STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES
TENURE HEARING

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In the Matter of the Arbitration Between:

ATLANTIC CITY BOARD OF EDUCATION

PETITIONER

AND

JOHN TOLAND

RESPONDENT

OPINION

AND

AWARD

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

DOCKET DOE 167-8/20

ARBITRATOR: GERARD G. RESTAINO, ASSIGNED BY THE NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH C.18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

TRACY RILEY, ESQ. — COUNSEL FOR ATLANTIC CITY BOARD OF EDUCATION

BARRY CALDWELL — SUPERINTENDENT OF SCHOOLS

FOR THE RESPONDENT

ARNOLD MELLK, ESQ. — COUNSEL FOR RESPONDENT

JOHN TOLAND — RESPONDENT

COURT REPORTERS:

THERESA MASTROIANNI – MARCH 22, APRIL 23, 2021

DAWN MARIE TURPIN – AUGUST 17, 2021

PROCEDURAL BACKGROUND

This proceeding takes place pursuant to P.L. 2012, Chapter 26 of the laws of the State of New Jersey. The Respondent, John Toland, hereinafter referred to as Mr. Toland/Respondent, is a tenured health and physical education teaching staff member in the School District of the City Atlantic City, Atlantic County. The Petitioner School District is hereinafter referred to as the Board/District. The Respondent is assigned has a Certificate of Completion for Lifeguarding/First Aid/CPR/AED.

On January 14, 2019, an incident occurred in the pool at the High School involving a special needs student. The Respondent was the assigned teacher of record. A special needs student K.S. was in the pool and lost consciousness requiring cardiopulmonary resuscitation and the use of a defibrillator to regain a pulse. K.S. was transported to a local hospital for treatment. The Respondent acknowledges that a camera is located within the pool area of the High School.

On January 14, 2019, the respondent submitted an incident report concerning the issue that had occurred with K.S.

On July 3, 2020, Tracy Riley, Esq. on behalf of the Petitioner, filed with the Commissioner of Education six (6) tenure charges with various specifications against the Respondent. Included with the Tenure Charges was a Certificate of Determination prepared by Superintendent, Barry Caldwell. On August 19, 2020, Arnold Mellk, Esq. on behalf of the Respondent submitted answers to the Tenure Charges.

Incorporated in the various documents submitted to the Commissioner's Office by the Petitioner was a USB drive (See exhibit 8) which is a video of the January 14,

2019 pool incident. The video is identified as Exhibit 13H, and the Respondent has challenged the admissibility of the video.

On August 24, 2020, in accordance with N.J.S.A. 18A:6-16, the Commissioner of Education (Controversies and Disputes) referred the charges to the undersigned.

On September 2, 2020, a conference call with counselors Riley, Mellk and the arbitrator was held to discuss scheduling for the instant matter. It was agreed that hearings were to be scheduled for November 30, December 1-4, 2020

On November 18, 2020, in conformance with N.J.S.A. 18A:6-17.1(b)(3), Mr. Toland submitted his statement of evidence to the District. That statute states:

> *"Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony to the employing board or its representative. The employee shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses."*

On November 23, 2020, the Respondent, John Toland, moved *in limine* to *"prohibit the Petitioner, Atlantic City Board of Education, from proffering the testimony of any witness not properly identified pursuant to N.J.S.A. 18A:6-17.1(b)(3). Mr. Toland further moves to prohibit the consideration of admission into evidence of any documents or other evidence likewise not identified and provided to Mr. Toland in conformance with that statute."*

On November 25, 2020, the Petitioner (District) submitted its arguments to set aside Mr. Toland's Motion in Limine position.

