

BEFORE THE COMMISSION OF EDUCATION
OF NEW JERSEY DEPARTMENT
OF EDUCATION

In the Matter of Tenure Charges

between

**The Irvington Township
Board of Education, Essex County, NJ,**

Petitioner,

and

Roslyn Turner-Ince,

Respondent.

Agency Docket No. 42-2/16

MOTION-TO-DISMISS

**Dr. Andrée Y. McKissick
Arbitrator**

APPEARANCES:

For the Petitioner: Ronald C. Hunt, Esquire
Hunt, Hamlin & Ridley
Military Park Building
60 Park Place, Suite 1602
Newark, New Jersey 07102

For the Respondent: Nicholas Poberezhsky, Esquire
Caruso Smith Picini, PC
60 Route 46 East
Fairfield, New Jersey 07004

STATEMENT OF FACTS

Respondent Roslyn Turner-Ince has been employed by the School District of the Township of Irvington since September 2003. She was assigned to the Grove Street School as a Fourth (4th) Grade school teacher. The charges at issue were served by the District on February 5, 2016. The Superintendent of Irvington Public School, Dr. Neely Hackett, charged Respondent Turner-Ince with the following charges:

1. On or about October 1, 2003, the Respondent was reprimanded for hitting two (2) students.
2. On or about May 3, 2011, the Respondent was reprimanded for throwing coffee on a student.
3. On or about October 26, 2015, the Respondent was reprimanded for failing to provide proper treatment to her students.
4. On or about December 28, 2015, during the New Jersey Department of Child Protection and Permanency (DCPP) Investigative Unit, Investigation, at Grove Street Elementary School regarding an unrelated event, the Respondent was observed by the DCPP worker inappropriately handling a student.
5. As a result of the information set forth above, which some shall be specifically set forth below, the Respondent's conduct is in violation of various state and district laws and policies.
6. The Respondent's conduct constitutes just cause for her termination.
7. Moreover, the Petitioner believes that when staff members receive continuous reprimands for physically abusing children, such actions are unacceptable because it endangers the welfare of students, and it negatively affects the academic development of students.
8. Thus, there are just causes to terminate the Respondent by way of tenure charges.

The record reflects that on February 18, 2016, Respondent Turner-Ince received a letter from Dr. Hackett indicating that the tenure charges were certified by the Board and that she was removed from the payroll. Yet on February 19, 2016, the record reveals that Respondent Turner-Ince submitted her answer through her attorney. Nonetheless a day before her answer, the Certificate of Determination had been forwarded to her in contravention to NJ.AC 6A: 3-5.1 (b) (4).

The record further reflects that on March 7, 2016, Respondent Turner-Ince submitted a timely-filed Answer to the tenure charges with a Motion-to-Dismiss for the Commissioner's consideration. This motion for dismissal was requested for two (2) reasons: the District apparently failed to consider the Respondent's Answer before certifying the tenure charges violative of NJ.AC, 6A: 3-5.1 (b) (4) and because charges

contained information relative to our Institutional Abuse Investigation Unit (IAIU) investigation without authorization were also violative of NJ.SA 9: 6-8.10 (a). The District submitted an Opposition to the Motion-to-Dismiss on March 10, 2016. On that date, the record further reflects that the Commissioner issued an Order sealing the tenure charges and any related IAIU records pending further action by the arbitrator.

On March 15, 2016, this Arbitrator was assigned this case. On March 17, 2016, the Commissioner formally forwarded the sealed charges with the Respondent's Answer and the Motion-to-Dismiss to the Arbitrator. The record further reflects that the Respondent has yet to receive the following: the record of evidence including the list of witnesses and a complete summary of this testimony at variance with NJ.SA 18A: 6-17.1 (b) (3), as required. Briefs regarding the Motion-to-Dismiss were to be mailed on April 18, 2016. The Arbitrator received the Respondent's brief on that date. However, the Petitioner was granted an extension to May 31, 2016, when his brief was submitted.

