

**STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION**

IN THE MATTER OF THE TENURE)	
CHARGES OF)	
)	Arbitrator's
DARNAY DODSON)	Decision and Award
)	
-AND-)	
)	Agency Docket No. 278-9/15
STATE-OPERATED SCHOOL DISTRICT)	
OF THE CITY OF NEWARK)	

**Peter Adomeit, Esq.
Arbitrator**

For The State Operated School District of the City of Newark

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Date of Arbitrator's Decision, Award and Order: July 22, 2016

Summary of Award

Mr. Dodson received two back to back evaluations in 2013-2014 ("Partially Effective" and 2014-2015 ("Ineffective") which under the TEACHNJ Act, required the District to initiate tenure charges. There were three evidentiary arbitration hearings where both sides called witnesses and presented exhibits in the many hundreds of pages. The briefs and reply briefs totaled 143 pages.¹

The arbitrator has studied and analyzed all of this incredibly detailed and highly technical material of extraordinary complexity and the statues and authorities cited by the parties, and the requirements and limitation the law places on an arbitrator in an effective case, and applying the legal standards to the facts of this case, issues this opinion and award.

The arbitrator finds there were no mistakes of fact; that the evaluations were not motivated by any of the illegal motive specified in TEACHNJ; that the districts actions were not arbitrary or capricious. The arbitrator finds that the calculations used to compute student progress is both 2014 and 2015 in the language of TEACHNJ "failed to adhere substantially to the evaluation process."

Having so found, I am by the statute required to *determine if that fact materially affected the outcome of the evaluation*. I find that it did not. If student performance were

¹ The arbitrator acknowledges the superb advocacy by both sides and their ability to make clear their view of the facts and contentions. Attorney Sarah Wieselthier assisted on the briefs for the District. Andrea L. Madden, J.D. assisted on the briefs for Mr. Dodson.

entirely removed from his evaluations, his other failures would by themselves require the evaluations given him. Even if his student performance were calculated properly and were acceptable, his other deficiencies in the 2013-2014 evaluations would not have increased his 2013-2014 evaluations from "partially effective " to "effective"; and that his 2014-2015 evaluations would not have increased from "ineffective" all the way past "partially effective" to "effective." Achieving those scores was a practical impossibility in 2013-2014 and a mathematical impossibility in 2014-2015, even if his student's showed sufficient progress, because his other competency scores were too low. Even if his students were measured as having sufficient progress, which they were not because they could not be so measured by the tools then in existence, the outcome would have been the same.

Because they would not have made a difference in his overall evaluation rating, they are not "material" under TEACHNJ. It is not enough for the teacher to show the standards were not substantially followed. The teacher must also show that any deviation was "material." A "material" deviation is one that would more likely than not make a difference in the evaluations. I conclude they would not.

In different case with a teacher whose other evaluations compared with Mr. Dodson's were better, contained components that were better, the defect in measuring student progress may well be "material." It will turn of the facts of each case.

I find Mr. Dodson's other contentions either unsupported by credible evidence or not persuasive.

Having so found, TEACHNJ Act requires that I render a decision in favor of the board. I so find.

Limitations on Arbitrator

Under The TEACHNJ ACT 18A:6-17.2. , the arbitrator must follow these "*Considerations for arbitrator in rendering decision.*"

23. a. [In an inefficiency case] *in rendering a decision the arbitrator shall only consider whether or not:*

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

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

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

(4) the district's actions were arbitrary and capricious.

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

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

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

Notice of Inefficiency Tenure Charges

The Charges, dated August 25 and filed September 19, 2015, state as follows:

1. During the period from September 2013 to the present~ Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher in an effective manner.
2. During the 2013-2014 school year, Respondent was assigned as a math teacher at Maple Avenue School.
3. Respondent's annual summative evaluation rating for the 2013-2014 school year was "partially effective."
4. As a result of Respondent's annual summative evaluation rating of "partially effective" Respondent was placed on a corrective action plan ("CAP") for the 2014-2015 school year.
5. During the 2014-2015 school year, Respondent was assigned as a math teacher at the Dr. William H. Horton Elementary School.
6. Despite feedback, suggestions, and assistance, Respondent continued to demonstrate inefficiencies as a teacher.
7. Respondent's annual summative evaluation rating for the 2014-2015 school year was "ineffective."
8. Respondent was rated ""partially effective" and "ineffective" in two consecutive summative annual evaluations.
9. Respondent has failed to prove his effectiveness as a teacher during the 2013-2014 and 2014-2015 school years.
10. Respondent has failed to demonstrate a knowledge of lesson design and focus.
11. Respondent has failed to demonstrate a knowledge of lesson sequence.
12. Respondent has failed to organize lesson components and deliver lessons to move students towards mastery.
13. Respondent has failed to demonstrate a knowledge of pacing and momentum.
14. Respondent has failed to demonstrate an ability to communicate content and instructions in a clear way.
15. Respondent has failed to demonstrate a knowledge of coherent planning.
16. Respondent has failed to demonstrate a knowledge of progression of instruction.
17. Respondent has failed to demonstrate lessons incorporating rigor and inclusiveness.

