IN THE MATTER OF THE TENURE CHARGES AGAINST

PETER IAPPELLI

DOCKET NO. 120-5/18

BY

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

CLOSTER PUBLIC SCHOOL DISTRICT
BERGEN COUNTY, NEW JERSEY

INTERIM AWARD RE MOTION TO DISMISS

FOR THE DISTRICT:	STEPHEN R. FOGARTY, ESQ. FOGARTY & HARA 21-00 ROUTE 206 NORTH FAIR LAWN, NEW JERSEY 07410
FOR MR. IAPPELLI:	JEFFREY R. MERLINO, ESQ. SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC 239 ST. PAUL STREET WESTFIELD, NEW JERSEY 07090
HEARING DATE:	JULY 11, 2018 (ON MOTION TO DISMISS)

I. Procedural Background

The Closter Public School District/Board of Education, Bergen County ("District," "Board," or "Employer") initiated, and the State District Superintendent certified to the Commissioner of Education, tenure charges seeking the termination of employment of Peter Iappelli ("Respondent" or "Mr. Iappelli"), who is tenured in the District as the School Business Administrator/Board Secretary. The Commissioner of Education referred the charges to this Arbitrator pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109. A preliminary conference was conducted with counsel. As Respondent had submitted a Motion to Dismiss in lieu of an answer to the charges, and arrangements were made for the District to respond to the Motion and for Respondent to reply. By agreement of the parties, an initial

hearing was convened on July 11, 2018, for the purpose of addressing the Respondent's Motion to Dismiss. At hearing, each party was given ample opportunity to address and further develop the points presented in their detailed and comprehensive briefs.

The Board has asserted five charges against Respondent, who has been employed by the Board since 2007 and achieved tenure in 2010. The charges relate to a variety of instances, some of which are asserted to have occurred as long ago as, potentially, 2011, and they allege that Respondent engaged in "unbecoming conduct" and insubordination. The Respondent seeks to have all charges dismissed on the following grounds: that the charges are vague, stale, and barred by laches and estoppel; that the charges are procedurally defective in referencing a document that is omitted from the charge attachments; that the Board's certificate of determination failed to comply with the substantive statutory requirements in terms of content; and that Respondent had not been provided with a "*Rice* notice" relating to the Board meeting at which charges were considered. The Arbitrator addresses these arguments, in turn, below.

II. Omission of Suspension Letter from Attachments to Charges

The Board notified Respondent via letter dated October 4, 2017, that he was suspended from employment pending investigation and resolution of charges against him. Respondent does not suggest that he did not receive the letter, and he has acknowledged that he was suspended as of that date. Respondent argues, however, that the Board failed to comply with statutory requirements in that, when it issued the charges to him, it did not append to the charges a copy of the October 4th suspension letter. The Respondent notes that the charges refer to the letter and, although they indicate that it is attached as "Exhibit G," the actual Exhibit G is a different document and the October 4th letter is nowhere to be found in the exhibits supporting the charges. Citing N.J.S.A. 18A:6-11, Respondent argues that the Board was required to provide him with the complete evidence upon which it relied and, that, by failing to include the October 4th letter with the charges, the Board denied him the opportunity to set forth a complete defense. Respondent, however, does not address how the omission of this letter could have impaired the preparation of his defense.

Respondent also cites and N.J.A.C. 6A:3-5.1, which requires, in part, that "all documents referenced" in the charges are to be attached. Noting that the charges reference the October 4th suspension notice, Respondent argues that there is no exception for inadvertent or accidental omission. In this regard, Respondent cites *Marie Ebert and the State-Operated School District of the City of Newark*, Agency Docket No. 267-9/14 (January 30, 2015), as support for his theory that the omission requires dismissal.

The Arbitrator finds these arguments unpersuasive, as it is undisputed that Respondent received the letter at issue and was aware of the suspension and the general basis for it. No logical mind can deduce that the omission of that letter from the charges and documentation, which are quite detailed, could have limited in any way Respondent's ability to prepare his response and defense. In citing the *City of Newark School District,* Respondent suggests that the obligation to include all documents is an absolute requirement necessitating dismissal of charges even if a ministerial or clerical item is omitted. *City of Newark School District*, however, involved a matter in which a school district had produced no evidence of any kind until one week prior to the hearing. This led the arbitrator in that case to conclude that, as a board of education was "precluded from presenting any additional evidence at hearing" beyond what it supplied in advance or what was necessary for impeachment, there was no evidence that the board could supply at hearing. Therefore, the charges were dismissed. This is in contrast to the instant case, in which a wealth of documentation and information regarding the Board's case has been supplied with the charges.

The Arbitrator thus must reject Respondent's reading of the statute and regulations and Respondent's unsupported assertion that the omission from attachments of a letter, which he had timely received, in some way impaired his preparation. The Motion to Dismiss in this regard therefore is denied.