POSITIONS OF THE PARTIES

Motion in Limine

For the Petitioner

The Petitioner strongly argues that, based upon the severity of the charges against the Respondent, the Motion in Limine should be denied. Moreover, on May 28, 2020, *"Mr. Toland received a copy of the filed Tenure Charges by regular and certified mail. Contained within those tenure charges is specific allegations and evidence that the District would be relying upon to present those charges to the Board. Those charges went unanswered."*

Furthermore, on "*July 3, 2020, a Certification and Statement of Charges and Specifications, certificate of determination by Supt. Barry Caldwell, along with evidence the District would rely upon to present those charges were served on John Toland, the Respondent. Those charges and specifications were answered by Mr. Toland."*

The Petitioner contends that the *"intent of the legislation listed above to provide the opposing party with a list of witnesses, is to provide a reasonable opportunity and notice of the identity of the witnesses and the nature of their knowledge as it relates to a particular matter.* The Petitioner asserts that *a party may call another party to testify as a party. The Petitioner intends to call the Respondent to testify."* In support of this position, the Petitioner argues they" can *call the opposing party to testify as parties are fully aware of the charges and evidence supporting the case, all communicated via the notice of tenure charges as indicated above. Included within the evidence supplied by the Board is a written statement prepared by Mr. Toland. The*

Respondent has been aware of the contents of the allegations and supporting evidence for over six months."

For the above stated reasons, the Board asks that the Motion in Limine be denied.

For the Respondent

The Respondent argues that N.J.S.A. 18A:6-17.1(b)(3), is controlling and states: the Board *"shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment*." Mr. Toland strenuously argues that *"other than the tenure charges and documents submitted",* the Petitioner did not submit a list of witnesses and a summary of their testimony as the statue requires.

Additionally, the statue in question *"is strictly construed, and self-executing and absent contrary legislative intent, statutes are to be given their plain meaning."*

This case *"was referred to an arbitrator on August 24, 2020, therefore, the Board was notified and aware that this was the referral date. The term referral in* N.J.S.A. *18A:6-17.1(b)(3) does not include a hard date, i.e., a specific number of days after referral of the case to arbitration for the Board to furnish its witness list. The statute does, however, contain a hard date-10 days - with respect to the employer's providing his witness list.* The Respondent further argues that *"it would be an absurd interpretation of N.J.S.A. 18A:6-17.1(b)(3) to allow the employer to identify new witnesses after the employee is statutorily foreclosed from doing so."*

The Respondent contends that N.J.S.A. *18A:6-17.1(b)(3) is a* statute that requires mandatory adherence to its clean language. It is not permissive. *"If the Board had wished to provide the required witness lists and summaries of testimony, it had every opportunity to do so. The allegations in this case date back to January 2019:*

they are nearly two years old." Moreover, Mr. Toland has only the limited window between referral, and hearing, to set forth his defenses. *"The statute cannot and does not permit a board of education to shrink that window by failing to adhere to the strict timelines of*

N.J.S.A. 18A:6-17.1(b)(3. To do so would eviscerate the procedure which has been implemented to protect the Due Process rights of teaching staff members defending tenure charges."

For the foregoing reasons, the Respondent, John Toland, asks that his Motion in Limine be granted.

Decision on Motion in Limine

On November 27, 2020, I rendered my decision on the Respondent's Motion in Limine as set forth below:

> *"I reviewed all 6 charges and accompanying specifications submitted by the Petitioner. Those charges and specifications do show what the Petitioner will use for its case in chief. The only named Board employees found on the Charges, Specifications and Certificate of Determination are Barry Caldwell, Superintendent of Schools, Angela Brown, Board Secretary, Sherry Yahn, Assistant Superintendent, and Diane Saunders, Director of Human Resources. I can infer that Superintendent Caldwell, because of his intimate knowledge of the Charges and Specifications, may very well testify*
>
> *What is missing from the Petitioner's exhibits is a list of witnesses with a complete summary of their testimony. Contrast that omission with the Respondent's Statement of Evidence dated November 18, 2020. The Respondent complied with all requirements of N.J.S.A. 18A:6-17.1(b)(3).*
>
> *That omission was addressed in DOE 267-9/14, Marie Ebert vs. the State-Operated School District, City of Newark, by arbitrator Tia Schneider Denenberg. In that case, based upon the specific language of the above cited statute, the Respondent submitted a motion to have the tenure charges dismissed.*

Arbitrator Denenberg determined that "the Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to meet the timeliness mandate in N.J.S.A. 18A:6-17.1(b)(3)." The arbitrator determined that the "dismissal is without prejudice to the District's right to file charges again."