18. Respondent has failed to demonstrate tailored instruction.
19. Respondent has failed to demonstrate effective practices of asking questions and assigning tasks.
20. Respondent has failed to demonstrate responsiveness to student misunderstanding classroom (sic).
21. Respondent has failed to demonstrate that he demands precision and well-structured arguments from his students.
22. Respondent has failed to demonstrate that his students revised work based upon teacher and student feedback.
23. Respondent has failed to demonstrate a depth of knowledge.
24. Respondent has failed to achieve a culture of achievement where his students demonstrate an enthusiasm for learning.
25. Respondent has failed to achieve a culture of achievement where his students persist in confronting demanding concepts.
26. Respondent has failed to persist in seeking approaches for students who have difficulty learning.
27. Respondent has failed to achieve a culture of learning where students use positive productive language and promote classroom values and norms.
28. Respondent has failed to ensure that his students were paying attention and focused on lessons.
29. Respondent has failed to set high learning expectations for his students.
30. Respondent has failed to achieve a culture of learning where there is peer accountability.
31. Respondent has failed to set high learning expectations for his students.
32. Respondent has failed to demonstrate that students understand the lesson and instruction.
33. Respondent has failed to provide students with appropriate feedback.
34. Respondent has failed to demonstrate that his students mastered lesson objectives.
35. Respondent has failed to demonstrate that he effectively used data.
36. Respondent failed to demonstrate that he had an effective understanding of student growth.
37. Respondent failed to demonstrate that his students progressed towards goals.
38. Respondent failed to demonstrate commitment to continuous improvement.
39. Respondent failed to effectively collaborate or contribute during meetings with colleagues.
40. Respondent failed to effectively communicate students~ progress to students, parents, and school leaders.
41. Respondent failed to demonstrate effective attendance and promptness.
42. Despite feedback, suggestions, and assistance. Respondent continued to demonstrate inefficiencies as a teacher.

Decision

Mr. Dodson was employed as a teacher with the district for approximately 15 years,² serving first at Avon School teaching elementary classes and with a change in certification, middle school math. Structural changes in the school building would have interfered his continued coaching, so he transferred Maple Avenue in 2010-11, teaching in successive years math, science (which was new to him) and returning to math in 2013-2014, the first year on which the tenure charges are based. Maple Avenue administrators identified him as needing a correction plan in 2012-2013, so at the start of 2013-2014, he met with Hillary Dow, his new supervisor, to develop a Corrective Action Plan ("CAP"). He finished the 2013-2014 school year with a summative evaluation of "partially effective" and because Maple Avenue closed down, the district assigned him to teach eight-grade math at William H. Horton Elementary School for 2014-2015, a struggling school, with many students below proficiency.

There is no credible evidence that the administrators in these three schools, all of whom found him deficient as a teacher, were motivated by any consideration other than trying to improve his ability to teach. There is no credible evidence that the charge of inefficiency was brought against him for any of the improper motives in the statute: "political affiliation, nepotism, union activity, discrimination as prohibited by State or

² Before starting his career as a certified teacher, he worked in the District for approximately 5 years, for a total service of 20 years.

federal law, or other conduct prohibited by State or federal law."

His claim that his relationship with Ms. Mignone, his supervisor at the third school, was strained by her not collaborating with the development of a CAP, by his calling his Union representative when she failed to respond to his questioning of his evaluation, or when she sent him a change in his evaluation impersonally by using Bloomboard, and other frictions, and other actions which he considers slights, does not rise to an illegal motive, nor is there any evidence of any improper motive by any of the other evaluators and observers. If he had succeeded in following the advice of his evaluators, his evaluations would not have required a referral for termination proceedings. His CAP was not in retaliation for his calling his Union because he could not get his supervisor's attention. His CAP arose out his performance at the school from which he came prior to 2014-2015. The evaluation process can be frustrating and it is not infrequent that the relationship between the teacher and the administration can be strained, but that does mean that the evaluation was in retaliation for the friction. Mr. Dodson was observed by a number of administrators besides Ms. Mignone, and he makes no credible claim that they all were improperly motivated.

Although he testified he began the 2013-2014 year without a textbook or teacher's edition, he was provided with written teaching materials, and the assistance of the school's math coach. So while the materials were not in textbook form, he went on the internet, developed lesson plans, which he says quickly became satisfactory, and taught his classes. In his first observation, he received an evaluation of "effective." In view of

this evaluation and his own testimony that he went on the internet and developed lesson plans that he said quickly became satisfactory, his assertion that he was disadvantaged by the lack of physical textbooks and teacher's edition harmed his evaluations is not persuasive.

TEACHNJ requires the District to establish a School Improvement Panel ("SIP") N.J.S.A. 18A:6-120. The purpose of an SIP is to ensure the effectiveness of teachers by overseeing the mentoring of teachers and "identify[ing] professional development opportunities tailored to meet the unique needs of the staff". N.J.S.A. 18A:6-120(b); N.J.S.A.18A:6-128. However, at Maple Avenue School in 2013 - 2014, the named panel never met. Mr. Dodson contends that this is a gross violation of the applicable law clearly and deprived Mr. Dodson of an opportunity to improve and grow as a teacher.

The argument is not persuasive. I have examined the statutory provisions³ on the School Improvement Panel and conclude, in agreement with the District, that they are an administrative device to advise on the process of evaluating teacher performing smoothly and adhering to the rules and timelines. Contrary to Dodson's unsubstantiated assertions, the SIP was not required to meet with individual teachers, nor would it be appropriate for the SIP to do so. There is nothing in the Framework for either the 2013-2014 or 2014-2015 school year that provides for the SIP to meet directly with certain teachers or provide professional development directly, as a panel, to individual teachers. Rather, the

³ TEACHNJ 6A:10-3.1 School Improvement Panel membership 6A:10-3.2 School Improvement Panel responsibilities

SIP meets as a panel to oversee the mentoring and evaluations of teachers and provides advice as to school-based implementation of teacher evaluation and development.

There is no credible evidence of any causation between the lack of an advisory panel and Mr. Dodson's 2013-2014 evaluation of "partially ineffective." Nor is there any evidence of any supports the SIP could find which the administrators could not. In the absence of any established causal link between the absence of the SIP, even if they were determined to be part of the "evaluation process" rather than the administrative unit monitoring the process, I find that their absence in 2013-2014 did not "materially affect the outcome of the evaluation, including but not limited to providing a corrective action plan."