III. Adequacy of the Certificate of Determination

Respondent also asserts that the charges must be dismissed for failure to comply with the content requirements for the certificate of determination. N.J.S.A. 18A:6-11 requires the board to

forward charges to the commissioner for a hearing, "together with a certificate of such determination," and N.J.A.C. 6A:3-5.2 then specifies that, within the certification will be included several points, one of which is the "date, place, and time of the meeting" at which the probable-cause determination was made. Respondent acknowledges that the Board provided a certificate of determination, but Respondent alleges that the certificate was insufficient because it did not specify the place and time of the meeting at which probable cause was found. This, argues the Respondent, would lead a reasonable person to conclude that the Board may not have met or that the vote taken may not have been valid. This specific requirement, argues Respondent, is not onerous or burdensome and thus cannot be cast aside. Beyond arguing that the time has elapsed for him to challenge the action in court under the Open Public Meetings Law, N.J.S.A. 10:4-1 to 21, Respondent does not cite any way in which preparation on the merits or other pursuit of other rights have been or could be affected by that omission.

By contrast, the Board has cited cases in which a failure to comply with the certification requirement has led to dismissal, and the Board notes that each involved a failing that raised harm to the tenured employee. The case law shows that dismissal results not when a minor ministerial omission has occurred but, rather, when a board has failed to provide the required specificity of allegations or the opportunity for the tenured employee to review same. *See, e.g., The Tenure Hearing of Harrell*, 1985 S.L.D. 946 (Initial Decision August 30, 1985), *aff'd as modified*, 1985 S.L.D. 952 (Comm'r January 6, 1986). Further, the certification clearly stated the date of the meeting and the outcome. In addition, the Board has noted that, when the omission of the time and place in the certification was brought to its attention, the actual formal public notice – which included the time and place – immediately was supplied to Respondent. The Board thus argues, based also upon applicable New Jersey law regarding substantial compliance, that it has substantially complied with the requirements articulated in the regulations. In this regard, the Board also has explained that the omission was inadvertent, and a far more minor omission than was the case in the instances in which substantial compliance has been found by New Jersey courts. See, e.g., *Corcoran v. St. Peter's Medical Center*, 339 N.J. Super. 337 (App. Div. 2001), and *Nasimento v. King,* 381 N.J. Super. 593 (App. Div. 2005).

Based upon the foregoing analysis, the Arbitrator finds that the omission by the Board of the time and location at which the meeting was held does not require dismissal. The oversight was inadvertent, full public notice had been provided, all other required meeting information was supplied in the certification, and the minor omission was immediately remedied by the Board. Accordingly, the Respondent's motion for dismissal on this basis is denied.

IV. *Rice* Notice

The Respondent also argues that the charges must be dismissed because the Board did not provide him with a "*Rice* notice," as addressed in *Rice v. Union City Reg'l High School Board of Education*, 155 N.J. Super. 64 (App. Div. 1977). *Rice*, and the notice requirement that resulted from it, relates to the personnel exception to the Open Public Meeting Law, NJSA 10:4-1 to 21. The Open Meeting Law provides that a public entity may exclude the public from portions of meetings involving employment, appointment, termination of employment, discipline, etc. of public employees "unless all the employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting."

The Board acknowledges that Respondent was not given a *Rice* notice for the March or the May meetings, but the Board asserts that this notice requirement did not apply to the meetings relating to Respondent, which occurred under the specific statutory system pertaining to tenured public school employees. The Board notes that N.J.S.A. 18A:6-11 expressly prohibits boards from considering tenure charges in public meetings, stating that the board's consideration and action "as to any charge shall not take place at a public meeting." That specific provision, and the need to harmonize it with the Open Public Meeting Law, was considered in *Cirangle v. Maywood Board of Education*, 164 N.J. Super. 595 (1979). The court in *Cirangel* found that the specific dictates of N.J.S.A. 18A:6-11prevailed over the provisions of the Open Public Meetings Law that allow for a public meeting when requested by those who could be adversely affected. Through an extensive analysis of the legislative intent in this regard, the court cited the legislature's specific concerns regarding the disruptive effect on a community when local school boards engage in public consideration of such matters. The court held, "The Legislature has manifested its intention to exclude the public even in the face of a demand for an open meeting

by the affected tenured employee." That interpretation of the law has not changed, and lower courts continue to follow *Cirangle.* See *Karp v. Board of Education of Barnegat*, 2016 WL 2593711 (N.J. Adm.). See also *RDA v. Hunterdon Central Regional High School District Board of Education,* No. A-5011-16T, 2018 WL 3189493 (NJ Super. Ct. App. Div., June 29, 2018).