ISSUE

Whether or not the Motion-to-Dismiss should be granted without prejudice, allowing the Petitioner to re-file charges?

If not, what shall the remedy be?

PERTINENT PROVISIONS

NJ.AC 6A: 3-5.1 (b) (4)

Upon receipt of the tenured employee's written statement of position and evidence under oath, or upon expiration of the allotted fifteen (15)-day time period, the District Board of Education shall determine by a majority vote of its full membership, or the State District Superintendent shall determine, within forty-five (45) days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction of salary.

NJ.AC 6A: 3-5.1 (b) (3) states, in pertinent part:

An employee "shall have an opportunity to submit to the District Board of Education or the State District Superintendent a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within fifteen (15) days of receipt of the tenure charges."

NJ.SA 9: 6-8.10 (a)

Records of child abuse reports; confidentiality; disclosure.

"1.a. ... all records obtained by the Department of Children and Families in investigation ... such reports ... all reports of findings forwarded to the child abuse registry ... shall be kept confidential"

NJ.SA 18A: 6-17.1 (b) (3) states, in pertinent part:

Upon referral of the case to 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 the purposes of impeachment of witnesses.

NJ.SA 18A: 6-7 (a) states, in pertinent part:

When a complaint made against a school employee alleging child abuse or neglect is investigated by the Division of Youth and Family Services, the division shall notify the school district and the employee of its findings. Upon receipt of a finding by the division that such a complaint is unfounded, the

school district shall remove any references to the complaint and investigation by the division from the employee's personnel records. A complaint made by the Division of Youth and Family Services shall not be used against the employee for any purpose, relating to employment, including, but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuation of employment, termination of employment, or any right or privilege relating to employment.

POSITIONS OF THE PARTIES

It is the position of the Petitioner that the Motion-to-Dismiss should be granted, but without prejudice. That is, the Petitioner argues that this result would allow the District to re-file the charges and the Respondent should then submit an Answer consistent with NJ.SA 18A: 6-11. Moreover, the Petitioner also contends that the Respondent should be afforded the right to be heard. Specifically, the Petitioner agrees that she was deprived of the right due to an error in calculation as to when the charges were sent to the Respondent (see NJ.AC 6A: 3-51 (b)(3)).

In response to the Respondent's argument that the Petitioner failed to comply with disclosure obligations, the Petitioner disagrees (see NJ.SA 18A: 6-17.1 (3)). In addition, the Petitioner contends the procedural defects are generally dismissed without prejudice, which allows the District to remedy its defects (see I/M/O Frank King, Agency Docket No. 117-4/07).

The Petitioner argues that it is important to note that tenure charges against the Respondent can be filed, notwithstanding a determination of "unfounded" by the Department of Children and Families (DCF) regarding the Respondent's conduct. In support of this premise, the Petitioner cites In Re Young, 202 NJ 50 (2010).

Although the Respondent relies on I/M/O Kevin Garifine, Agency Docket No. 317-10/15 on the issue that a dismissal with prejudice is warranted, the Petitioner rebuts that the respondent Garifine differs significantly from our Respondent Turner-Ince. Here, the Petitioner notes, Respondent Turner-Ince has three (3) reprimands prior to the current October 2015 incident. Moreover, the “unfounded” determination from the DCF’s Institutional Abuse Investigation Unit (IAIU) was uncontested in the Garifine case, unlike our case. Notwithstanding that the Garifine case was dismissed with prejudice, the Petitioner points out that it was not because of just the IAIU’s finding solely. Instead, the case was dismissed with prejudice as the result of several investigations by the Board, the police, and the IAIU. That is, the Petitioner asserts, that Respondent Garifine did not commit any misconduct on the day at issue. The Petitioner reasons that the Respondent’s request to dismiss Count 4 of the charges with prejudice should be denied for all the above reasons.