Mr. Dodson contends that for the second year, 2014-2015, his assigned school had a School Improvement Panel, but they never met with him, and therefore failed to adhere to the evaluation process. The argument is not persuasive. As just discussed, the District presented credible evidence that the School Improvement Panels meet amongst themselves to discuss teachers, and exchange information, but they do not meet with the individual CAP teachers.

Mr. Dodson's 2013-2014 CAP was required by TEACHNJ and AchieveNJ (N.J.S.A.18A:6-117 et seq.) and N.J.A.C. 6A-10) to contain a measurement of student achievement and to make it part of the teacher's evaluation. In other words, how much have the student advanced during the time in question. That requires a measurement of their skills before they entered Mr. Dodson's class and a second measurement at the end.

Mr. Dodson's 2013-2014 CAP listed four end points.⁴

None of them were usable. The District so acknowledged in their brief. "The District does not dispute that it did not provide a specific student achievement score separate from a teacher practice score as part of Dodson's annual evaluations for either the 2013-2014 and 2014-2015 school years. However, the District was not required to do so because the New Jersey Department of Education ("Department of Education") approved its alternative method of incorporating student achievement into the annual evaluation."⁵ The parties disagree over whether the written documents showing the Department of Education approved the District's method of computation were admissible. This issue of whether the final evaluations complied with the statute is discussed later in this decision.

The 2013-2014 observations reveal serious deficiencies in Mr. Dodson's teaching. Ms. Dow's Long observation in October, 2013 showed as follows: 1) For competency 1 [lesson design and focus], he needed a) to design lesson components which move students towards mastery; b) to design questions that lead students to the application and analysis in the strategy in the absence of the scaffold; c) to redirect off-task behavior to preserve lesson time; d) provide unique feedback for each student to allow for independent corrections. For competency 2 ["rigor and inclusiveness"] he used questions that allowed students to show they understood the SOLVE strategy, but needed to ask

⁴ Mathematics tasks that will conclude at the end of Units of Grade 7 curricula; Mathematics assessments developed by ANET; Mathematics NJASK; and Mathematics Post Unit Assessment.

⁵ Page 3, District Brief.

questions leading to the application of the strategy and an understanding as to why the strategy was used rather than the SOLVE scaffold. For competency 3 [culture of achievement], he allowed a few off-task students to be talking and not focusing on the problem; he provided feedback to the entire class as a group where he should have given feedback tailored to the individual student so they could correct their mistakes.

Ms. Dow entered the scores as competency 1 [lesson design and focus]: "effective" ; competency 2 ["rigor and inclusiveness"]: "partially effective"; competency 3 ["culture of achievement"]: "effective" ; and competency 4 ["student progress toward mastery"]: "partially effective." The total is 10, falling in the "partially effective" range. "Partially effective" is 6-10 points. "Effective" is 11-14 points. When she first filled out the numbers, she added the numbers wrong and selected the overall rating was "effective" whereas in fact the numbers only added up to 10, which is "partially effective." Javier Nazario, a Special Assistant for Teach Quality noticed the error, asked Ms. Dow to correct it. Ms. Dow had a meeting with Mr. Dodson and told him that the overall score was added wrong and changed, but the individual scores were not changed. He re-signed the summary observation form and initialed the correct number.

Mr. Dodson's position that he was only told it was a "glitch in the system" and that the change constituted an error in the evaluation under the statutory list of reasons to set aside an evaluation is not persuasive, in light of the evidence showing the error was in adding the numbers, not changing the individual scores within the overall assessments of two effectives and two ineffectives. Mr. Dodson's position that he was somehow

disadvantaged by not being first told of the discrepancy, but learning of it on Bloomboard, is not a statutory violation of some process. The Bloomboard is a standard communication device.

Ms. Dow conducted a short, unannounced observation on November 20, 2013. Evaluating him on competency 3 and found his students confronted a demanding concept and helped peers. She rated him as "effective."

Ms. Dow and Mr. Dodson's mid-year conference took place on February 14, 2014. For competency 1, She told him that he must submit lesson plans on time and improve the quality of his lesson plans. For competency 2, she told him that lesson questions and tasks must move students toward analysis and synthesis of the focus skill and standard and questions and tasks must lead students toward extension of their thinking. For competency 3, she told him he must continue to foster an environment that allows students to confront demanding concepts, provide rationales for their solutions, and challenge and support peers. For competency 4, she told him he must be able to articulate, with evidence, each student's progress, standards mastered, and continuing needs. For competency 5, she told him he must submit lesson plans on time.

Ms. Dow reviewed with Mr. Dodson the ANET assessment data. The District used ANET, an interim assessment, during 2013-2014. His students on the ANET assessment performed as follows: Assessments 1 and 2, his students were 12% below other 7th graders in the network. Despite weekly in-class assistance with the math coach,

weekly math content meetings, and monthly progress reports from Ms. Dow, Ms. Dow believed he was not on course to meet the goals he set for himself in his CAP. Ms. Dow told him he must submit lesson plans for review and feedback and analyze data to modify his lessons to address student deficiencies. The District acknowledged in their brief that the ANET scores are not a sufficient basis by themselves for judging student progress, because it doesn't measure how much Mr. Dodson's students progressed.

On the teaching rubric, Ms. Dow rated Mr. Dodson as follows: "partially effective" competencies 1, 2 and 3; "effective" for competency 4; and "slightly below expectations" for competency 5.⁶ Competencies 1, 2, and 3 represent, respectively, "lesson design and focus"; "rigor and inclusiveness"; and "culture of achievement." Competency 4 is "student progress towards mastery" and is the one affected by the measurement tools for showing student progress; and competency 5 is "commitment to personal and collective excellence."

Mr. Dodson's overall rating for the mid-year evaluation: "partially effective."