Respondent, however, asserts that the recent decision in *Kean Federation of Teachers v. Morell*, 448 N.J. Super. 520 (App. Div. 2017), *rev'd on other grounds,* __ N.J.___ (June 21, 2018), states a clear requirement that *Rice* notices must be issued to a public employee in any instance in which termination of employment is placed on the agenda of a public body. The Board responds that *Kean* dealt with a non-tenure employee, but Respondent contends that "tenure charges" seeking dismissal form a term of art that is the equivalent of termination of employment. Careful reading of *Kean*, however, discloses that, while the court in that case was considering the same statutory provisions of the Open Public Meeting Act that were addressed in *Cirangle*, the specifically controlling language of N.J.S.A. 18A:6-11was not at issue, as the employee in *Kean* was not protected by the tenure statute. Accordingly, Kean cannot be read as having expanded the *Rice*-notice obligation in an way that makes it applicable here.

In light of the clear dictates of the statute and clear prevailing interpretation by the courts, the Arbitrator finds that there was no requirement for the Board to issue to Respondent a *Rice* notice. Thus, the Respondent's argument for dismissal on this basis is rejected.

V. Specificity and Timeliness of the Allegations Stated in Charges 1, 2, and 3

Respondent also asserts that certain of the charges relate to allegations of incidents that occurred as long as ten years ago and that others cite no particular time. Respondent also notes that no warning or discipline occurred that would have alerted Respondent to the alleged behavior so that he would understand that his conduct was at issue, that disciplinary action could result, and that he needed to gather or preserve evidence. Thus, says Respondent, these charges are vague and stale and must be dismissed, for to require response to them would be fundamentally unfair. Respondent also argues that the principle of laches bars these issues and that the Board should be estopped from pursuing these aspects of the charges.

Assessment of this argument requires consideration of each of the charges, as these contentions are charge-specific. Respondent does not raise these issues as to the allegations that turn on the events alleged to have occurred in 2017. In large part, Charge 1 consists of allegations regarding conduct at and related to a flag football game on September 30, 2017. Charge 4 pertains entirely to alleged conduct at a PEOSH meeting and related activities on or about September 8, 2017. Charge 5 relates entirely to allegations that on specific dates in late 2017 and early 2018 Respondent was insubordinate in returning to District property after having been placed on suspension. Accordingly, Charges 4 and 5 are not addressed here, nor are the elements of Charge 1 that are alleged to have occurred in 2017.

The analysis thus turns first to the aspects of Charge 1 that are alleged to be vague, stale, and barred by laches or estoppel. These matters relate to an episode alleged to have occurred on or about March 15, 2013, initially at an off-campus, District sponsored event. The Charge in this regard is highly specific regarding the alleged action and the events that followed, including an arrest for driving while intoxicated and coverage by local media. The Arbitrator finds that the charges are sufficiently specific as to date and alleged occurrence. The only question is whether these matters have grown stale, as they occurred in 2013, or whether a theory of laches or estoppel applies, given that the District took no action at the time to warn Respondent or to take disciplinary action.

Respondent asserts that the passage of years since this incident has made a proper defense unavailable, due to the fading of recollections, witnesses who may no longer be available, and the inability now to gather other evidence as part of his case. He also notes that he believed that the matter had been put to rest, and thus he was not on notice that such instances could be used to support a disciplinary action years later. The Board responds that Respondent obviously has not been hindered in developing his defense, as he prepared and submitted to the Board a detailed written response to the charges. The Respondent argues, persuasively, that he should not be penalized for his effort cobble together recollections in an effort to defend himself. Indeed, Respondent should not be faced with the choice of remaining silent or losing his option to argue that these elements are stale. Nonetheless, the Arbitrator finds that, as the allegations are

sufficiently detailed and much of what transpired appears to have led to documentation and official action that the Board's reliance on this action as indication of a pattern of problematic conduct is not barred. Further, while the failure of the Board to take disciplinary or other formal action at the time of the actions may be a point upon which Respondent bases an argument that little weight should be accorded to these instances, or that the passage of time mitigates against any conclusion of a pattern of behavior, or that discipline now would be fundamentally unfair, the Arbitrator finds that those are contentions that will turn on the record of evidence in its entirety and that there is no basis upon which these aspects of Charge 1 should be dismissed.

Charge 2 relates in part to Respondent's actions in and relating to an end-of-school-year meeting in 2014 regarding staffing for the next school year. The allegations relate to questions of compliance with statutory or regulatory mandates and to inappropriate discussion of students in the special education program. The Arbitrator finds that, as the allegations set forth in this aspect of the charges are sufficiently specific and, although they date back to 2014, are potentially part of an ongoing pattern of action, proceeding with these allegations is appropriate. The Arbitrator notes, however, that the allegation stated in Paragraph 14 is lacking in sufficient specificity as to the date of occurrence or the nature of the alleged failing to enable Respondent to formulate an informed response or defense. Accordingly, Paragraph 14 is dismissed as a basis for Charge 2. The remaining allegations of Charge 2, however, will proceed.

