant to N.J.S.A. 18A:6-17, the  
TEACHNJ statute. Both parties participated in these hearings, were  
represented by counsel, and were afforded full and equal opportunity to  
offer testimony under oath, to cross examine witnesses, and to present

evidence and arguments. The evidentiary record was declared closed on November 24, 2014, subject to the receipt of the stenographic transcript and the submission of post-hearing briefs by both parties.

By letter dated December 19, 2014, counsel for the School District of Newark requested that the instant matter be held in abeyance because the School District had filed a second set of tenure charges for inefficiency against the Respondent arising from the same set of facts and circumstances during the 2012-2013 and 2013-2014 school years, the difference being that the new charges were brought under Section 8 of the relevant statute N.J.S.A. 18A:6-17, rather than Section 25.

Counsel for Respondent Jodi Thompson opposed the School District's request to hold the instant matter in abeyance, and asserted that there was no statutory or equitable basis for suspending the proceedings after the close of the record. Stated simply and colloquially, Respondent argued that the District is not entitled to two bites of the apple, or in the alternative, to two entire apples from the same barrel.

The Arbitrator addresses the School District's request and Respondent's reply in the Interim Award set forth below.

### APPEARANCES

#### For the School District

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

#### For Respondent

Charles I. Auffant, Esq., of Stuart Ball, LLC

### NATURE OF THE CASE

The District's request to hold in abeyance the instant tenure charges brought against Respondent Jodi Thompson by the State-Operated School District of the City of Newark was precipitated by the issuance during the pendency of the proceedings in the instant case of six arbitration awards involving tenure charges brought by the School District against six other teachers. Each decision dismissed tenure charges for various reasons, including conclusions by the six arbitrators that the 2012-2013 school year had improperly been considered by the Newark School District as one of two consecutive years of inefficient ratings in light of evidence apparently submitted in the record of those cases that the arbitrators construed as restricting the use of the information and evaluations obtained during the 2012-2013 school year solely for the purpose of refining the applicable evaluation rubric and providing notice to teachers of the changed basis for evaluating

performance and efficiency under the newly enacted TEACHNJ statute. The rationales and holdings of these arbitration awards need not be set forth in detail herein.

In order to address the issues raised by these arbitration decisions, the Newark School District prepared a new set of charges against Respondent Jodi Thompson that were identical in content, but cited Section 8 as the basis for the charges, rather than Section 25 as in the first set of charges. The TEACHNJ statute provides the Respondent with an opportunity to respond to the Board of Education before the charges are referred to the Commissioner of Education for processing and referral to arbitration. The School District contended that suspending the proceedings and the issuance of the decision in the instant matter to afford Respondent an opportunity to respond to the new charges would protect the rights of Respondent. Respondent asserted that the reference to protecting Respondent's rights by suspending the proceedings in the instant case was a subterfuge, as the second set of charges materially increased Respondent's potential vulnerability to loss of employment and prolonged the period of uncertainty and loss of pay while the second matter was litigated.

### DISCUSSION AND ANALYSIS

The Arbitrator has fully reviewed the submissions of the parties regarding holding the matter in abeyance. The School District, as the moving party, bears the burden to demonstrate an applicable statutory provision or compelling equitable principle that would permit the School District to revise its pleadings after the conclusion of the hearings to add additional charges based on the same set of facts and circumstances. Although the parties retain the ability to resolve any dispute amicably after the record has been declared closed and before a decision has been issued, and although arbitrators may accede to a mutual request to postpone issuing a decision while the parties are attempting to settle a dispute, there is no cognizable basis for curtailing or suspending these proceedings simply because the School District seeks to bolster its position by amending charges after learning that other arbitrators have reached conclusions adverse to the District's position, either after the original insufficiency charges were filed or after the evidentiary record in the instant matter was closed.

Moreover, there is no substantial likelihood that any response to the new tenure charges by the Respondent will be accepted by the Newark School District as a persuasive basis for refraining from

certifying new tenure charges based on Respondent's performance, attendance record, and evaluations during the same two academic years that resulted in the filing of the tenure charges for inefficiency pursuant to Section 25 of the statute. With the wisdom of hindsight, the School District may prudently cite both Section 8 and Section 25 in the alternative when filing future tenure charges. Nevertheless, the Arbitrator is constrained by well-established principles of equity and the Labor Arbitration rules of the American Arbitration Association not to permit a charging party to add a new cause of action that was not included as part of the original tenure charge.

The District's request is not analogous to the latitude afforded a grieving party in an arbitration proceeding arising under a collective bargaining agreement when a grieving party cites the wrong contractual provision as having been violated in the original grievance or in its demand for arbitration. The omission of a particular contract section in filing a written grievance by employees or shop stewards does not customarily preclude disputing an employer's alleged violation of the collective bargaining agreement by acting without just cause. Consequently, arbitrators rarely, if ever, restrict the grieving party to arguing at arbitration only those contract sections cited by the employee or the union representative when filing the original grievance or moving the grievance to arbitration.

The new TEACHNJ law created a statutory framework with separate tenure charge provisions. While a party may argue that charges of inefficiency citing generally to the TEACHNJ statute do not preclude pursuing alternative theories of culpability, the different standards of proof established by Section 8 and Section 25 mandate that an employee be placed on notice at the outset that the employer will pursue tenure charges under both statutory provisions. Pleading two separate causes of action, each invoking different standards of proof, requires adequate prior notice. Such notice was not provided in the instant case.

Consequently, the District cannot materially increase the exposure of the Respondent to culpability and penalty by adding a cause of action during the hearing phase of a tenure charge proceeding, and certainly not after the record has been closed.


The purported benefit to the Respondent by holding the instant matter in abeyance so Respondent can reply to the School District's second set of tenure charges, which are based on identical facts and circumstances, is far outweighed by the potential detriment and lack of fundamental fairness that would arise if the District's request were granted. The sequential issuance of arbitration decisions from various arbitrators addressing insufficiency tenure charges brought under the TEACHNJ statute in which the 2012-2013 school year was a critical

issue does not justify ignoring a basic tenet of fundamental due process. Therefore, the District's request to hold the instant matter in abeyance is hereby denied.

The parties shall submit post-hearing briefs forthwith in accordance with the schedule established by the parties and the Arbitrator.

The Arbitrator hereby retains jurisdiction for the purposes of resolving any and all disputes regarding the tenure charges brought against Respondent Jodi Thompson by the State-Operated School District of the City of Newark.

January 16, 2015

  
Daniel F. Brent, Impartial Arbitrator



State of New Jersey  
County of Mercer

On this 16<sup>th</sup> day of January, 2015 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.

A handwritten signature in blue ink, appearing to be 'D. Brent', is written over a horizontal line.

An Attorney at Law of the  
State of New Jersey