The Petitioner's response to the Motion in Limine falls short of full compliance with N.J.S.A. 18A:6-17.1(b)(3) due to the lack of a witness list with a complete summary of their testimony. The language of the statute is clear and unambiguous, and not subject to varied interpretations that the Petitioner would have me accept.

Hearings in the matter at bar are scheduled to start on Monday, November 30, 2020, and continue to December 4, 2020. The Respondent has not made a motion to dismiss as was done in the Ebert case, supra.

The purpose of N.J.S.A. 18A:6-17.1(b)(3) is to guarantee that a tenure teacher is guaranteed due process when tenure charges are filed against that individual. Part of due process is compliance with a specified time frame. In this matter, the Petitioner was required to submit its witness list and summary of their testimony no later than November 20, 2002. They failed to do so and I have no recourse other than to adhere to the language of the statue. I do not have the authority to state that the Petitioner complied with N.J.S.A. 18A:6-17.1(b)(3) in spirit.

The specifics of the Legislative intent do not grant me leave to ignore the requirements of the statute. The language in question is specific not general and must be given its full force and weight.

The Respondent's Motion in Limine to bar the testimony of previously undisclosed witnesses is granted."

Additional arguments presented by the Petitioner and Respondent will be addressed below.

A court reporter was present at each hearing and I received a copy of the transcripts. Reference to the transcripts will be as follows: March 22, 2021, TR 1, April 23, 2021, TR 2, August 17, 2021, TR 3

Motion To Dismiss The Tenure Charges With Prejudice.

For the Petitioner

The Petitioner continues to assert that Exhibit 13H, the video is admissible for 2 reasons. Mr. Toland's statement (see Exhibit 13e) is in evidence, and that Superintendent Caldwell can testify about the video because it was presented to him as part of the tenure charges. More importantly, he is a *"non-voting member of the Board and as the person who put forward these charges, that reviewed the evidence to put forth these charges, he has the ability to testify what happened in the pool area based upon his review of all the evidence."*[1] Additionally, "i*t is not the law that he had to physically be there to testify about it. It's not the law."*[2]

The District strenuously argues that *"they have the right to call the Respondent as a witness because he is a party to this case."*[3] The Petitioner acknowledged that it was always their intent to call the Respondent as a witness.

The Petitioner contends that: *"both Caldwell's testimony and Toland's own incident report and response to the charges, which were admitted as admissions, not as business records, are competent evidence that the arbitrator should have used to both substantiate the charges and authenticate the video."*

Moreover, the Board offers in support of its position in the matter at bar that rules of evidence do not apply in administrative agency proceedings. DeBartolomeris v. Bd. Of Review, 341 N.J. Super. 80,83 (App.Div. 2001) "Even if New Jersey's evidence

[1] TR 2 – 68:18-23
2 TR 2 – 68/69: - 25/1

[3] TR3 – 84/85: 24-25/4-6

rules are to be applied strictly, however, there is more than sufficient evidence that the videotape is an accurate reproduction of that which it purports to represent and the reproduction is of the scene at the time the incident took place." State v. Loftin, 287 N.J. Super. 76, 98 (App. Div. 1996)

The Petitioner asserts that *"when the videotape in question purports to represent a contemporaneous recording of the actual events, like the videotape in the present case showing what occurred as it was occurring, the proponent of the evidence need not comply with the four-part test set forth in Balian, nor does admission require the testimony of an actual eyewitness to the event in question."* Balian v. General Motors, 121 N.J. Super. 118 (App. Div. 1972)

In furtherance of its position, the Petitioner reaffirms that the rules of evidence of relaxed in arbitration, the arbitrator properly ruled that Superintendent Caldwell could offer hearsay testimony based upon information about the incident he had received, and then immediately prevented him from offering this exact type of testimony. The Petitioner relies on N.J.S.A. 18A:6-17 and N.J.A.C. 1:15.5 concerning the use of hearsay evidence and the weight accorded too same.