The Petitioner vehemently argues that the concept of industrial double jeopardy does not bar the consideration of prior reprimands, when analyzing the determinants of just cause in a termination case. The Petitioner relies on Linden Board of Education v. Linden Education Association John Mizichko, 202 NJ 268 at 267 (2010). In particular, the Petitioner maintains that progressive and corrective discipline is an integral part of the concept of just cause. As to a discussion on the applicability of progressive discipline, an element of just cause, the Petitioner points to I/M/O John Carlomagno, Agency Docket No. 180-8/13. In particular, the Petitioner asserts that all prior reprimands are relevant to the just cause determination in making an evaluation in a dismissal case. Based upon the foregoing, the Petitioner requests that the arbitrator should not dismiss Counts 1, 2, and 3, as the Respondent requests.

On the other hand, the Respondent contends that Respondent Turner-Ince's procedural due process rights have been breached. Although she submitted her statement of position to the District in a timely manner, nonetheless her tenure charges were certified by the Commissioner before her statement of position was even considered (see NJ.AC. 6A: 3-5.1 (b) (3)). Thus, the Respondent maintains that the tenure charges must be dismissed with prejudice and that Respondent Turner-Ince should be made whole for all compensation and benefits lost during the pendency of this proceeding. The Respondent relies on I/M/O Frank King, Agency Docket No. 117-4/07 as a comparable case. As to the application of NJ.AC. 6A: 3-5.1 (b) (3) and NJ.AC. 6A: 3-5.1 (b) (4) (5), the Respondent points to the mandatory language used as noted in Aponte-Correa v. Allstate Insurance Company, 162 NJ 318 (2000) citing Harvey v. Board of Chosen Freeholders of Essex County, 30 NJ 381 at 391 (1959).

The Respondent points out the Petitioner's failure to comply with the disclosure obligations as mandated by NJ.SA 18A: 6-17.1 (3). Specifically, the Respondent delineates the failure of the Petitioner to supply Respondent Turner-Ince the following: statement of witnesses, list of witnesses, and a complete summary of their testimony prior to the hearing. That is, the Respondent maintains, that the Board of Education must furnish the entire record of evidence on the date that this case was referred to this Arbitrator (March 17, 2016). However, the Respondent asserts that Respondent Turner-Ince was not advised of the list of witnesses nor was sent the complete summary of their testimony, as required. Thus, the Respondent reasons that these omissions to supply these statutorily-mandated disclosures renders the Respondent virtually impossible to mount a defense to the charges. Thus, for all the foregoing reasons, the Respondent requests the Arbitrator to grant this Motion-to-Dismiss with prejudice. The Respondent offers the I/M/O Michael Wilson,

Agency Docket No. 302-10/15 (final decision, December 12, 2015) as a comparable case on this issue.

In violation with NJ.SA 9: 6-8.10 (a), the Respondent notes that the investigative testimony may not be disclosed in a tenure proceeding (see also Tyler, 236 NJ Super 478 (App. Div. 1989 Certif. denied, 121 NJ 615 (1989))). In spite of this prohibition, Count 4 incorporates information relative to an investigation conducted by the IAIU, a division of DCF. Thus, the Respondent explains is prohibited information and must be dismissed with prejudice by this Arbitrator (also see NJ.SA 9: 6-8.10 (b), which prohibits dissemination and constitutes a punishable offense, up to three (3) years imprisonment).

Lastly, the Respondent adamantly urges the Arbitrator to dismiss Counts 1, 2, and 3 because they comprise the three (3) reprimands prior to the current charge of October 2015. Based on the concept of industrial double jeopardy, the Respondent reasons that these counts should be dismissed. That is, it would be unjust not to because it would subject Respondent Turner-Ince to being punished for the same offenses twice. The Respondent points to a line of cases such as: In the Matter of Victor Onwuzuruike (MSB, decided 2006); I/M/O John Carlomagno, Agency Docket No. 180-8/13 (December 20, 2013); I/M/O Jill Buglovsky, Agency Docket No. 265-9/12 (December 21, 2012) and I/M/O Nikita Clarke-Huff, Agency Docket No. 290-9/15 (November 16, 2015) as being exemplary of this issue. In summary, the Respondent maintains that it would be manifestly unfair to Respondent Turner-Ince for her to face additional punishment for the same underlying conduct.

