

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 and 16-1/15

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AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated as Impartial Arbitrator by authority of the Commissioner of Education of the State of New Jersey in accordance with the TeachNJ statute, N.J.S.A. 18A:6-17, and having been duly sworn, and having duly heard the proofs and allegations of the parties, after applying the criteria set forth in the TeachNJ statute AWARDS as follows:

Based on the evidence submitted, the Tenure Charges filed against Respondent, Jodi Thompson, by the State Operated School District of the City of Newark cannot be sustained. Respondent's Motion to Dismiss these tenure charges is hereby granted.

All claims by Respondent alleging violation of the Family Medical Leave Act by the District or alleging that retribution for Respondent's use of FMLA leave in the 2013-14 school year was a factor in her annual evaluation have been thoroughly considered by the Arbitrator and are hereby rejected as unsubstantiated in the evidentiary record.

Respondent Thompson shall be returned forthwith to employment by the State Operated School District of the City of Newark, with uninterrupted medical benefits. The 120 days pay lost as a consequence of the filing of tenure charges shall be reimbursed to her, less any substitute interim earnings during this interval.

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, including the remedy herein ordered.

June 19, 2015

  
Daniel F. Brent, Impartial Arbitrator

State of New Jersey  
County of Mercer

On this 19th day of June, 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.



Notary Public

State of New Jersey  
**BETH PATCHEL**

**NOTARY PUBLIC OF NEW JERSEY**  
**My Commission Expires 4/21/2020**



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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 Teacher  
Effectiveness and Accountability for the Children of New Jersey (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 subsequent submission of post-hearing briefs by both parties. After the record had closed, but before post-hearing briefs were filed, counsel for the School District of Newark requested, by letter dated December 19, 2014, 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 N.J.S.A. 18A: 6-16, rather than Section 25, of N.J.S.A. 18A: 6-17.

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 addressing the initial tenure charges after the close of the record. The Arbitrator considered the School District's request and Respondent's reply opposing the request, and issued an Interim Award dated January 16, 2015, which denied the District's motion for suspending the first proceeding and held that the District cannot materially increase the exposure of the Respondent to culpability and penalty by adding a cause of action after the hearing phase of a tenure charge proceeding had ended and the evidentiary record has been closed.

The controversy concerning whether issues raised by the second set of charges could be considered in a second proceeding was deferred and consolidated for consideration in the context of addressing the original tenure charges.

The parties submitted post-hearing briefs, followed by a succession of written exchanges commenting on arbitrators' awards issued after the parties' briefs had been submitted in which various interpretations of the TeachNJ statute by other arbitrators were discussed. Both parties reiterated various aspects of their arguments in light of these subsequent decisions. The Arbitrator requested and received extensions of time to address these additional submissions, and now renders his Award and Opinion after considering the initial set of tenure charges, the second set of tenure charges to the extent discussed below, and the subsequent written communications submitted by counsel for both parties.

APPEARANCES

For the State-Operated School District of Newark

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

Janelle Edwards-Stewart, Esq., Office of General Counsel, SOSD

Yolanda Mendez, Principal of Roberto Clemente Elementary School

Sheila Laurenceau, Vice-Principal, Roberto Clemente Elementary School

For Respondent Jodi Thompson

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

William Tiersten, Esq., of Stuart Ball, LLC

Jodi Thompson, Respondent

ISSUE SUBMITTED

What shall be the disposition of the tenure charges filed against  
Respondent, Jodi Thompson, by the State Operated School District of the City  
of Newark?

