

STATE OF NEW JERSEY  
COMMISSIONER OF EDUCATION

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IN THE MATTER OF THE TENURE HEARING OF  
FELICIA A. PUGLIESE

AND

THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK  
ESSEX COUNTY

Docket No. 272-9/12

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Hearings were held in the above-entitled matter on November 20, 2012, December 5, 2012, and January 3, 2013 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey, before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witness and to present evidence and arguments. The Arbitrator issued an Award and Opinion, dated February 15, 2013, upholding the tenure charges against Respondent and granting the Petition of the State Operated School District of the City of Newark, Essex County.

Respondent appealed the decision to the Chancery Division of Essex County Superior Court, which confirmed the Award. Respondent then appealed to the Appellate Division, which reversed the Chancery Division, and remanded the case, along with another tenure decision by Arbitrator Tim Brown involving the State Operated School District of the City of Newark, Essex County and Edgar Chavez, to the Commissioner of Education for clarification regarding the proper legal standard to be applied by arbitrators in cases arising in the interval following the enactment of the TeachNJ Statute before the Statute became fully effective.

The Appellate Division directed the Commissioner of Education to clarify for the arbitrators which teacher tenure statute was applicable to these two cases and to determine the applicable standards of proof for the District to satisfy its burden of persuasion under the applicable statute. The District's rationale for filing tenure charges and Respondents' defenses to the tenure charges were then to be reconsidered by each arbitrator in light of the Commissioner's guidance.

The Commissioner of Education determined that the tenure statute in effect before TeachNJ became law was the appropriate statute under which Respondent Pugliese's and Respondent Chavez's tenure charges should be adjudicated. The Commissioner referred the Pugliese matter back to the undersigned Arbitrator for reconsideration of the School District's tenure charges and Respondent Pugliese's defenses de novo under the prior statutory

criteria using all of the arguments and proofs previously submitted, as augmented by the subsequent written submissions of counsel for Respondent and for the District.

After the parties submitted briefs and reply briefs to the Arbitrator following the Appellate Division decision, the Arbitrator reviewed the evidentiary record in conformity with a mandate of the Appellate Division decision. The Arbitrator has complied with the instructions of the Appellate Division and of the Commissioner of Education, having revisited the record of the instant case, and reevaluated the testimony and other evidence as if the matter had been addressed solely under the previous tenure statute. The following Opinion and Order reflect this reconsideration.

#### APPEARANCES

For Petitioner, State Operated School District of the City of Newark, Essex County:

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

For Respondent, Felicia A. Pugliese:

Richard A. Friedman, Esq., of Zazzali, Fagella, Nowak, Kleinbaum  
and Friedman, Esqs.

OPINION

In the original Award issued in this matter on February 15, 2013, I discussed the Respondent's inability to demonstrate that the District's imposition of tenure charges terminating her employment had been arbitrary and capricious, the standard imposed by the new TeachNJ statute. Following the Appellate Division's remand of the instant matter to the Commissioner of Education for clarification and the Commissioner of Education's subsequent referral of the case back to this Arbitrator for reconsideration pursuant to the Appellate Division's decision, the undersigned Arbitrator reviewed the record and applied the standards in effect prior to the implementation of the TeachNJ statute. Under the prior statute, the District unequivocally bears the burden of demonstrating by a preponderance of the evidence that an Employee's teaching performance as been ineffective or inefficient in two successive school years. The District has met that burden in the instant case.

The evidentiary record submitted by the District established by a preponderance of evidence that the Respondent was chronically unable to control her class after she received an assignment to teach in a setting other than the more structured computer learning center where she had previously been assigned. The record further established by a preponderance of evidence that Respondent was chronically unable to research social studies topics, assemble and transmit appropriate curriculum related materials, formulate

lesson plans addressing the various skill and ability levels of her students, or consistently deliver to her students meaningful and engaging instruction covering the curriculum tailored to reach the various levels of students within each class. That many of the students in Respondent's classes suffered from manifest deficiencies in their prior educational preparation was also established by the evidentiary record. This circumstance has been incorporated into the Arbitrator's analysis.

