

**STATE OF NEW JERSEY DEPARTMENT OF EDUCATION**

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In the Matter of Tenure Hearing  
of Noel Gordon, School Board  
of the City of Englewood, Bergen County.

Agency Docket No. 24-1/18

**Decision on Motion to Dismiss**

Issued: August 13, 2018

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**Arbitrator**  
Joseph Licata, Esq.

**For The Petitioner**  
Dennis McKeever, Esq.  
Sciarrillo, Cornell, Merlino,  
McKeever & Osborne, LLC

**For The Respondent**  
Andrew L. Schwartz, Esq.  
Schwartz Law Group, LLC

**INTRODUCTION**

On January 29, 2018, the Englewood Board of Education (“Board”) filed Tenure Charges consisting of 138 separate paragraphs (46 pages) against Respondent, Noel Gordon, a certificated staff member, holding the position of Director of Guidance. The Tenure Charges allege Unbecoming Conduct, Incompetence, and Other Just Cause. The Tenure Charges stem from irregularities within the High School guidance department that led to a number of students graduating from the Englewood Public High School without having the State mandated number of classroom hours, classes, or number of course credits. Many students were found to have more than one of these deficiencies that affected the student’s course schedule and transcript.

On February 14, 2018, Respondent filed a Notice of Motion to Dismiss the Charges in Lieu of an Answer. On April 23, 2018, the Board filed opposition papers. By letter brief dated May 8, 2018, Respondent replied to the Board’s opposition papers. The undersigned considered

the Tenure Charges, Statement of Evidence and the aforementioned filings of the parties under the applicable Standard of Review.

### **STANDARD OF REVIEW**

N.J.A.C. 6A:3-1.5(g) expressly recognizes that a motion to dismiss may be filed in lieu of an answer: “Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the Office of Administrative Law.” In McQuilken v. N.J. Bd. Of Examiners, 2011 WL 6593432 (N.J. Adm. Dec. 13, 2011), it was observed that dismissal may be granted when petitioner has advanced no cause of action, even assuming that petitioner's factual allegations are accepted as true . . . N.J.A.C. 6A:3-1.10. In J.T., on behalf of Minor Children, J.T., A.T., and B.T. v. Bd. Of Educ. Of the Twp. of South Brunswick, Middlesex County, 2017 WL 1017575 (N.J. Admin. March 8, 2017), the standard for reviewing and evaluating a motion to dismiss was stated as follows: “The judge considers whether all of the evidence together with all legitimate inferences could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with the weight, worth, nature or extent of the evidence.

Finally, the judge must accept all evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can and legitimately be deducted therefrom. . . . Myles Hart v. New Jersey State Board of Examiners, 2014 WL 3708621 (citing New Jersey Practice, Administrative Law and Practice, § 5, 19, at 259-60).”

## SUMMARY OF ARGUMENTS

### Respondent

In this matter, Respondent sets forth a two-fold basis in support of dismissal of the Tenure Charges. First, Respondent contends that the Tenure Charges refer to and rely on numerous evidentiary exhibits that are omitted from its filing and therefore the charges cannot be determined sufficient for arbitrator referral under the tenets of N.J.S.A. 18A:6-11 and 18A: 6-16 and N.J.A.C. 6A:3-5.1(b).

Second, Respondent argues that the Tenure Charges, at most, make out a case of inefficiency under N.J.S.A. 18A:6-17.3. According to the Respondent, since the Board failed to comply with the statutory prerequisites to the filing of Tenure Charges based on inefficiency, it instead filed the charges as incompetency and conduct unbecoming. Such a ruse must be seen for what it is – an end run around the TEACH NJ prerequisites to filing Tenure Charges. Thus, Respondent seeks dismissal on this ground as well.

### The Board

The Board, in addressing Respondent's first argument, notes that Respondent was ultimately provided all of the evidentiary documents that pertain to his charged conduct by way of a combination of the original and resubmitted evidentiary CDs. The Board claims that it fully complied with the intention of N.J.A.C. 6A:3-5.1 and that Respondent failed to show prejudice sufficient enough to warrant dismissal of the Tenure Charges.