### NATURE OF THE CASE

Respondent Jodi Thompson was employed as a teacher by the State-Operated School District of the City of Newark (hereafter, the District or the Board) at the Roberto Clemente Elementary School, where she was assigned to teach Pre-kindergarten classes until the 2013-14 school year, when she was initially assigned to teach a Kindergarten class. Respondent Thompson was observed teaching in her classroom by her Building Principal and by two Assistant Principals on multiple occasions during both the 2012-13 and 2013-14 school years. At the conclusion of the 2012-13 school year, Respondent was rated Partially Effective in her annual evaluation. This rating was primarily the result of the deduction of two points when computing a value for Competency 5, regarding "Commitment to Personal and Collective Excellence", one of the categories of the newly implemented rubric for evaluating teachers under the District's Teacher Practice Evaluation Instrument, which was approved by the New Jersey Department of Education in mid-October 2012.

The deduction of points was made because the Respondent had been absent fourteen times and tardy eighty-two times during this school year. In addition, Respondent arrived and punched in between 8:18 and 8:20 a.m. on sixty-five other days. The balance of the annual evaluation, which was conducted using a rubric that the District implemented in or about



October 2012, addressed Respondent's pedagogical techniques, teaching strengths and weaknesses, and classroom management skills in sections designated as Competencies 1 through 4. But for the negative impact of Respondent's attendance record for the year, she would not have received a Partially Effective summative rating for the 2012-13 school year.

As a result of the Partially Effective rating, the Principal prepared a Corrective Action Plan (CAP) designed to assist Respondent in improving her teaching techniques and to alert Respondent to the negative impact of her attendance and tardiness record on her annual evaluations. Respondent Thompson was invited to participate in the refinement of the CAP. The extent to which she was afforded this opportunity, and to which she engaged in collaborative interaction in order to improve the design of the CAP or to modify the expectations established under the CAP, was disputed during the arbitration hearings.

The version of Respondent's CAP to be implemented for the 2013-14 school year was not finalized until on or about October 14, 2013, which Respondent contends invalidated the CAP, as it was implemented after the September 15<sup>th</sup> deadline established under the TeachNJ statute. Respondent raised this defense, among others, in support of her position that the tenure charges filed against her should be dismissed. The District asserted that the implementation of the CAP was timely because the District had received written

authorization from a designee of the Commissioner of Education explicitly extending until October 15, 2013 the deadline for finalizing Corrective Action Plans for teachers who had been rated Partially Effective in the 2012-13 school year.

Among the other defenses interposed by Respondent were that the 2012-13 school year evaluation was precluded from consideration by operation of the provisions of the TeachNJ statute, which provided that school districts throughout the state had to complete their implementation of new evaluation rubrics no later than January 31, 2014. According to Respondent, this deadline and other factors considered by arbitrators adjudicating TeachNJ efficiency cases involving 2012-13 annual summative ratings supported her assertion that, whatever shortcomings in her teaching performance, including attendance and tardiness issues, occurred during the 2012-13 school year could not be used by the District as a basis for tenure charges seeking termination of Respondent's employment for inefficiency as a teacher under the TeachNJ statute.

Respondent also asserted that the evaluation process conducted during the 2013-14 school year, when both parties agree the rubrics tested by the District during 2011-12 and approved by the Commissioner of Education in October 2012 were fully operative, was procedurally defective, as a major

evaluation had been arbitrarily and capriciously implemented, and thus her annual summative rating could not form a proper basis for a tenure charge, as the defenses to tenure charges alleging inefficiency explicitly provided by the TeachNJ statute include arbitrary and capricious action by the District. Respondent asserted that the primary pre-announced classroom evaluation of her performance was inherently unfair and procedurally flawed because she was observed on her first day of student contact in her new assignment as a writing support specialist, while dealing with unfamiliar children in a blended classroom that included students with special education needs, although she was not licensed as a special education teacher, and at grade levels with which she was not experienced. Respondent characterized the scheduling of this evaluation on her first day of teaching after returning from an extended Family Medical Leave (FMLA) Act leave as an arbitrary and capricious action by the District establishing one of the limited defenses to tenure charges specifically established by the TeachNJ statute.