The Board incorporates all of its previous arguments that have already been briefed at length as to *"whether parties to an arbitration must be disclosed in order to call them as witnesses, and Barry Caldwell's capacity to authenticate the videotape as issue, without repeating them at length."*

For the foregoing reasons, the Board has *"met its burden to substantiate the tenure charges. Therefore, the Board is seeking the termination of John Toland."*

For the Respondent

The Respondent strongly argues that *"in the absence of any competent testimony, and the absence of any authenticated video evidence, there is simply no competent evidence standing for the proposition that Mr. Toland engaged in any conduct unbecoming a teaching staff member."* Additionally, *"arbitrators in TEACH NJ Tenure cases have not hesitated to dismiss tenure charges when this burden is not met."*

The arbitrators November 27, 2020, Motion in Limine has not been modified and is still controlling in the matter at bar. The District did not comply with N.J.S.A. 18A:6-17.1(b)(3), and as such there is no credible evidence to support and/or prove the tenure charges filed against Mr. Toland.

Since the District never supplied a witness list and a summary of their testimony. Mr. Toland cannot be a witness for the Petitioner. The statute, N.J.S.A. 18A:6-17.1(b)(3), establishes that the employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. Most importantly, the video footage found on the USB Drive (see Exhibit H) cannot be used a weapon for the Petitioner. Mr. Toland objects to the playing of the video because *"there has been no foundation laid whatsoever for its authenticity. We do not know who operated it, we do not know the conditions under which it was operated. This witness (referring to Superintendent Caldwell) has no firsthand*

knowledge of what occurred at the pool." Superintendent Caldwell "did acknowledge that the video was silent and he couldn't hear what people were saying.

Mr. Toland contends that *"[I]n order to constitute competent, admissible evidence, video footage must be properly authenticated".* State v. Wilson, 135 N.J. 4, 17 (1994). The Board has *"failed to furnish any evidence which would permit it to meet its burdens vis-à-vis the authentication requirements as set forth in Wilson supra."*

The Respondent stresses that *"[N]*either Mr. Toland's answer, nor his purported statement, confirm the creation, compilation or preservation of the subject video footage. Mr. Toland's statement (see Exhibit 13) is just that, a statement that was not subject to any direct or cross examination. Nor were there any facts established as to how that statement was drafted.

The Respondent argues *"that New Jersey recognizes and applies the residuum rule. It is settled New Jersey Law that finding of fact made in administrative proceedings must be supported by some residuum of competent, non-hearsay evidence. In Weston v. State, 60 N.J. 36,51-52 (1972) the New Jersey Supreme Court set forth the requirement that agency factfinding be supported by some measure of competent evidence."* The court also said that *"to sustain an administrative decision, which affects the substantial rights of a party, there must be residuum of legal and competent evidence in the record."*

The Respondent further argues that a tenure hearing, which takes the form of an arbitration, requires such competent evidence as established by the residuum rule.

For the foregoing reasons, Mr. Toland contends that the tenure charges should be dismissed with prejudice, and the Arbitrator should enter an Award granting him back pay, benefits and other emoluments and otherwise make him whole.

DISCUSSION AND OPINION

The Petitioner acknowledges and accepts the mandates set forth in N.J.S.A. 18A:6-17.1(b)(3). Nevertheless, the District believes that based upon their post hearing briefs citing case law, testimony and commentary at the hearings, both Mr. Toland and Superintendent Caldwell can be called as witnesses for the District.

Quite frankly, normally a respondent may be called as a witness by a petitioner unless a fact pattern unique to a specific case exists that would preclude such testimony. The matter at bar is an example of specific circumstances that will prevent the testimony of Mr. Toland.