Finally, the Board asks the Arbitrator to apply the well-accepted Standard of Review for a motion to dismiss, i.e., the allegations in the complaint must be accepted as true and the evidence must be viewed in the most favorable light against dismissal. With these principles in mind, the Board asserts that the Tenure Charges plainly make out a cause of action for

unbecoming conduct, incompetency and/or other just cause against Respondent within the meaning of N.J.S.A. 18A:6-10. Accordingly, the Board maintains that the Arbitrator must deny the motion.

### **SUMMARY OF DECISION**

By way of summary, pursuant to N.J.S.A. 18A:6-16, I will grant the motion to dismiss, but without prejudice, due to the Board's failure to comply with both the Commissioner's admonition in the prior proceeding and with N.J.A.C. 6A:3-5.1(b). I direct the Board, if it does resubmit charges, to align the Sworn Tenure Charges to the Sworn Statement of Evidence and to fully append (or otherwise include) as part thereof all documents identified within the Statement of Evidence. The Board is, once again, directed to return Respondent Gordon to employment with any and all back pay/benefits due and owing under the terms of his employment.

Finally, given the disposition of this matter, although I need not address Respondent's argument at this juncture concerning the proper cause of action characterization of the allegations contained in the Sworn Tenure Charges, I note, the parties should be guided by the undersigned's recent decisions involving Guidance Counselors Cartwright, Sanchez, and Rose.

### **DECISION**

Initially, in September of 2017, the Board filed consolidated Tenure Charges and a consolidated Statement of Evidence against eight teaching staff members (including Respondent) together with a motion for a protective order because of the existence of personally identifiable student information contained in the Tenure Charges. Consequently, the charges and accompanying Statement of Evidence were temporarily sealed by the Commissioner.<sup>1</sup> However, pursuant to motions to dismiss filed on behalf of all respondents, the Commissioner dismissed

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<sup>1</sup> Although the Director of the Bureau of Controversies and Disputes actually decided the motion, she was plainly acting on behalf of the Commissioner. For this reason, the term "Commissioner", instead of "Director," is used throughout.

the originally filed Tenure Charges without prejudice and ordered respondents reinstated with back pay (due to the failure of the Board to file Tenure Charges and a Statement of Evidence against each affected staff member on an individualized basis).

The rationale underlying the Commissioner's dismissal without prejudice is set forth verbatim as follows:

Severance is also not an option since the charges as written deprive respondents of their fundamental due process rights to a clear statement describing the precise nature of the charges against him or her, and a description of the evidence which allegedly supports the charges. In this matter as it currently stands, there are 750 paragraphs in thirty-three counts and each count realleges and incorporates the previous counts, such that the allegations against respondent Rose also include the allegations against respondent Cartwright; the allegations against respondent Scott also include the allegations against respondents Rose and Cartwright, etc.; the allegations against respondent Armental therefore include the allegations against all seven of the other respondents. There is simply no way this matter may be determined sufficient to require that answers be filed; consequently, it must be dismissed as procedurally defective.<sup>2</sup>

The Commissioner observed that dismissals for procedural reasons are considered dismissals without prejudice. See, In the Matter of the Tenure Hearing of Sabino Valdes, Union City School Board, OAL Docket No EDU 3620-01, confirmed Valdes v. City of Union City Board of Education, Docket No. A-1337-04T32007 N.J. Super. Unpub. LEXIS 622 (App. Div. 1/22/07), certif. den. 191 N.J. 317, 5/15/07. The Commissioner ordered the original Tenure Charges and Statement of Evidence permanently sealed.

In parting, the Commissioner cautioned – “If petitioner chooses to again file Tenure Charges based upon any of the allegations in the within matter – against any or all of the individuals named in the within matter – it must comply with each of the statutory and regulatory requirements for certifying tenure charges” [emphasis supplied]. N.J.A.C. 6A:3-5.1(b)1 states:

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<sup>2</sup> <http://www.state.nj.us/education/legal/commissioner/2017/nov/330-17.pdf>.

“Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement” (emphasis supplied). The underscored language was added by rule adoption dated July 5, 2017, and was effective August 7, 2017 (See, 49 N.J.R. 2516(b)). The stated purpose of the amendment is to “reflect current practice and to ensure fairness and efficiency in the process.”<sup>3</sup>

In this matter, I acknowledge that the Board complied with the Commissioner’s prior ruling by separately filing Sworn Tenure Charges and a Statement of Evidence against each individual, including Respondent. I also acknowledge that the Board followed the requisite timelines regarding the reprocessing of Sworn Tenure Charges and Statement of Evidence against Respondent. However, for the reasons which follow, I find that, contrary to the Commissioner’s prior ruling, as well as N.J.A.C. 6A:3-5.1(b)1, the Board did not comply with each of the statutory and regulatory requirements for certifying Sworn Tenure Charges and, therefore, dismissal (without prejudice) is warranted.