The District refuted these allegations, contending that annual evaluations of the Respondent as Partially Effective for both the 2012-13 and the 2013-14 school years could properly be considered to support tenure charges for inefficiency because Newark was among a small number of school districts for whom the Commissioner of Education had approved 2011-12 as a pilot year for the development of new evaluation rubrics under the TeachNJ statute. Moreover, according to the District, the Department of Education had

approved the District's evaluation instrument in time for implementation early in the 2012-13 school year, and the District had negotiated contract language with the Newark Teachers Union permitting implementation of an approved rubric for evaluating teacher performance beginning in the 2012-13 school year. The District cited various statutory provisions in support of its position.

The District asserted that Respondent was properly evaluated on multiple occasions, and was offered coaching and other assistance by a master teacher, but that she failed fully to utilize these resources, declined opportunities to observe other successful teachers in her building, and consistently failed to implement the differentiated, individualized teaching techniques that the District reasonably expected its teachers to incorporate into their lessons. The District defended its methods of evaluation and the rating of Respondent Thompson as Partially Efficient for two consecutive school years as proper actions under the TeachNJ statute. The District disputed that any procedural defect existed in the evaluation process, denied that the defect alleged by Respondent had materially affected the outcome of Respondent's evaluations, and moved for the tenure charges to be sustained.

The legal arguments offered by Respondent and by the District have been set forth in detail in their post-hearing submissions, and thus need not be reiterated at length herein.

RELEVANT STATUTORY LANGUAGE

TEACHNJ ACT

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

\* \* \*

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

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[23] 22. (New Section)

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

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

\* \* \*

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

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

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the

American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

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

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

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

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

\* \* \*

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

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

8A:6-123 Review, approval of evaluation rubrics.

17.

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

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure

to the next year's measure;

(3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

#### 18A:6-124 Regulations.

24. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), in accordance with an expeditious time frame, to set standards for the approval of evaluation rubrics for all teaching staff members, other than those included under the provisions of subsection b. of section 17 of P.L.2012, c.26 (C.18A:6-123). The standards at a minimum shall include: four defined annual rating categories: ineffective, partially effective, effective, and highly effective.

28. This act shall take effect in the 2012-2013 school year, except that section 17 of this act shall take effect immediately. The Department of Education shall take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of this act.

Approved August 6, 2012.

17. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L.2012, c.26 (C.18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

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

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

(3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;



(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

c. A board of education shall adopt a rubric approved by the commissioner by December 31, 2012.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

f. The commissioner shall establish a model evaluation rubric that may be utilized by a school district to assess the effectiveness of its teaching staff members.

### OPINION AND ANALYSIS

Many of the arbitrators who have been designated under the TeachNJ statute to decide tenure charges of teaching inefficiency brought against teachers employed by the State Operated School District of the City of Newark during the 2012-13 school year have rendered opinions stating that evaluations conducted during this year cannot form a valid basis for inefficiency charges under the TeachNJ statute. Tenure charges for misconduct during the 2012-13 school year that were brought under Section 8 of N.J.S.A. 18A:6-16, and thus were not dependent on assessment of the pedagogical techniques and classroom performance, have been properly distinguished as suitable for supporting tenure charges because, unlike teachers facing tenure charges for inefficiency under Section 25 of N.J.S.A. 18A: 6-17, the misconduct charges brought under Section 8 of the TeachNJ statute were not dependent upon application of an approved performance evaluation framework, also known as a rubric. Teach NJ requires that: "Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district."

According to the Respondents in the tenure cases decided by several of my colleagues, no inefficiency tenure charge could properly be brought before the deadline established under TeachNJ mandating that all New Jersey public

school districts develop rubrics satisfying TeachNJ statutory teacher evaluation criteria had passed. Based on this premise, the Newark School District's use in 2012-13 of rubrics developed by the District in 2011-12 was deemed premature, and thus invalid, notwithstanding the designation of the Newark School District by the Commissioner of Education, among as many as eleven of the 604 public school districts in New Jersey, as a pilot district for TeachNJ during the 2011-12 school year. School districts, other than these specially designated pilot districts, could not implement approved rubrics to determine whether a teacher was performing with high efficiency, efficiency, partial efficiency, or inefficiency until the 2013-14 school year. At issue in the instant case is whether a similar restriction governing the use of 2012-13 teacher evaluations performed under the District's Teacher Practice Evaluation Instrument, approved by the New Jersey Department of Education in mid-October 2012, must be applied to the Newark District in the instant case.