Although the individual characteristics of her students may have presented formidable challenges to Respondent and thus complicated adequate performance of her duties, the District's negative evaluation of her performance relied, in a large measure, on her inability to organize her lessons or to formulate effective strategies for addressing the multiple student skill levels within her assigned classes. Respondent was not measured solely, or even primarily, on what her students learned given their individual characteristics and learning skills; she was not required to bring her students up to grade level understanding of the social studies curriculum. Respondent was judged on what material she presented to her students in order to motivate them to grasp the subject matter at each stage of the Social Studies Curriculum and how she presented the material.

After receiving satisfactory ratings during the years she taught language arts in a computer-based instructional setting to students whose classes came for a single period while their classroom teachers were afforded a preparation period, Respondent was reassigned to teaching in a full classroom setting, where she was required to prepare lessons for multiple levels of learners within each class. The evidentiary record established that this additional teaching burden, rather than the nature of the subject matter, was the primary cause of Respondent's failure to perform satisfactorily.

After reconsideration of the record, the Arbitrator concludes that the District has established persuasively by a preponderance of the evidence that the District has satisfied its burden of demonstrating that, despite multiple supportive interventions by District personnel, including Master Teachers, in repeated interactions and evaluations over a two-year interval, including during administration of a Professional Improvement Plan designed to address her weaknesses, the Respondent's performance did not improve significantly, nor did she adequately convey the subject matter in a meaningful way to her students, or demonstrate any foreseeable likelihood that her performance would improve with additional support. At issue is whether the procedural and substantive affirmative defenses interposed by Respondent invalidate the tenure charges and preclude terminating Respondent's employment.

Counsel for Respondent argued at the original hearings, and in the briefs filed after the Appellate Division decision remanded the matter for reconsideration, that Respondent had been illegally assigned to the classroom duties for which she was evaluated as ineffective because she was not rated “Highly Qualified” as required by the No Child Left Behind Act. Counsel further asserted that Respondent was not afforded a statutorily mandated Professional Improvement Plan (PIP) for the full ninety-day interval required by the then applicable statute, nor was she afforded an opportunity to participate in the formulation of this plan. In addition, Counsel asserted that the resources afforded to Respondent in connection with her Professional Improvement Plan were inadequate, as they were neither individualized nor created or provided solely for Respondent’s benefit. On the basis of these procedural defects, Counsel contends that the decision to terminate Respondent’s tenure and employment was unjust, improper, and illegal.

Respondent asserted that, based on her licensure, her assignment as a social studies departmentalized teacher was illegal, and thus any less than satisfactory performance ratings that she received for work performed in this assignment could not form a legitimate basis for tenure charges. Respondent further asserted that her assignment to teach social studies to elementary students violated both her licensure and the legal requirements established by the No Child Left Behind statute (NCLB), because Respondent had to be rated Highly Qualified to teach social studies in a departmentalized elementary

school setting. This argument did not demonstrate a valid basis to invalidate the disputed assignment.

Teachers at the high school level must be certified as “Highly Qualified” to teach in their area of specialization, as defined by state statute and by No Child Left Behind (NCLB). Therefore, assigning a teacher in a departmentalized high school setting to teach outside of the area in which the teacher is subject matter certified and has been deemed Highly Qualified is patently improper, and such an assignment would preclude negative evaluations based on sub-standard performance in such an assignment. Respondent asserted that a similar prohibition governs at the elementary school level. This is not the case. Moreover, Respondent could properly have been assigned under her licensure to teach all elementary core subjects, including social studies, in a non-departmentalized elementary school setting.

According to the testimony, the student population Respondent was assigned to teach in her social studies classes required focused assistance in reading and absorbing social studies lessons and assignments, some at rudimentary levels. These deficiencies in reading and comprehending written social studies materials were within the Grievant’s area of expertise to address. Grievant’s skill and experience as a language arts teacher could have enhanced her ability to help her students understand appropriate social studies-related course materials, tailored to meet their reading comprehension levels, which



should have been selected by Respondent from resources provided by the District.