Mr. Nazario conducted a short, unannounced observation on March 24, 2014. Mr. Nazario reported that Mr. Dodson spent the first 20 minutes on a "Do Now," a short introductory exercise to begin a class that is supposed to take five to seven minutes. 'Do Nows' introduce what the lesson will be about It is not intended for it to be the lesson."

⁶ The scale for competency 5 is different from 1 through 4. Grading the teacher in relationship to expectations, the descending scale is: exceeds expectations; meets; slightly above; and significantly below.

Mr. Nazario wrote in the observation that the "Do Now was not connected with the lesson, unit objective(s) or long term goal(s). " He wrote that there was minimal evidence that careful planning and consideration went toward organizing the tools for learning" and that "[m]ore than half the period was consumed without any whole group or instruction on the written objective."

The post-observation conference, held April 2, 2014. Mr. Dodson's rating for competency was "ineffective" and the rating for the entire observation was "ineffective."

The arbitrator finds it inexplicable why in the presence of an evaluator Mr. Dodson did not move onto the lesson for the day. As a veteran teacher, he obviously knew that the "Do Nows" should last for 5 to 7 minutes. When did not advance to the lesson is odd. And he did the same thing a second time, during an evaluation, having been previously told not to do it.

In Ms. Dow's fourth observation on March 31, 2014, was an unannounced long observation. Her evaluation states that Mr. Dodson (1) must be consistent in planning lessons that build on previous learning and are reflective of the major standards; (2) continue to implement lessons where students are required to provide well structured arguments for their solutions; (3) continue to foster an environment that affords students the opportunity to volunteer and actively participate; and (4) continue to provide feedback that will afford students the opportunity to self correct. On the teaching rubric, Ms. Dow rated Mr. Dodson as "effective" for competency 1, "effective" for competency

2, "effective" for competency 3, and "effective "for competency 4. Ms. Dow gave Mr. Dodson an overall rating for the long observation of "effective."

David Scaturi, a Special Assistant for Instruction, held a short, unannounced observation of Mr. Dodson on May 15, 2014, rating him on competency 1, "lesson design and focus", as "partially effective" on all four indicators. Mr. Scaturi found that Mr. Dodson did not connect the lesson to unit objectives or long-term goals; Mr. Dodson did not organize the components nor deliver them to move students towards mastery of the objective; Mr. Dodson's pace was too slow and his content and instructions were sometimes unclear or inaccurate. Mr. Dodson solved a problem on the board incorrectly. Mr. Scaturi recommended that Mr. Dodson use proper math vocabulary; design and implement alternative strategies to allow students to review material more effectively; ensure that he presents solutions that are complete and accurate; and ensure he is clear on the board.

The post-observation conference occurred on May 21, 2014. Mr. Scaturi rated Mr. Dodson on competency 1 as "partially effective" and his rating for the evaluation was "partially effective."

Before holding the annual evaluation, Ms. Dow supplied Mr. Dodson with an annual evaluation evidence sheet for him to complete by April 22, 2015. He failed to return it before the deadline. His annual evaluation had to be rescheduled for May 19, 2014 due to his absence on the prior scheduled date. Mr. Dodson was on an attendance

policy due to poor attendance and tardiness.

Ms. Dow's evaluation shows that Mr. Dodson did not implement any of the feedback he had received. For competency 1, Ms. Dow noted that he had to consistently provide lesson plans on time and that he had only provided lesson plans for review 50% of the time.

Ms. Dow noted his lesson plans must identify, through lesson sequence and lesson components, how lessons fit into the larger unit objectives and lead students toward identified achievement goals. For competency 2, Ms. Dow noted that he must plan and implement lessons tasks and activities that will afford students the opportunity to extend their thinking. For competency 3, Ms. Dow noted he must continue to foster an environment that affords students the opportunity to confront demanding concepts, provide rationales for their solutions, and challenge and support their peers. For competency 4, the Ms. Dow noted that Mr. Dodson must be able to articulate, with evidence, each student's progress , standards, mastered, and continuing needs.

Regarding whether he met his goals or SGOs set forth on his CAP, the evaluation shows he did not. His students performed well below their peers, according to the ANET assessment data. 15% of his students were below all other seventh grade students on interim 1, 11% were below all other seventh students on interim 2, and 17% were below all other seventh grade students on interim.

Mr. Dodson contends the ANET scores are not a valid measure of how students progressed through the school. I agree. There was no dispute. The District's brief acknowledges that their measure of student progress did not comply with the statutes but defended on the ground that the Department of Education had approved their approach. Whether the documentary evidence on this point was admissible is discussed elsewhere in this opinion.

The SGO data is incorporated into the evaluation of Mr. Dodson's performance with regards to indicators d,e, and f under competency 4. Regarding competency 5, Ms. Dow informed Mr. Dodson that he must consistently adhere to attendance policies. Mr. Dodson replied the meeting, (contrary to the facts showing that he failed to submit lessons approximately 50% of the time) that he only failed to submit lesson plans "once or twice" and that he always completed them. Mr. Dodson's assertion that he only failed to provide them once or twice is not credible. At the hearing, Mr. Dodson's assertion that a substitute failed to return his lesson plans for the day was possible; but when he continued to explain missing lesson plans by blaming the substitute, I concluded his mental agility outran his accuracy.

During 2013-2014, Mr. Dodson was absent 9 times and tardy 9 times, and was placed on an Attendance Improvement Plan during 2013-24. The District points to Ms. Dow's testimony that if a teacher is absent, the students are not receiving the curriculum instruction. An abundance of absences [such as Mr. Dodson's] means students are missing out on valuable instruction time.

Mr. Dodson's 2013-2014 ratings were for competency 1 -"partially effective"; competency 2 -"partially effective"; competency 3 - "effective;" competency 4 - "effective;" competency 5 - slightly below expectations. His overall rating for 2013-2014 was "partially effective". It does not incorporate a SGP score because New Jersey did not calculate a SFP score for Mr. Dodson because his class size was under threshold of 20.