Nothing in the provisions of the TeachNJ statute explicitly created a two-year, much less a four-year, hiatus during which ineffective teachers would be immune from evaluations of their performance resulting in discipline or discharge. Nor has any arbitrator on the Tenure Panel held, to my knowledge, that gross misconduct during 2012-13 must be ignored or condoned because school districts were impotent to react to misconduct or conduct unbecoming under both the old tenure law and the new TeachNJ law when it became effective. This arbitrator, and many others, have resolved tenure cases alleging

conduct unbecoming a teacher, principal, or other school employee that arose before and during the 2012-13 school year. These cases were governed by the procedures and criteria set forth in Section 8 of N.J.S.A. 18A:6-16.

Similarly, nothing in the new TeachNJ statute precludes a school district that had been designated a pilot district in 2011-12 and successfully implemented a rubric approved by the Commissioner in 2012-13 from evaluating its teachers under the approved teaching performance assessment criteria. That the statute imposed a specific deadline by which every district in the state was to have implemented these new rubrics in accordance with the standards of TeachNJ neither precludes valid assessment of teachers for 2012-13 by other districts using the standards previously approved by the Commissioner nor invalidates utilization of the newly approved rubrics by Newark to evaluate its teachers in 2012-13 after the Department of Education had approved the District's Teacher Practice Evaluation Instrument. Therefore, also at issue in the instant case is whether annual evaluations under the newly approved rubric can form a valid basis supporting tenure charges for inefficiency in teaching performance during 2012-13.

The evidentiary record involving Respondent Jodi Thompson established persuasively by a preponderance of the evidence that she was accurately evaluated in 2012-13 regarding her classroom performance and teaching acumen. This evaluation found that her teaching was worthy of being rated as

Efficient. However, after her egregious attendance and tardiness record was included when computing Competency Five, which addresses the factor of “Commitment to Personal and Collective Excellence”, a two-point deduction for poor attendance reduced Respondent’s annual rating for 2012-13 to Partially Effective. Given her fourteen days of absence, her tardiness on eighty-two days, and her last minute arrival a minute of two before she was scheduled to begin working with her students on sixty-five more school days when she was not actually tardy, Respondent’s attendance and tardiness record in 2012-13 was reasonably construed by the District as negatively affecting Respondent’s entire job performance as a teacher to the extent that her annual rating was reasonably reduced to Partially Efficient by the deduction of two points.

Whether or not the 2012-13 summative annual rating could be counted for sustaining teacher efficiency tenure charges in the instant case, the District exercised reasonable management discretion and authority by deeming Respondent “Partially Effective” (or the equivalent term for the third of four possible levels of performance under the pre-existing evaluation scheme) for the 2012-13 school year based solely on her attendance, tardiness, and near-tardiness record, the extent of which was undisputed. Regardless of whether two points could be deducted from the TeachNJ rubric under Competency Five, dropping Respondent from the Effective category to the Partially Effective category; whether she was evaluated under the pre-existing rubric; or whether her performance was assessed by applying well-recognized labor relations

principles using neither of these rubrics, Respondent's 2012-13 school year justified an annual performance rating of "Partially Effective" or the equivalent term then in effect, and exposed her to appropriate discipline. Nevertheless, the District elected not to impose discipline immediately under Section 8 for Respondent's poor attendance at the end of the 2012-13 school year.