Charge 3 contains a collection of allegations that are asserted to have constituted "repeated instances of verbal abuse over the course of his employment. . . ." One set of allegations relates to conduct "in or around Summer 2008," during which it is alleged that Respondent engaged in inappropriate and volatile communication. Other interactions are noted but without specific references to time, other than an indication that they occurred frequently, and are based in large part upon the reactions of those present and a resulting sense of "walk[ing] on eggshells" with Respondent. These generalized assertions, and those relating to interactions that took place at an unidentified time in 2008, must be regarded, as Respondent has argued, as stale and vague. The Arbitrator finds that it is not reasonable to expect Respondent to locate and prepare evidence that relates to interactions that occurred a decade ago and were not called to his attention until these charges were issued.

In this regard, Respondent's argument regarding discipline is well taken, not in the sense of progressive discipline, but that the absence of any action, comment, or intervention by the District indicates that Respondent was not put on notice that his conduct was problematic so that he either could make an effort to adjust or could have, at a minimum, focused and reflected on events such that he might contribute substantively to the discussion that now arises in the context of termination. Cf. *In the Matter of Tenure Hearing of Cowan*, 224 N.J. Super. 737 (App. Div. 1988). Accordingly, the allegations asserted in Paragraphs 6 through 16 of Charge 3 are dismissed. Allegations stated in Paragraphs 17 through 22 relate to an interaction that occurred "in the Summer of 2016," but they are stated with sufficient specificity that they remain a part of Charge 3.

Additional allegations in Charge 3 do not identify a specific date, but this is not fatal in all instances. N.J.A.C. 6A:3-5.1 requires that the charges "shall be stated with specificity as to the action or behavior underlying the charges. . . ." The allegations in Paragraphs 23 through 29 relate to a single, specific interaction that is said to have occurred by telephone "approximately five years ago" regarding Respondent having borrowed an item from a classroom. The interaction is alleged to have resulted in Respondent raising the issue with the Superintendent, which Respondent acknowledges. Although the charge lacks a precise date, the highly specific nature of the interaction and the limited participants (Respondent, the attesting employee, and the Superintendent) make it a matter that has been posed with sufficient specificity to be pursued.

By contrast, the allegations in Paragraphs 30 through 34 relate to an interaction that is alleged to have occurred "approximately five to seven years ago" involving a suggestion that had been made to Respondent that communication be conveyed to staff regarding deletion of emails. The Arbitrator finds that the two-year window of time in which this exchange may have occurred, five or more years ago, lacks the specificity necessary to put Respondent on sufficient notice of the allegation against him and to enable him to develop a defense. Accordingly, Paragraphs 30 through 34 are dismissed from Charge 3.

VI. Summary

For the reasons stated above and upon full and careful consideration of all arguments and submissions presented by the parties, the Arbitrator dismisses the allegations set forth in Paragraph 14 of Charge 2, Paragraph 14, and Charge 3, Paragraphs 6 through 16 and 30 through 34. The Motion to Dismiss is denied as to all other Charges.

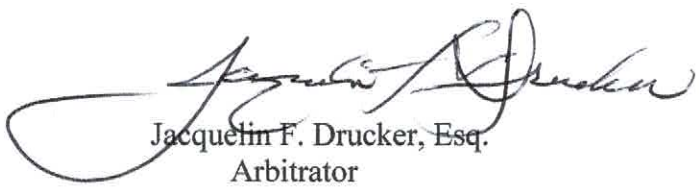
This matter accordingly will proceed to a hearing on the merits. In accordance with a schedule to which counsel agreed, in the event the Motion to Dismiss were denied, Respondent's answer to the Charges will be due on or before August 16, 2018. No later than August 31, 2018, Respondent will produce to the Board all evidence upon which he intends to rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony no later than August 31, 2018.

A final pre-hearing conference will be held on September 6, 2018, at 4:30 p.m. ET. The Arbitrator's office will circulate dial-in instructions prior to that time. The hearings in this matter, begun on July 11, 2018, will resume as follows:

September 13, 2018, at 1:30 p.m. ET
September 18, 2018, at 10:00 a.m. ET
September 24, 2018, at 10:00 a.m. ET

Counsel will confer to identify the agreed location(s) for the hearings and are asked to notify the Arbitrator no later than August 10, 2018, so that a formal Notice of Hearing may be issued.

Dated: August 4, 2018



Jacquelin F. Drucker, Esq.
Arbitrator

State of New York)
) SS:
County of New York)

On this 4th day of August 2018, before me personally came and appeared Jacquelin F. Drucker, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that she executed same.

Notary Public

JOHN H. DRUCKER
Notary Public, State of New York
No. 02DR6018984
Qualified in New York County
Commission Expires February 1, 20