Because competency 1 and 2 did not contain student assessment, they would have remained as "partially effective" and is the basis for my conclusion that the failure to follow the statutory scheme for measuring students was not "material" because it not have affected competency 1 and 2 at all. Additionally, his rating for competency 4, where the defective measuring tool for student achievement, was "effective, "which was the highest rating he achieved on any competency during any evaluations in the two period covered by his CAP. For Mr. Dodson to credibly show that the defective measuring tools for student achievement would have been "material" would mean he would have to establish that he would have, had they been measured properly, reached "highly effective" for competency 4, a score he had never achieved on any evaluation. So the "effective" score for competency 4 was the highest he could reasonably expected. With that "effective" his overall score would still have been "partially effective."

Black's Law Dictionary (2nd Ed.)⁷ defines "material" in this way

⁷ The Law Dictionary, featuring Black's Law Dictionary (2nd Ed.)
<http://thelawdictionary.org/material/>

Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. An allegation is said to be material when it forms a substantive part of the case presented by the pleading. Evidence offered in a cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.

Each dispute has unique facts and so a deviation from procedures may have a different impact, depending on the facts of the case. The arbitrator must examine both the deviation and the impact it may have had on the process. If the impact would not change the overall evaluation, it is not material. If it would have changed the evaluation or had a substantial impact on the integrity of the process of evaluation, it is material, and would nullify the termination.

For 2014-2015, Mr. Dodson continued on a CAP. Mr. Dodson's annual evaluation was completed On May 28, 2015, Ms. Mignone and Mr. Dodson met for his evaluation conference. His testimony that he had no such conference is not credible; the final report was witnessed and states he did not sign the evaluation. Ms. Dow credibly testified that the conference took place.

The evaluation document reviewed Mr. Dodson's performance on observations and coaching observations throughout the school year, including the 4 formal observations, 3 coaching observations, and 16 classroom visits from the math coach.

For competency 1, Ms. Mignone indicated that: "Lesson plan submission does not demonstrate a connection between lesson, units and long term goals. There is also a lack of structured lesson components such as modeling, shared practice, guided practice and

independent practice." Mr. Dodson's rating for competency 1 was "partially effective".

For competency 2, Ms. Mignone found that Mr. Dodson failed to implement structured, standards based learning centers despite the math coach focusing on this in several meetings. Mr. Dodson's rating for competency 2 was "partially effective."

For competency 3, Ms. Mignone that "Mr. Dodson's class improved in the realm of management but it is still evident that procedures and routines are absent." His rating for competency 3 was "partially effective."

Mr. Dodson's rating for competency 4 was "partially effective." Ms. Mignone noted that Mr. Dodson did not submit a portfolio to demonstrate his student's progress, despite being asked to do so. The ANET assessment data indicated that Mr. Dodson's goals were not met with regard to any of the four focus standards he identified. The percentage passing was 30% for 8EE1, 31% for 8EE2, 24% for 8EE3, and 56% for 8EE4.⁸ As such, the District contends that Mr. Dodson did not meet his goals.

Mr. Dodson contends that competency 4 contained invalid measures of student achievement. I agree. Elsewhere in the decision I discuss the issue of whether approval by the Department of Education of the District's assessment plan was admissible. The District acknowledged it did not comply with the strict standards of the statute and I have ruled that the Department of Education approval was inadmissible.

Mr. Dodson contends that even if it were admissible, the District did not follow it. There is no need to discuss this alternative argument, in light of the finding that it is not

⁸ 8EE1, 8EE2, 8EE3, and 8EE4 reference common core standards that relate to the eighth grade math curriculum. These are the standards that Mr. Dodson identified in his CAP with regard to SGOs.

admissible.

I conclude there that the District failed to substantially follow to this portion of the evaluation process. However, even if his students improved sufficiently, and were so measured, and thus increased competency 4 from "partially effective" to "effective", his scores in competencies 1, 2 and 3 were still all "partially effective." Given his set of skills t would have been impossible for him to have overcome three "partially effective" ratings and achieved an overall "effective" score. Consequently, the fact the District's failure to measure student achievement by the statute did not materially affect the outcome of the evaluation.

For competency 5, Mr. Dodson was rated slightly below expectations. Ms. Mignone noted that:

Mr. Dodson has not shown a commitment to improvement. Although he has had several meetings with the math coach and feedback sessions with the administration there has been little improvement in target areas. Mr. Mr. Dodson did not submit a portfolio to communicate student progress through data. Attendance is in need of improvement with 17 days absent and 18 days late (7 of which were 5 minutes or more).

Mr. Dodson's overall annual evaluation score was 6, or "ineffective." It is a score so low that he could not mathematically move it to the "effective" range even if he were "effective" on student achievement.

The District contends that Mr. Dodson falsely testified that he never received an annual review conference. In fact, Mr. Dodson was present and refused to sign the form at the meeting. Mr. Hutchins served as a witness for the meeting and signed the document to indicate her presence as a witness that the meeting took place. I conclude

the meeting occurred, and Mr. Dodson is mistaken when he claims it didn't.

During the 2014-2015 school year, the School Improvement Panel ("SIP") met monthly to discuss all of the teachers that needed assistance. The SIP included Ms. Mignone, the math coach, and the literacy coach. The Panel discussed at the meetings held during the November 2014-April 2015 time period. The agendas from the meetings make clear that Mr. Dodson continued to struggle in the same areas and did not implement the feedback and support he was provided.

For example, in February 2015, it the Panel noted that there was "[n]o evidence of implementation" of feedback Mr. Dodson received about lesson structure. Mr. Dodson continued to require assistance with small group learning centers. In March 2015, the Panel discussed how Mr. Dodson was still having difficulty implementing small group instruction. In April 2015, the Panel discussed how Mr. Dodson needed to work on data analysis and use additional assessments throughout the unit between the pre-tests and post-tests to drive instruction.