Nothing in the evidentiary record before me, or in the published opinions of my colleagues, convinced me that the TeachNJ statute established a safe harbor that unequivocally and completely insulated teachers from the adverse consequences of their actions for a minimum of two, to as many as three, years before tenure charges based on inefficiency could be brought. However, the well-reasoned opinion of Arbitrator Robert Simmelkjer in The Matter of Ursula Whitehurst, issued on January 5, 2015, in which he thoroughly and persuasively analyzed the relevant factors that govern the disposition of many of the parties' arguments in the instant case, persuasively mandates a conclusion that neither the approval of the District's Teacher Practice Evaluation Instrument by the New Jersey Department of Education by a memo issued in mid-October 2015, nor the acquiescence of the Newark Teachers Union to a provision in its collective bargaining agreement with the District, justified using an annual evaluation for 2012-13 as the basis for inefficiency tenure charges brought pursuant to Section 25 of N.J.S.A. 18A: 6-17.

Whether or not unreliable and untimely attendance at work to the extent demonstrated by Respondent during the 2012-13 school year constituted misconduct or conduct unbecoming a teacher that was sufficient, per se, to justify termination of tenure, there is no valid basis in the evidentiary record to find that Respondent was insulated from an annual evaluation that incorporated her egregious attendance and tardiness or near-tardy record as a significant factor. Thus, Respondent's attendance and tardiness record could properly be included as a factor in assessing her performance. However, Arbitrator Simmelkjer's detailed analysis and conclusions of law are sufficiently persuasive to support Respondent's assertion in the instant case that her annual summative rating for 2012-13 cannot be used as a valid basis for tenure charges based on insufficiency applying only the standards of Section 25 of N.J.S.A.18A:6-17.

This conclusion necessitates a discussion regarding the second set of tenure charges that the District issued following the publication of arbitration decisions by several of my colleagues that invalidated tenure charges based on annual summative assessments for 2012-13 made by Newark administrators applying the "new" rubric in insufficiency cases. While prudent lawyering may explain the District's decision to file an additional set of tenure charges alleging identical facts and conduct under a different section of the statute, Section 8 of N.J.S.A. 18A:16-6, the District's filing of these charges after the record addressing the first set of charges had closed imposed an inherently unfair

burden both on Respondent and on the attorneys who represent her.

Permitting duplicative filing of tenure charges alleging identical facts to be submitted in a separate action under a different statutory provision that imposes different standards for establishing conduct sufficient to terminate tenure would unduly encumber the tenure adjudication process established by TeachNJ, which process the Legislature required to proceed expeditiously by creating short time limits within which the arbitration process must be completed.

Moreover, the second tenure charges did not amend the first charges by the introduction of new facts. Nor was the second theory raised in a timely manner. The second set of tenure charges simply alleged a second cause of action under a different statutory standard in order to prove that Respondent's teaching was legally unacceptable to the extent that her tenure should be rescinded. Respondent's alleged misconduct, other than her pedagogical shortcomings, that could have formed a basis for imposing discipline under Section 8 during 2012-13, such as her attendance or an incident involving a verbal altercation with a Vice-Principal in front of her students, was addressed by the District in the calculations of professionalism under Competency Five of the rubric. Thus, the District's decision not to file Section 8 tenure charges at the end of the 2012-13 school year supports Respondent's assertion that neither her 2012-13 attendance record, her interaction with parents, the quality of her driving near the school, nor the incident involving a verbal



altercation with a Vice-Principal in front of her students established a second, independent cause of action justifying terminating her employment that could be raised after the record addressing the first set of charges had been closed.

There is no valid basis in the statute to afford the District two separate, sequential opportunities to litigate identical charges arising from the same set of facts by citing two different sections of the statute in two sets of tenure hearings. Nor is there any compelling basis under the rules of the American Arbitration Association governing TeachNJ cases, or mandated under sound arbitration or legal practice, to permit a duplicate filing of amended tenure charges based on the same set of facts after the record in the first case has been closed. Therefore, the second set of tenure charges filed by the District against Respondent Thompson must be dismissed as procedurally invalid and untimely.