N.J.S.A. 18A:6-17.1(b)(3), mandates that 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 statute also requires *that the "employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment."*

All of the above enumerated items including a witness list must be presented to the Respondent prior to the start of a hearing. To do otherwise relegates the tenure hearing process to nothing more than trial by ambush, which is anathema to the statute.

Yet there was no witness list or a summary of their testimony presented to the Respondent, and the record is devoid of any such list.

Counsel for the Petitioner stated that it was always her intent to call Mr. Toland as a witness. (see footnote 3) However, that must be done in accordance with the statutory requirement for witnesses.

On a two-prong test for admissibility of Mr. Toland's testimony, because a required witness list was not submitted by the Petitioner, the Respondent cannot be called as a witness. The second prong allows Mr. Toland to be called as a rebuttal witness. For this to occur Mr. Toland would be testifying in rebuttal to the record set forth by the Respondent. However, counsel for Mr. Toland did not call any witnesses and rested. The Arbitrator asked the Respondent's counsel if he was going to call Mr. Toland as a witness. He answered by stating *"that trial strategy discussions with Mr. Toland are attorney client privilege and not subject to this matter."* He is correct, and I have no authority to pierce attorney client privilege.

The Petitioner also strongly argues that Mr. Toland's written statement (See Exhibit 13e) can authenticate that statement. However, there is no competent evidence in the record to establish the foundation for that exhibit. For example, where was it written, who was present when it was drafted, did anyone suggest a modification or revision, did anyone proof the statement. Did Mr. Toland submit the statement of his own volition or was he asked to submit the statement?

Mr. Toland cannot be called as a witness to authenticate the video of the pool incident on January 14, 2019, because N.J.S.A. 18A:6-17.1(b)(3), was not complied with.

The issue of the USB drive, Exhibit H must be addressed. At the March 22, 2021, hearing Jennifer Killough-Herrera, Director of the Office of Controversies and Disputes, of the DOE testified that tenure charges are sent to the Commissioner of Education and are then submitted to her office. She further testified that the USB drive is evidence in this case and that evidence is transmitted to the Arbitrator. In this case due to COVID the USB was not submitted to the Arbitrator and the parties were to send a USB directly the Arbitrator. Additionally, Ms. Killough-Herrera testified that she *"should have indicated that the parties should have provided the Arbitrator with a copy.*[4] On March 23, 2021, I received a letter from Ms. Killough-Herrera with the USB attached.

Superintendent Caldwell could not authenticate the video because he was not a witness to the January 14, 2019, incident at the High School pool. He testified that he received the video from Mr. Atiba Rose, the District's Director of Operations.

Yet there was no proof offered that Mr. Rose was an eyewitness to the January 14, 2019, incident at the High School pool.

The Petitioner argues that Superintendent Caldwell is a non-voting member of the Atlantic City Board of Education and as such is a party to these proceedings, which allows him to testify. Unfortunately, the statue does not reference party or non-voting

member of the Board, it specifically states employer or employee. Superintendent Caldwell is an employee of the Board, he is not the employer. Following that logic simply means that any member of the Atlantic City Board of Education can offer testimony to authenticate the video in question. If that individual was present at the high School pool on January 14, 2019, and observed the incident in question, that person, if listed on a Petitioner witness list, can certainly offer testimony

On July 3, 2020, Superintendent Caldwell signed a Certificate of Determination, against the Respondent. Within the twelve (12) cited points, there is no reference that Superintendent Caldwell was an actual eye witness to the January 14, 2019, pool incident at the high school. Compare that to 18A:6-17.3 section 2 which requires any Superintendent of schools to file inefficiency charges against a teacher who for two (2) consecutive years receives a partially effective or ineffective evaluation. For exceptional circumstances a Superintendent may defer the filing of tenure charges until the next annual summative evaluation.

In the evaluative scenario, a Superintendent does not have to be a witness to any shortcomings in a classroom, and absent any exceptional circumstances, tenure charges must be filled. Here, the Petitioner seeks to have Superintendent Caldwell offer his evaluation or insight into the video.