The District contends that they provided Mr. Dodson with a significant amount of professional development throughout the 2014-2015 school year in the form of coaching observations, written materials, access to videos and other resources on Bloomboard, weekly meetings with the math coach, and unlimited assistance from the math coach. Despite the significant assistance provided to him, Mr. Dodson failed to make improvements to his teacher practice or demonstrate student progress on the identified goals. Consequently, the District had no choice but to give Mr. Dodson an overall rating of ineffective for the 2014-2015 school year and proceed with tenure charges. I found this evidence persuasive.

Mr. Dodson contends that TEACHNJ required that he receive at last one pre-conference for an announced evaluation during 2014-2015. He did not. It appears to have been an oversight. Mr. Dodson contends that this failure to adhere substantially to the evaluation process. I agree. I must then decide whether this failure materially affected the outcome of the evaluation. Mr. Dodson contends it did. The Board disagrees. I conclude that it did not. Obviously having a pre-conference might make for a better performance and a better evaluation. And possibly a higher score on one evaluation. However, his deficiencies were well known to his evaluators and to him; he knew what he had to work on. He had been told repeatedly. He appeared over a two-year period to be unable to put into effect what he had been told to do. Inserting one conference into this mix would not have moved the scoring needle in an upward direction by very much, if at all. That is not to say that failure to have a pre-observation may not been in a different case, but not on these facts.

I now turn to the question of admissibility of the Department of Education's approval. I conclude it was not admissible; but I also have also conclude that the District's failure in complying with the process on measuring student achievement was not a material failure to comply with the evaluation process. So the issue of admissibility is moot.

Mr. Dodson contends the Department of Education's approval is not admissible because it was not among the evidence provided by the Board to Mr. Dodson before the hearings and is therefore expressly inadmissible under TEACHNJ; and because one of

their interrogatories was broad enough to cover this document and was not provided, which also renders it inadmissible under the Act. I agree. Here is what the statute provides:

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence 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 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.

At the hearing, I reviewed the language and structure of the statute, and concluded it means what it says and the exception based on "impeachment of witnesses" did not apply. "Impeachment" refers to evidence that attacks the credibility of a witness. At the time the District offered the evidence, Attorney Ball had not yet called a witness. There was nothing to impeach. Had a witness denied that the document existed, it could be used to impeach that witness. That is not what happened. I suggested that the parties brief the issue so I could reconsider my initial ruling. I had the documents marked for identification, but not admitted.

On reconsideration, having again reviewed the statute, its language and purpose, and the transcript of the hearing, and analyzed the issue in depth, I again conclude that the evidence is not admissible. However, this ruling does not affect the outcome of the case, because as I discuss elsewhere, although the District failure to substantially follow the procedures for measuring student achievement in competency 4, this failure did not materially affect the outcome of the evaluation.

Here is what transpired when I asked Attorney Ball to describe the documents, which I had then not yet seen. Attorney Ball:

"There are two documents. One is a set of documents that purports to say Mr. Dodson did not have an SGP for that particular year, the 2013, 2014 year. The

second set of documents he is going to try to produce is a set of documents that purport to show that he also didn't get SGOs, that part of the requirement for SGOs was waived and another part was rendered unnecessary because the way they scored competency 4 was equivalent to doing an SGO.

*Now, this the first time we are getting this. We have gone through the entire process with the initial disclosure of documents, inches thick. Then we also did discovery, and in my interrogatories, in number three I wrote as follows. As per NJAC 6A 10-4.2, **describe in detail the measures of student achievement and/or Student Growth Objectives that were utilized to evaluate respondent's performances in 2013, 2014 and 2014, 2015.** Describe how the SGOs were specific and measurable based on available student learning data aligned to the core curriculum standards and based on growth and/or achievement. Include detailed descriptions of how respondent met or failed to meet the SGOs in his CAP, Corrective Action Plan. [Emphasis added.]*

*They provide an answer to that question that is at least half of a page long. **Nowhere in that answer do they make any reference to any of these documents or even to any of the theories that the documents are submitted to support. There's nothing in the case here that I prepared for trial that gave me any clue about any of this stuff. I developed my case, I tried my case, I prepared Mr. Dodson based on the record that I had.** The record now goes 180 degree the other way. I'll ask for a mistrial. If that is not granted, I'll ask to the law division.*

*I will not present Mr. Dodson because we are not prepared to meet any of this.*⁹

[Emphasis added.]

This statute really means business. The TEACHNJ Act contains an affirmative disclosure provision, which by its terms requires each side to exchange all of their documents in advance. There are no depositions, and interrogatories are limited to 25 questions including subparts. "***The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.***" (Emphasis added.) The same goes for the teacher. No disclosure, no admit, except for impeachment. Rebuttal is not impeachment. The whole discovery process relies on voluntary disclosure. It would not work as the legislature intended if new evidence could be introduced to fill holes in either of the parties' cases. The one exception is "impeachment of witnesses." There is no general exception for rebuttal that is not impeachment, although clearly new documents can be introduced for impeachment purposes.

The clear language of the statute states the evidence here in question is inadmissible. The legislature mandates that the arbitrators are required to enforce the statute as written. The procedural structures could unravel if arbitrator opened the door to evidence not allowed by the NEACHNJ. Rejecting the offered document is the enforcement mechanism that makes the pre-trial process work. Weaken that enforcement mechanism, and the pre-trial discovery process could unravel. In other words, making

⁹ Tr. Hearing Day 3, March 10, 2016, p. 6.

this evidence inadmissible is a means to an end and not an end in itself. The end is making the discovery work. The means is rejecting evidence that does not comply with the discovery rules.