According to the testimony and the documents comprising the evidentiary record of the instant case, Respondent Thompson's attendance record would have justified a rating of "Partially Effective" or its equivalent rating in for 2012-13 school year whether the District had used the prior evaluation standards, the disputed current rubric, or considered Respondent's attendance and tardiness record as an independent factor. Although the District reasonably concluded that Respondent's 2012-13 attendance and tardiness record was a material impediment to an efficient teaching

performance during the 2012-13 school year, the District misapplied a rubric that had not yet unequivocally been approved by the Commissioner for use by the District during the 2012-13 school year as a basis for filing tenure charges based on inefficiency under Section 25 of N.J.S.A. 18A:6-17. In light of such a material defect by erroneously applying the standards of the TeachNJ statute for the 2012-13 school year, the District's rating of Respondent as "Partially Effective" for 2012-13 must be deemed invalid regardless of the methodology used to evaluate her classroom techniques and performance and notwithstanding her egregious tardiness and attendance record.

A similar conclusion must be reached for the 2013-14 school year, but for a different reason because the District's summative evaluation of Respondent's performance, while achieved using an approved rubric the validity of which was undisputed, contained at least one serious material procedural flaw that satisfied an explicit statutory criterion of a valid defense. By electing formally to evaluate Respondent's teaching on the first day of student contact in her new assignment as a writing support specialist, thus observing her work with a class that was unfamiliar with her and that included a substantial cadre of special education students, the District created a procedural defect that satisfied the "arbitrary and capricious" standard of defenses specified in the TeachNJ statute.

No valid excuse for scheduling a major evaluation under such adverse circumstances has been offered in the evidentiary record. Time limits for completing annual evaluations that were alleged as justification for asking a teacher to prove her competence in a different subject area with students who were strangers to her on the first day she entered their classroom was far outweighed by the detriment to Respondent and the material negative impact on her annual summative evaluation for the 2013-14 school year by the arbitrary and capricious timing of this observation.

Much testimony was devoted to the timeliness of the Corrective Action Plan implemented for Respondent during the 2013-14 school year; the degree to which Respondent cooperated in developing the CAP; and the applicability of a Corrective Action Plan developed while Respondent was a Pre-kindergarten teacher for use after she was assigned to teach Kindergarten commencing in September 2013. None of these factors, however, invalidated the District's annual rating for 2013-14. The District has established persuasively by a preponderance of the evidence that:

(1) The District satisfied the requirement that the CAP arising from Respondent's performance rating for the 2012-13 school year be finalized by October 15, 2013, the extended date established by a designee of the Commissioner of Education, with at least apparent authority, upon which the District reasonably relied;

(2) Respondent Thompson was offered ample opportunity to participate in the development and refinement of her CAP;

(3) Respondent Thompson was afforded substantial access to coaching and other assistance by a Master Teacher during 2013-14;

4) The pedagogical deficits identified by the CAP were equally valid, if not more so, in the context of teaching Kindergarten students than Pre-K students, and thus Respondent suffered no material detriment from any failure substantially to review and edit her CAP after Respondent's initial teaching assignment was changed from Pre-kindergarten to Kindergarten for the 2013-14 school year;

(5) There was no adverse consequence to Respondent Thompson because of her valid use of FMLA leave from January through April 2014, and any allegation of retaliation against Respondent for using FMLA was unsubstantiated in the evidentiary record;

(6) The Building Principal's decision not to return Respondent to her original Kindergarten class after Respondent returned from extended FMLA leave in April 2014 was based on valid educational considerations, including the successful performance of the long-term substitute teacher who had replaced Respondent during her protracted FMLA leave and the likely adverse consequences for the students from disrupting their bond with a teacher for a second time during the same school year; and

(7) Respondent Thompson did not significantly improve her performance between September 2013 and January 2014, despite being given a Corrective Action Plan.