The elementary school level Social Studies Curriculum requires that a teacher possess a general knowledge of history, government, sociology, and other related topics sufficient to understand and implement the curriculum. Respondent argued that she was improperly and illegally assigned to teach elementary school social studies because she was a sociology major in college, rather than a history, government, or social studies major. Although sociology is arguably only a minor component of the elementary school level social studies curriculum, nothing in the evidentiary record of the instant case outweighed the District's assertion that a former sociology major can grasp and convey the social studies curriculum intended for transmittal to elementary school students. Gaining command of such material may be less challenging for a former history or government major, but neither the NCLB law nor New Jersey statute then in effect expressly limited Highly Qualified designations for teaching social studies to those majors. Therefore, the nature of the material to be presented did not disqualify the social studies assignment in which Respondent was evaluated as complying with the legal standards applicable under state statute before the implementation of TeachNJ. Neither does the No Child Left Behind Act mandate such a result. Consequently, the nature of the subject matter she was assigned to teach in 2010-11 and 2011-12 does not mandate dismissal of the tenure charges.

Credible testimony by the Building Principal and other District witnesses, which was not effectively rebutted by Respondent, established persuasively that Respondent was invited to participate in the formulation of her Professional Improvement Plan, or to add input concerning the parameters of the PIP, but elected not to avail herself of this opportunity. Consequently, this aspect of the alleged District's defective procedure for assisting Respondent must be discounted.

In addition, Respondent contended that the truncated length of the mandated ninety calendar-day PIP interval, which was at most eighty-seven days long, was fatally deficient. Different interruptions may arise during a ninety-day PIP interval-- including teacher absences, intervening spring or winter recess, or other variables--that reduce actual classroom teaching time and student contact during the ninety calendar-day PIP interval. That several of the days during Respondent's PIP interval were devoted to standardized testing or to packing up classrooms in anticipation of the school year ending and the school closing, as Respondent asserted, did not invalidate the interval for several reasons. Students may also be focused on non-academic activities at other times during the school year; for example, in preparation for a holiday seasonal assembly, on field trips, or rehearsing for a dramatic production. The statutory ninety calendar-day plan length is intended to provide a long enough interval for a deficient teacher to absorb and integrate advice and suggestions, to address her deficiencies with expert assistance and support, and to

demonstrate significant observable improvement in teaching performance before the expiration of the interval.

Moreover, the truncation of the ninety-day PIP interval by three days in the instant case was attributable to Respondent's refusal to meet with school administrators formally to accept and discuss tenure charges because her Union representative was not available at work on those days. Respondent was certainly entitled to Union representation, and no adverse inference can be, or has been, drawn from her insistence on waiting until such representation was available. Nevertheless, an employee cannot unilaterally precipitate an entitlement to an additional year's employment simply by delaying the meeting at which tenure charges are to be delivered or a PIP is to commence until fewer than ninety days remain in the school year. Ceding such leverage to an individual teacher would be untenable and contrary to the intent of the statute establishing the requirement of remedial assistance through a Professional Improvement Plan. Consequently, if the PIP was properly created, and if the school administration provided the requisite support materials, evaluations, feedback, and opportunity for Respondent to demonstrate improvement, the loss of three days would not invalidate an otherwise proper PIP interval.

Respondent did not demonstrate significant improvement in her performance during the eighty-seven day interval. Thus, the three extra days would not have altered the outcome. However, the District failed to provide

tailored support for Respondent throughout the PIP interval, as the testimony established that no Master Teacher or other supporting expert assisted Respondent in improving her classroom performance after mid-May of the 2011-12 school year. The evidentiary record established that no remedial help was provided to Respondent after May 9, 2012, creating a potentially material defect in administering the PIP as required under pre-TeachNJ standards.

Although it was unlikely that Respondent would have been able to improve her ability to identify resources, implement multi-level lesson plans, and control her classroom to provide focused and appropriate activities and lessons for her students to an acceptable level even with such additional coaching, the District's failure to provide substantial assistance for almost half the PIP interval constituted a significant defect in the PIP process.

Respondent has not established as affirmative defenses that she was illegally assigned to the classroom duties for which she was evaluated as ineffective, or that she did not have an opportunity to participate in the formulation of her Professional Improvement Plan, or that the length of the plan was fatally deficient. Thus, the critical factors determining the outcome of this reconsideration of the prior record using the pre-TeachNJ standards are whether Respondent was deprived of remedial support to which she was legally entitled throughout the PIP interval and whether such defect materially affected the outcome of the instant case.