The District's contends that because TEACHNJ tells the arbitrators to use the American Arbitration Association Labor Arbitration Rules, the AAA rules would allow the arbitrator to admit this evidence,¹⁰ and so the evidence is admissible. But TEACHNJ also says in the event of a conflict with the AAA rules, a conflict which clearly exists here, the TEACHNJ rule procedures rules shall govern:

*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.** (Emphasis added.)*

The District argues they had no notice that Mr. Dodson would raise the question of non-compliance with the measurement of student. However, Attorney Ball asked in his interrogatories quoted above about the measurement instrument, and the District did not mention that the Commissioner of Education had essentially waived the statute and

¹⁰ Under AAA Rule, Rule 14, AAA Rules, could admit the document. *"The parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."*

approved a substitute method. The District, by not including it in their list of exhibits and by not providing it in the answer to his interrogatories, are compelled by the statute from relying on that evidence.

The District argues that it would violate due process not to allow the evidence in. Courts have the power to declare statutes unconstitutional; NJ statutory arbitrators under TEACHNJ do not. Besides, courts of law frequently exclude otherwise admissible evidence for failure to follow the discovery rules. I am unaware of any decision that finds that enforcing the discovery rules by excluding evidence violates due process. Excluding evidence to enforce discovery rules is a common event in the trial courts across America. This is no different. Except here, the venue is a statutory arbitration tribunal, not a court.

The District argues “this document amounts to a legal ruling by an administrative agency that the Arbitrator must consider as part of the legal analysis of this case”. It cites Smith v. Director. Div. of Taxation, 108 N.J, 19, 25 (1987), for the proposition that substantial deference should be given to the interpretation an agency gives to a statute that the agency is charged with enforcing. But the “equivalency” document does not “interpret a statute”. At most it gives a limited waiver to compliance with specific portions of N.J.A.C. 6A:10 et seq. (P87C- “Waiver”).

But before we get to the issue of whether it excuses compliance with the statute, it must first be in evidence, and I conclude that it cannot be admitted. A court may conclude that "waiver" is the same as "interpretation" and that deference must be shown.

I can't get to that issue unless the evidence is admissible, and it is not. The legislature created this evidentiary mechanism to enforce their strict rules on pre-hearing disclosure of documents and interrogatories . The legislature coupled it with a stern admonition to the arbitrators to follow their procedural rules.

Mr. Dodson was observed by six different supervisors and administrators (i.e., Ms. Dow, Mr. Nazario, Mr. Scutari, Ms. Ms. Mignone, Ms. Mr. Hutchins, Ms. Evans-Humes) for a total of nine formal observations over a two-year period, in addition to a peer validation observation by a non-District employee. The observers included administrators in two different school buildings and Network administrators, in addition to a tenth observation conducted by an individual who is unaffiliated with the District. Additionally, Mr. Dodson received informal coaching observations. All seven individuals consistently identified the same fundamental problems with Mr. Dodson's performance as a teacher during both the 2013-2014 and 2014-2015 school years.

Specifically, the pace of instruction was too slow, he lacked lesson planning, did not use scaffolding; he did not use tailored instruction and did not divide the class into groups; he failed to press students to analyze problems for themselves or with other students and would simply provide them with the answers; he did not individualize instructions; he failed despite many warnings to provide lesson plans; his attendance and timeliness was not satisfactory and he was placed on an attendance plan. Mr. Dodson failed to implement instructional strategies that would instill higher level thinking in his students, and there was a lack of student progress. These deficiencies are reflected in the

observation summary forms and accompanying rubrics as well as Mr. Dodson's mid-year and annual evaluations for both school years in question, resulting in a “partially effective” rating for the 2013-2014 school year and an "ineffective rating" for the 2014-2015 school year.

Mr. Dodson received help and assistance and encouragement over two years. The observers gave him specific advice as to how to improve, including how to scaffold, how to divide the class into groups, how to press students to analyze problems rather than simply providing answers, how to individualize instruction rather than teaching the entire class.

Mr. Dodson claim that he did not receive adequate assistance and should have been given more in the form of modeled teaching is not persuasive. He was given substantial supports over a two-year period.

Because Mr. Dodson received a ”partially effective” rating for the 2013-2014 school year and an ineffective rating for the 2014-2015 school year, the District was required by law to file inefficiency tenure charges against him. N.J.S.A. 18A:6-17.3(a)(1). The District's decision to file the instant tenure charges was neither arbitrary nor capricious.

Mr. Dodson contends he did not develop his CAP in collaboration with an administrator. A CAP is defined as "a written plan developed by a teaching staff member serving in a supervisory capacity in collaboration with the teaching staff member to

address deficiencies as outlined in an evaluation." N.J.S.A. 18A:6-119. See also N.J.A.C. 6A: 10-2.5 ("a corrective action plan shall be developed by the teaching staff member and the ... teaching staff member's designated supervisor"). Mr. Dodson drafted his CAP for the 2013-2014 school year and then met with Ms. Dow to review it. Similarly, Dodson drafted his CAP for the 2014-2015 school year and then met with Vice Principal LaContee Hill to review it. Dodson's testimony to the contrary is not credible and is contradicted by the documentary and testimonial evidence in the record.

Mr. Dodson contends that a peer observation was excluded, arguing it was excluded because it rated Mr. Dodson "effective." The argument is not persuasive. The District states it was excluded because Mr. McVerry was from outside the district and conducted a Peer Validation Observation. There is a correct application of the clear language of TEACHNJ regulating which evaluation must be included in the annual summative evaluation rating. The person must be "employed in the district" and have the necessary credentials. By law, the McVerry observation, which was not a statutory evaluation, had to be excluded from the annual summative evaluation.