Initially, Respondent claimed that the Board omitted the following evidence exhibits from the Statement of Evidence: 13, 18, 22-25, 96 (yet this exhibit appears on the Board’s CD with such evidence), 98-99, 114, 116-117, 119-120, 129, 219-222, 224, 228-232, 244-246, 256 (yet this exhibit also appears on the Board’s CD with such evidence), 323, 329-339, 360, 406-415, 417-453, and 456. The Respondent asserts that the omitted exhibits are expressly referenced in at least 13 paragraphs of the charges – and, crucially, such paragraphs contain

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<sup>3</sup><https://nj.gov/education/sboe/meetings/2017/July/public/Item%20F%20%20Controversies%20&%20Disputes.pdf>.

numerous sub-paragraphs.

Respondent further complains that the following paragraph references from the charges refer to evidence exhibits that are set forth in the Sworn Statement of Evidence, but omitted from the evidence CD containing the actual evidence: ¶ 67(d) references Exhibits 371, 372, 374 and 375, which are not provided; ¶ 81(d) refers to Exhibit 369, which is not provided; ¶ 93 references Exhibits 370-77, which are not provided; ¶ 94(c) references Exhibits 370-77, which are not provided; ¶ 97(c) refers to Exhibit 378, which is not provided; ¶ 101 refers to Exhibit 379, which is not provided; ¶ 102 refers to Exhibit 380, which is not provided; ¶ 129 references Exhibits 381-89, which are not provided; ¶ 130 refers to Exhibit 390, which is not provided; ¶ 131 refers to Exhibit 391, which is not provided; ¶ 133 references Exhibits 392 and 393, which are not provided; ¶ 134 refers to Exhibit 394, which is not provided; and ¶ 137 references Exhibits 395-405, which are also not provided. Respondent points out that this string of paragraph references comprises almost 16 of the 46 pages that make up the entire set of charges or, stated differently, almost 35% of the charges refer to evidence that the Board failed to supply.

In its opposition brief, the Board addressed both prongs of Respondent's complaint as follows: The original exhibit-numbering scheme remained unchanged from the first filing. In other words, the Statement of Evidence for each individual omits or skips reference to any exhibit that is inapplicable to his or her individual charges. Since the second set of tenure documents are drafted in terms of individual respondents, the exhibits appropriate for each individual are different and no one individual's charges involve each and every exhibit document. This is the reason for omitting a number of exhibits from Respondent's Statement of Evidence, and for not including such exhibits within the second Evidence CD. The Board more specifically elaborates:

1. Exhibit 13 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.
2. Exhibit 18 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.
3. Exhibits 22-25 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
4. Exhibit 96 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.
5. Exhibits 98-99 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
6. Exhibit 114 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.
7. Exhibits 116-117 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
8. Exhibits 119-120 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
9. Exhibit 129 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.
10. Exhibits 219-222 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
11. Exhibit 224 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.
12. Exhibits 228-232 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
13. Exhibit 244 was inadvertently not provided to Respondent on the second compact disc of evidence and does not appear in the Statement of Evidence.
14. Exhibits 245-246 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
15. Exhibit 256 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.



16. Exhibit 323 was inadvertently not provided to Respondent on the second compact disc of evidence and does not appear in the Statement of Evidence.
17. Exhibits 329-339 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
18. Exhibit 360 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.
19. Exhibits 369-405 were inadvertently not provided to Respondent on the second compact disc of evidence. These documents are listed in the Statement of Evidence.
20. Exhibits 406-415 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
21. Exhibits 417-453 are not cited in the tenure documents and as such, they are not required to be provided and do not appear in the Statement of Evidence.
22. Exhibit 456 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.

Finally, the Board asserts that dismissal is not warranted because no prejudice resulted from the manner in which it perfected its second filing.