Had Superintendent Caldwell been listed as a witness for the Petitioner and a summary of his testimony provided to the Respondent, he would have started his testimony subject to any potential objections that may have been raised.

[4] TR 1 – 76:4-17

However, to get to the potential objection phase he had to have been listed as a witness for the Petitioner. Again, that did not happen.

The Petitioner offers New Jersey court decisions to bolster its argument that Superintendent Caldwell was improperly denied the opportunity to offer testimony about the video in question.

Balian (1972) supra was a product liability, civil action in which the "*party offering the film was attempting to implement the testimony of an expert witness by filming an experiment for the purpose of submission of the film to a jury."* **Contrast that with the Toland matter where there is no expert witness and there is no experiment.** (emphasis supplied)

Wilson (1994) supra, was a criminal case. On March 3, 2020, Mario Formica, Deputy First Assistant Prosecutor, Atlantic County Prosecutor's Office, sent an email to the Petitioner's counsel in which he indicated that *"we reviewed the matter some time ago and determined that no action (or inaction) on the part of the lifeguard or gym teacher rose to criminal conducts under a probable cause standard."* The Toland matter was not pursued by the Atlantic County Prosecutor's Office. Nevertheless, the N.J. Supreme Court in Wilson said that *"because the videotape is relevant only if based on its representation of the positions of the witnesses at the time of the crime, only a witness to the actual crime can properly authenticate that the video accurately represents the scene of the crime."*

Balian, and Wilson were pre-N.J.S.A. 18A:6-17.1(b)(3), which was approved on August 6, 2012. In her closing arguments, counsel for the Petitioner referenced post

N.J.S.A. 18A:6-17.1(b)(3), cases and stated: "In *light of the fact that our Courts merely require a prima facie showing, neither absolute certainty nor conclusive proof is required to authenticate a video. Any person with knowledge of the facts represented in the video may authenticate it, through evidence that it is an accurate depiction of what is purports to represent and (sic) the scene at the time of the incident in question."* The Court decisions referenced do not eliminate the absolute requirement for a witness identification list and a summary of their testimony as specified in the above cited statute.

Under the residuum rule, competent evidence must be presented to sustain the charges against the Respondent. Superintendent Caldwell testified that he received the video from Mr. Abita and that Mr. Rose was at the pool on January 14, 2019, at the time of the incident.[5] In light of that testimony one would expect that Mr. Rose would have been on the Petitioner witness list with a summary of this testimony or was a rebuttal witness. Mr. Rose could not be called as a rebuttal witness because the Respondent never put on its case-in-chief. The record clearly and unequivocally establishes that no proof was offered that Mr. Rose was a witness to the January 14, 2019, pool incident at the high school.

Other than the reasons offered above, the Petitioner did not present any rationale for the lack of non-conformance with N.J.S.A. 18A:6-17.1(b)(3). Any further discussion by me would be highly speculative. Arbitrators are not privy to trial strategy nor should we be. If arbitrators become involved with trial strategy, then that becomes the new

[5] TR 3 – 21:13-18

norm for the definition of the word neutral. For the foregoing reasons, and having duly heard the proofs and allegations of the parties, I Award the following:

AWARD

The Respondent's motion to dismiss the tenure charges filed against John Toland is granted due to the district's failure to follow the requirements of N.J.S.A. 18A:6-17.1(b)(3). John Toland shall be returned to work with full back pay, health benefits, seniority and any other emoluments he lost while serving a 120 days suspension. The District shall reimburse Mr. Toland for any personal and/or family medical expenses he may have incurred while on suspension.

Dated: October13, 2021

Gerard G. Restaino

_____

Gerard G. Restaino, Arbitrator

State of New Jersey)

County of Ocean) ss:

On this 13th day of October, 2021, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Cheryl Yannacone

Cheryl Yannacone

Notary Public
State of New Jersey
My commission expires on August 26, 2026

CHERYL YANNACONE
Notary Public, State of New Jersey
My Commission expires
August 26. 2026