*Observation" means a method of collecting data on the performance of a teaching staff member's assigned duties and responsibilities. An observation for the purpose of evaluation will be included in the determination of the annual summative evaluation rating and **shall be conducted by an individual employed in the school district** in a supervisory role and capacity and possessing a school administrator, principal, or supervisor endorsement as defined in N.J.A.C. 6A:9-1.1.¹¹*

The content of the McVerry peer validation observation of Mr. Dodson may be helpful advice on how to improve his teaching, but does him no credit. For competency 1,

¹¹ 6A:10-1.2 Definitions

Mr. Dodson had issues with pacing, taking 40 minutes to go over the first three problems. Mr. McVerry noted that the group activity did not begin until there was five minutes left in the class. As for competency 2, Mr. McVerry observed that Dodson "did not adjust his instruction to meet their [the students'] needs" and instead would refer to the common misconceptions he noted rather than individual struggles by the students. Mr. McVerry noted that Mr. Dodson did not create a learning environment in which students could demand evidence of each other. With regard to competency 3, Mr. McVerry noted that the environment was "too teacher directed" and that one student was sleeping in the classroom. Similar deficiencies were found in the numerous observations during the 2014-2015 school year.

Mr. Dodson contends that because the rebuttals he wrote to each of the observations and evaluations were not considered by Mignone, the District violated the evaluation rules. However, while Dodson maintained the right to submit a rebuttal to challenge the observations and evaluations he received, Mignone had no obligation to do anything but attach the rebuttals to the observations and evaluations in his file. The statute gives him no right, beyond the evaluation meeting, to have more meetings to reconsider what has already been discussed.

While Dodson had the right to submit a written rebuttal and create a written record, Mignone did not have any obligation to have a meeting with Dodson to discuss its contents. In fact, Dodson never requested the opportunity to meet with Mignone to discuss his rebuttal submissions at any time during the 2014-2015 school year. Moreover, consideration of Dodson's rebuttals has no bearing on whether the District substantially adhered to the evaluation process.

The process related to rebuttals is outlined in the Framework. The Framework provides:

What is the process for a teacher who disagrees with their observation, Mid-Year, or Annual rating?

If a teacher disagrees with his or her score, he or she still has to sign the form to indicate receipt, but not agreement. In the event that a teacher refuses to sign the form, a witness signature must be obtained indicating the refusal to sign. Teachers have the opportunity to object to the observation in writing within 10 days of the post-observation conference. The Assistant Superintendent (or his/her designee) **may review** the rebuttal letter, mid-year evaluation or annual rating, and supporting documents and **if the rating is inconsistent with the documentation, then the Assistant superintendent may, in his/her sole discretion, change the overall evaluation rating after reviewing the documentation with the principal.**

The words "may review" shows that review is not mandatory, but within the discretion of the administrator. Because there is no obligation to read the rebuttals, Mr. Dodson had no right to have them read.

Ms. Mignone had no obligation to respond to Mr. Dodson's rebuttals, either through an in-person meeting or in writing. Ms. Mignone used her discretion to determine that Mr. Dodson's ratings would not be changed as a result of the rebuttals that he orally made to her at their meetings and confirmed through her testimony that Mr. Dodson's rebuttals did not provide any information that demonstrated why the rating did not reflect his practice. Ms. Mignone's actions with regard to the rebuttals were consistent with the Framework and compliant with the District's evaluation process.

I have found nothing in Mr. Dodson's factual or legal arguments that fall within the statutory grounds for setting aside a decision to recommend termination.

Mr. Dodson was only marginally credible. He truthfully acknowledged he used sick time when he used up his three personal days to take his daughter to visits high

schools. But he was not credible, when confronted with the fact that this could be seen as fraudulent, fumbled a bit and stated that he was sick on the days he visited schools with his daughter. That portion of the cross-examination was a textbook illustration of the truism that a lawyer can make up questions faster than an untruthful witness can make up answers. Once a witness starts to stray from the truth, his credibility is undermined. That happened here to Mr. Dodson.

At other times, Mr. Dodson testified with diminished accuracy, with a tendency to diminish his shortcomings, such as not filing timely lesson plans 50% of the time, or finding excuses for shortcomings external to him. His memory was at times faulty, unable to remember meetings, which the evidence establishes through witnesses and documents bearing a signature by a witness and a notation that Mr. Dodson refused to sign or did not sign. The credible evidence establishes that these meetings took place.

When asked at the hearing about an instance of failure to leave lesson plans in his room, he said a substitute took them, and then when asked about other missing lessons, said the same thing. It is unlikely that all of these missing plans were taken by substitutes. He showed a tendency at times to be simultaneously inventive but unconvincing. Ultimately I found his testimony on critical contested issues of fact not credible.

I have carefully considered all of his factual and legal arguments and find them unpersuasive.

Based on the forgoing, I find that the District has proven its case and Mr. Dodson has failed to show that any of the variations from the evaluation process had a material effect on the outcome of the evaluations.

AWARD

The District established that it had statutory grounds to terminate Mr. Dodson for two consecutive evaluations of "partially effective" and "ineffective." Mr. Dodson established in several respects that the District failed to adhere substantially to the evaluation process. However, the evidence and reasonable inferences drawn from the evidence shows that these failures to adhere did not materially affect the outcome of the evaluations. There were no mistakes of fact in the evaluations that could materially affect the outcome of the evaluations. There is no credible evidence that the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or Federal law, or other conduct prohibited by state or federal law. The District's actions were not arbitrary or capricious.

The arbitrator renders a decision in favor of the Board and in accordance with the law, the employee shall be dismissed.

Dated: July 22, 2016 Peter Adomeit

Peter Adomeit, Esq.
Arbitrator

State of Connecticut)
) SS: West Hartford
County of Hartford)

On this 22 day of July, 2016, before me personally came Peter Adomeit, Esq., to be known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that he executed same.

Cynthia A. Arthur

Notary Public



CYNTHIA A. ARTHUR
NOTARY PUBLIC
STATE OF CONNECTICUT
MY COMM. EXP. 09-30-2018

My Commission expires on _____