However, in its reply brief, Respondent objects to the suggestion implicit in the Board's position, i.e., that Respondent could simply review both evidence CDs in order to prepare a full defense to the Tenure Charges. Respondent also contends that a showing of prejudice is not required because the Board violated the mandatory language of N.J.A.C. 6A:3-5.1: Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement" (emphasis supplied).

In reviewing the parties' competing positions, I note the following material deficiencies with respect to the Board's filing:

1. **Exhibit 13 is not cited in the tenure documents and as such, it is not required to be provided and does not appear in the Statement of Evidence.**

Exhibit 13, although not referenced in the Sworn Statement of Evidence, is referenced in the set of documents the Board provided on its evidentiary CD. However, the document that contains the header “Ex 13” only references the “PST Disk”, which the Board fails to provide. See, Charges at ¶ 26 and ¶ 42 (noting that “PST” stands for “Pitt Bull Secure Technologies” and that the Final Report was forwarded to Norah Peck, the Bergen County Interim Executive Superintendent, on Tuesday February 21, 2017). Exhibit 12 clarifies that “Ex 13” and its reference to the “PST Disk” should be the Final Report by Pitt Bull Secure Technologies, which the Board fails to supply. However, the Final PST Report that is referenced in Exhibit 12 and listed on the document with the header “Ex 13” is also referenced in ¶ 45 of the charges without any reference to an exhibit. This Final PST Report is also explicitly referenced at ¶¶ 104 and 126 of the charges but with incorrect references to Exhibit 10, when Exhibit 10 is expressly a “preliminary” report.

Here, I agree with Respondent that the Board’s failure to provide the Final PST Report is significant. See, Charges at ¶ 50 (“The findings of a significant deviation from professional standards by Gordon, bolstered by the information provided by the audit, led to an internal investigation, which uncovered that Gordon engaged in a long-standing pattern and practice that is indicative of incompetence, unbecoming conduct, dereliction of duty and other just cause requiring his termination...”). Despite the Board’s claim that it never intended to supply Exhibit 13, the numerous references to the “final” report in the charges make clear that it was required to.

Having said this, however, standing alone, an argument could be entertained that Respondent has been well aware of the Board’s reliance on the Final PST Report and could have (if it did not already) obtain a copy of same before certification to the Commissioner.

Ultimately, the Board's failure to attach or include a copy of the final PST Report to the Sworn Statement of Evidence must be deemed but one of several deficits which collectively amount to more than just a *de minimis* violation of N.J.A.C. 6A:3-5.1(b)1.

**13. Exhibit 244 was inadvertently not provided to Respondent on the second compact disc of evidence and does not appear in the Statement of Evidence.**

Exhibit 244 is referenced in ¶ 67c of the Charges. The Exhibit is one set of student records out of 20 which are related to allegations that guidance counselors under Respondent's direction certified or cause to be certified to the NJDOE that 20 students were eligible for graduation, even though they had not earned the necessary 120 credits to meet the State's graduation requirements. Since Exhibit 244 is referenced in the Charges, I find, the Statement of Evidence should have included both an identifier and a copy of the student record referred to.

**16. Exhibit 323 was inadvertently not provided to Respondent on the second compact disc of evidence and does not appear in the Statement of Evidence.**

Exhibit 323 is referenced in ¶ 70a of the charges. The Exhibit is one set of student records out of 59 which are related to allegations that guidance counselors under Respondent's direction allowed 59 students to graduate despite their failure to achieve 130 credits, as required by Board Policy 5460.

**19. Exhibits 369-405 were inadvertently not provided to Respondent on the second compact disc of evidence. These documents are listed in the Statement of Evidence.**

Exhibits 369-405 refer to a host of similar allegations against Respondent and refer to a host of similar student records as well as other documents. The failure to provide 36 exhibits to Respondent upon re-filing in a *de novo* proceeding, is, in my opinion, what tips the scale in favor of dismissal, absent a cognizable defense which, as discussed, is not forthcoming.