FINDINGS AND DISCUSSION

After a careful review of the briefs in support of your positions regarding the Motion-to-Dismiss, this Arbitrator finds that this motion should be granted but without prejudice for the following reasons, except as specified with prejudice.

First, the record reflects that NJ.AC 6A: 3-5.1 (b) (3) provides a fifteen (15)-day window for the Respondent to answer to the Charges presented. However, prior to Respondent Turner-Ince's Answer, the Board certified the tenure charges in contradistinction to the above regulation (see Exhibit I). That is, without considering Respondent Turner-Ince's Answer and prior to the fifteen (15)-day duration, the Board removed her from its payroll on the day of certification, February 18, 2016. Thus, such premature actions from the District are violative of NJ.AC 6A: 3-5.1 (b) (4).

Second, NJ.SA 18A: 6-17.1 (b) (3) provides that the District shall send a record of evidence which includes the following: a list of witnesses and a complete summary of their testimony. However, neither were provided to Respondent Turner-Ince violative of the above provision. Such submissions were to be presented on March 17, 2016, the date this grievance was sent to this Arbitrator (see Exhibit M). These omissions are significant because of its corrosive effects on the Respondent's ability to respond to the charges presented against her.

Third, as to whether the remedy shall be with or without prejudice due to procedural defects, let us look at the prevailing case law. For instance, In the Matter of Arbitration Regarding Tenure Charge for Inefficiency, Michael Wilson and the State-Operated School

District of the City of Newark, Essex County, Agency Docket No. 302-10/15, December 12, 2015, Arbitrator Amis held that some of the same safeguards were violated, namely the omission to supply the witness list and a summary of the testimony to be presented. However, the time requirements were not strictly complied with, as required. Since the District failed to observe statutory guidelines and offered no explanation for the delay, Arbitrator Amis also granted the dismissal for the District's violation of NJ.SA 18A: 6-17.1 (b) (3). Respondent Wilson was reinstated as a teacher with full back pay and benefits. Our Respondent correctly notes that the Wilson grievance was not nearly as egregious as here with Respondent Turner-Ince in terms of the gravity of omissions, as noted earlier.

In three (3) cases, all involving motions to dismiss, the arbitrators granted the motion, but without prejudice for various reasons. These cases are most analogous to our case involving Respondent Turner-Ince as it relates to statutory violations.

In the Matter of the Tenure Hearing of Carol Beam, School District of the Township of Mantua, this case is substantively related to our case because it was based on NJ.SA 18A: 6-11. In the Beam case, the respondent was not given time to answer the charges. Also, the certification was defective. In sum, the Board failed to comply with the procedural mandates. Since the tenure charges were improperly filed, the Arbitrator granted the Motion-to-Dismiss, but without prejudice.

Another case which dealt with the failure to comply with statutory mandates is: In the Matter of the Tenure Hearing of Frank King, School District of the City of Salem, Salem County, OAL DKT No. Edu. 448907: Agency Docket No. 117-4/07, 2007 NJ Agen Lexis 584, August 22, 2007. In King, no statement of evidence was submitted to the respondent, as required. Moreover, Respondent King was never served with charges prior

to the Board's consideration as required by NJ.SA 18A: 6-11. Thus, the Administrative Law Judge dismissed the charges but without prejudice.