The District has the burden of demonstrating not only that Respondent was unsatisfactory as a teacher, but also that a meaningful Performance Improvement Plan, personalized to address Respondent's weaknesses, had been developed, implemented, and staffed by qualified support personnel. The District's failure to provide supervision and supplemental support after May 9, 2012 potentially eroded the essential purpose of the PIP. However, if Respondent believed additional direct assistance by the Master Teacher or other support resources provided by District officials would have been helpful in improving her performance, Respondent could have demanded more assistance from the Master Teacher and from her Principal or reached out for other District support services after May 9, 2012. The record did not establish to the Arbitrator's reasonable satisfaction that Respondent clearly requested such additional assistance and was rebuffed. No grievance was filed, nor did she enlist her Union's assistance to rectify this situation.

In evaluating the total context of the continued sub-standard caliber of Respondent's teaching performance throughout the PIP interval, the Arbitrator cannot ignore the help Respondent received during her Professional Improvement Plan in determining the weight to be afforded the insufficient level of remedial assistance provided Respondent after May 9, 2012. The preponderance of the evidence demonstrated to the Arbitrator's reasonable satisfaction that the limited interactions between Respondent and the Master Teacher assigned to assist in improving Respondent's performance and other

resources provided by the District did not significantly impair Respondent's ability to demonstrate satisfactory teaching during the PIP interval.

Given Respondent's election not to participate in crafting the Professional Improvement Plan and her inability to improve her performance during the 2012 PIP interval, the District's failure to provide more adequate assistance after May 9, 2012 was not a material defect in the Professional Improvement Plan invalidating the tenure charges solely on the basis of diminished Master Teacher interaction or insufficient provision of other support resources provided to Respondent after May 9, 2012. Therefore, the District met its minimum burden regarding the PIP. A different conclusion might apply in the case of a teacher who demonstrated discernible improvement before remedial help was diminished or discontinued.

This conclusion did not shift the burden to demonstrate non-compliance to Respondent, but recognizes that Respondent showed no discernible improvement during the first half of the PIP, when the District provided her at least the minimum required level of remedial assistance. The District established by a preponderance of the evidence that Respondent chronically and persistently failed to respond to the support that was offered before or during the PIP interval or to show any discernible improvement in her classroom performance during the first half of the PIP interval. Thus, absent any clearly articulated demand for more help from Respondent or any noticeable improvement in her teaching, the perfunctory support afforded to

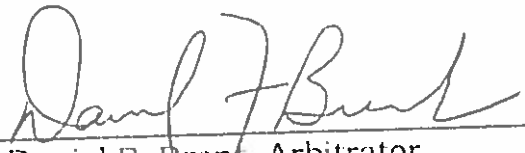
Respondent during the second half of the Professional Improvement Plan interval did not invalidate the District's compliance with the PIP requirement then in effect.

The District demonstrated by a preponderance of the evidence, as required by then applicable statute, that Respondent's pedagogical skills-- particularly effective lesson planning, classroom control, and coordinated presentation of multiple levels of curriculum-related tasks--consistently failed to satisfy minimum standards of teaching competence in her classes during two school years. The shortcomings repeatedly cited, and persuasively demonstrated, by the District as evidence of Respondent's teaching inefficiency involved her persistent inability to control her class or to craft and deliver lessons suitable for the multiple learning levels of students in her classes. The District has met its burden of evaluating Respondent's performance under the pre-TeachNJ standards, demonstrating by a preponderance of the evidence that Respondent was an unsatisfactory teacher in 2010-11 and 2011-12. Although Respondent has argued that a less stringent penalty, consistent with progressively severe discipline, is more appropriate than termination, the evidentiary record did not justify returning to the classroom, to the detriment of the District's students, a teacher whose pervasive shortcomings have been amply demonstrated.

ORDER

Based on the Arbitrator's reconsideration of the evidence and arguments submitted by the parties in the instant matter, applying the standards for deciding tenure charges in effect under the statutes and regulations in effect prior to the implementation of the TeachNJ statute, Petitioner State Operated School District of the City of Newark has demonstrated by a preponderance of the relevant evidence that the tenure charges brought by the District against Respondent Felicia Pugliese should be sustained. I so order.

June 8, 2106  
Princeton, NJ

  
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Daniel F. Brent, Arbitrator



State of New Jersey  
County of Mercer

On this 8<sup>th</sup> day of June, 2016 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.



Kathryn Gallagher

**KATHRYN GALLAGHER**  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires 2/18/2021