As to items 16. and 19., above, which reflect an absence of 37 exhibits from the Statement of Evidence, I reject the Board's referral to the previously filed evidentiary CD. In pertinent part, the original evidence CD was provided to Respondent during the local tenure proceeding and then filed with the Commissioner. However, the original evidence CD, together with all other documents filed in the prior proceeding, were sealed and the corresponding Tenure Charges were dismissed. In effect, the parties started anew upon the separate local processing of Tenure Charges against each individual respondent. As such, the record subject to review in the instant proceeding includes only the Certification of Determination, the Sworn Tenure Charges and Sworn Statement of Evidence filed with the Commissioner on January 29, 2018. And, since N.J.A.C. 6A:3-5.1(b) requires a Statement of Evidence to include all documents identified therein, the failure to do so in a material sense, i.e., Exhibits 323 and 369-405, cannot be countenanced.

N.J.A.C. 6A:3-5.1(b) places the onus on a board of education to line up all of its ducks before it commences the local processing of charges. The sworn tenure charges must align with the sworn statement of evidence and the sworn statement of evidence must include all documents identified therein. Conversely, the affected tenured staff member bears no burden to aide a board of education perfect the charges under the applicable statute and regulation. For example, in this case, I find that Respondent has no obligation to piece together a Statement of Evidence by pairing parts from the sealed or defunct filing with parts from the resubmitted pleadings. The Board's omissions in this case are not *de minimis* and they run contrary to both the plain language of N.J.A.C. 6A:3-5.1(b) and the rationale underlying the regulation - to make the filing process more "efficient" and "fair." And, since it may be implied from the stated purpose of the amended regulation that a significant failure to comply is inherently inefficient and unfair,

I do not interpret the regulation to require a respondent to demonstrate that it could not make up for a board's shortcomings by obtaining documents from other sources and/or from the board after the matter is processed to the Commissioner or to an arbitrator.

For the reasons stated above, I find that the Board's second filing complies with neither N.J.A.C. 6A:3-5.1(b)1 nor the Commissioner's prior directive: "If petitioner chooses to again file tenure charges based upon any of the allegations in the within matter – against any or all of the individuals named in the within matter – it must comply with each of the statutory and regulatory requirements for certifying tenure charges" [emphasis supplied]. As such, the remaining question pertains to remedial relief.

Respondent understandably seeks dismissal with prejudice. However, similar to the prior proceeding, dismissal based on a procedural error is usually without prejudice to a re-filing. See, In the Matter of the Tenure Hearing of Sabino Valdes, Union City School Board, OAL Docket No EDU 3620-01, confirmed Valdes v. City of Union City Board of Education, Docket No. A-1337-04T32007 N.J. Super. Unpub. LEXIS 622 (App. Div. 1/22/07), certif. den. 191 N.J. 317, 5/15/07. Accordingly, I direct the Board, if it does resubmit charges, to align the Sworn Tenure Charges to the Sworn Statement of Evidence and attach or otherwise include the complete record of exhibits as part of the Sworn Statement of Evidence. The Board is, once again, directed to return Respondent Gordon to employment with any and all back pay/benefits due and owing under the terms of his employment.

Finally, given the disposition of this matter, I need not address Respondent's argument alleging that the Board essentially alleges an inefficiency charge masked under charges of unbecoming conduct, incompetency and other just cause. Nonetheless, the parties herein should take notice of the undersigned's recent decisions involving the Board and Guidance Counselors

Cartwright, Sanchez, and Rose. Although I denied the motion to dismiss in each of those matters, I opined: “[a]t the end of the day, good faith and/or unwitting violations will either be dismissed or be given comparatively less weight than any sustained charge involving willful, knowing and/or fraudulent conduct in an overall determination concerning the final disposition of this matter”. These matters are now proceeding to separate hearings to determine whether the Board can demonstrate that the allegations levied against each guidance counselor, if proven, show knowing, purposeful, or intentional actions and/or inactions having a detrimental affect on students and/or the district as a whole. The parties are guided accordingly in the event that the Board does resubmit Tenure Charges against Respondent.

**AWARD**

Due to the Board's material noncompliance with N.J.A.C. 6A:3-5.1(b)1 and the Commissioner's prior admonition, the instant motion to dismiss filed by Respondent Gordon is granted without prejudice to a subsequent re-filing by the Board, provided that such re-filing comports with each and every statutory and regulatory requirement.

Respectfully submitted

  
Joseph Licata

Dated: August 13, 2018

State of New Jersey        )  
  ):SS  
County of Bergen            )

On the 13<sup>th</sup> day of August, 2018, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

  
Jacqueline M. Licata

JACQUELINE M. LICATA  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires 11/8/2020