Notwithstanding these conclusions, the District's evaluation of Respondent's performance for the year was fatally tainted by an arbitrary and capricious action that materially impaired Respondent's right to be judged and rated on the basis of valid observations and evaluations as required under the TeachNJ statute.

The District has credibly described deficiencies in Respondent's performance observed during that evaluation visit, but the arbitrary and capricious timing and circumstances of this evaluation session was unjustified by sound educational policy, prohibited by applicable statute, and undermined the validity of the District's summative evaluation of Respondent Jodi Thompson for the 2013-14 school year, resulting in the tenure charge for inefficiency.

Respondent Thompson's testimony convincingly articulated that she was well-meaning in her efforts to foster a learning environment in her classroom that incorporated multiple creative pedagogical techniques to reach students in her classes, many of whom were often below grade level in their reading skills and were dealing with other emotional and physical circumstances. These factors posed greater challenges to a teacher, such as Respondent, who was

evaluated during more than one informal observation as needing coaching and assistance and unequivocally advised that she must expend substantial and consistent effort to achieve an efficient level of teaching performance, whether as a Kindergarten teacher or as a writing support specialist.

The Arbitrator does not, and should not, substitute his judgment for the substantive professional evaluations of Respondent's teaching performance, lesson preparation, and classroom management by two Assistant Principals and a Building Principal at Roberto Clemente Elementary School, who competently discerned on several occasions professional weaknesses in Respondent's teaching organization, pedagogical, and classroom management skills that must be addressed immediately if she is to succeed as a teacher in the future. However, the glaring procedural error in evaluating Respondent on her first day teaching a new subject to classes of students with whom she had no prior opportunity to develop a relationship or to set the standards for her classroom cannot be ignored when applying the standards and defenses clearly articulated in the TeachNJ statute. Because the District's annual evaluation of Respondent Jodi Thompson for the 2013-14 school year was improper under the statutory criteria, the District's rating of Respondent Thompson's teaching performance for the 2013-14 school year as Partially Effective cannot be sustained.

The evidentiary record as a whole supported the District's assertion that Respondent was deficient in the areas of professional development described by District administrators. To protect her employment going forward, Respondent must significantly improve her classroom management skills and develop more focused, multi-level lesson plans appropriate for the mix of students in whatever teaching role she may be assigned in the future. Respondent would be well advised to ask for, assiduously pursue, and willingly accept whatever coaching or other assistance District professionals can provide so that she can be successful as a classroom teacher for the Newark School District. If she continues to teach with the same lack of sophistication in her lessons, and the rudimentary level of classroom management and organizational skills described by the District's witnesses, Respondent may find herself vulnerable to tenure charges in the future.

Despite her daunting family situation, Respondent Thompson must also expend whatever energy and organization is necessary to arrive at school in a timely and reliable manner sufficiently before classes begin to be ready to perform her professional duties. Failure to take such steps to improve her out of classroom performance may also jeopardize her continuing employment.

Having considered thoroughly the written evidentiary record, sworn testimony, and legal arguments submitted in the instant case, I am compelled to find by at least a preponderance of the evidence that the Tenure Charges

filed against Respondent Jodi Thompson by the State Operated School District of the City of Newark cannot be sustained. Respondent's Motion to Dismiss these tenure charges is hereby granted.

All claims by Respondent Thompson alleging violation of the Family Medical Leave Act by the District or alleging that retribution for Respondent's use of FMLA leave in the 2013-14 school year was a factor in her annual evaluation have been considered by the Arbitrator and are hereby rejected as unsubstantiated in the evidentiary record.

Respondent Thompson shall be returned forthwith to employment by the State Operated School District of the City of Newark, with uninterrupted medical benefits. The 120 days pay lost as a consequence of the filing of tenure charges shall be reimbursed to her, less any substitute interim earnings during this interval.

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, including the remedy herein ordered.

June 19, 2015

Daniel F. Brent, Impartial Arbitrator