Still another case, where the tenure charges were dismissed as premature, is: In the Matter of Marie Ebert State-Operated School District of the City of Newark, Essex County, Agency Docket No. 267-9/14. Here, Arbitrator Denenberg held that the District failed to provide a list of witnesses and no summary of testimony of witnesses until one (1) week before the scheduled hearing. It did not allow adequate time for the respondent to prepare a viable response. Thus, this was found to be in violation of NJ.SA 18A: 6-17.1 (b) (3). Accordingly, the arbitrator granted the Motion-to-Dismiss without prejudice on January 20, 2015. This allowed the District to re-file the charges. Based on this analysis of procedural defects, it seems fair to allow the District to remedy the violations by re-filing. Thus, these aforementioned statutory violations shall be dismissed without prejudice.

Fourth, in response to the Respondent's argument that Count Four should be stricken, this Arbitrator agrees. This count was derived from the investigation by the New Jersey Department of Child Protection and Permanency (DCPP) unit. The record reflects that the Department of Children and Families (DCF), Institutional Abuse Investigation Unit (IAIU) found that the evidence did not support a finding that a child was harmed or placed at risk of harm. Accordingly, the complaint was deemed "unfounded." NJ.SA 18A: 6-7 (a) governs this matter. It, in essence, asserts that such findings, characterized as "unfounded", are precluded from usage against Respondent Turner-Ince as it relates to her employment. This includes disciplinary actions.

In the Matter of the Tenure Charges of: Board of Education, City of Long Branch, Monmouth County v. Kevin Garifine, Agency Docket 317-10/15, February 15, 2016,

Arbitrator Weiss dismissed the tenure charges with prejudice based on NJ.SA 18A: 6-7 (a). In sum, this statute states as follows: “upon receipt of a finding by the Division [of Youth and Family Services] that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the division from the employee’s personnel records.” Moreover, this statute goes on to say that a complaint “shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment” (also see In Re Young, 202 NJ at 72). Based on the foregoing, this Arbitrator finds that Count 4 must be dismissed.

Fifth, in regards to the Petitioner’s argument that Counts 1, 2 and 3 should not be dismissed, this Arbitrator must disagree as to Count 2, the coffee incident on May 3, 2011. Here, Counts 1, 2 and 3 are the specified reprimands delineated as three (3) separate charges. Since these are written reprimands, Respondent Turner-Ince has these reports in her permanent file. However, applying the doctrine of industrial double jeopardy, Respondent Turner-Ince was essentially disciplined twice for Count 2, when she was suspended and reassigned. Such actions are against the concept of fundamental fairness, the basis of just cause, because she is being punished twice for the same conduct involving the coffee incident of 2011 (see Exhibit D). Also see In the Matter of Victor Onwuzuruike Merit System Board, decided 2006; I/M/O Jill Buglovsky, Agency Docket No. 265-9/12, final decision (December 21, 2012) and I/M/O Nikita Clarke-Huff, Agency Docket No. 290-9/15, final decision (November 16, 2015).

Although the Petitioner rightly points out that prior disciplinary actions can be considered when making a determination of punishment, this Arbitrator fully agrees. Notice that Count 1 and Count 3 were written reprimands that were utilized only by keeping them in her permanent file. However, Respondent Turner-Ince was suspended and reassigned, solely for the coffee incident of May 3, 2011. Thus, Counts 1 and 3 are not dismissed and are viable (see Linden Board of Education v. Linden Education Association John Mizichko, 202 NJ 268 at 267 (2010); also see I/M/O John Carlomagno, Agency Docket No. 180-8/13, final decision (December 20, 2013)).


AWARD

This Motion-to-Dismiss is granted without prejudice due to violations of the statutory mandates, as noted. Moreover, Count 4 is dismissed based upon the breach of NJ.SA 18A: 6-7 (a). Lastly, Count 2 shall be dismissed with prejudice, as violative of industrial double jeopardy for the reasons stated herein. However, Count 1 and Count 3 are not dismissed but remain viable. Accordingly, Respondent Turner-Ince shall be reinstated as a teacher with full back pay and benefits.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE OF AWARD: June 25, 2016



ARBITRATOR

C:\Roslyn Turner-Ince (New Jersey Panel) June 25, 2016.docx