ARBITRATION PROCEEDINGS
BEFORE ARBITRATOR GARY T. KENDELLEN

In the Matter of the Tenure Hearing Gregory Janicki School District of the Township of Washington, Gloucester County Agency Docket No. 256-12/20	**ARBITRATOR'S DECISION ON MOTION TO DISMISS AMENDED/ SUPPLEMENTAL CHARGES**

COUNSEL:

For the District	Joseph F. Betley, Esq. Capehart Scatchard, P.A.
For Gregory Janicki:	Matthew B. Wieliczko, Esq. Zeller & Wieliczko, LLP

Background

During the course of the Hearings before the Undersigned held on November 6, 12, and 13 and December 2, 9, 11, and 15, 2020 in the related matter Agency Docket No. 52-2/20 ("TC 52-2/20"), the School District of the Town of Washington, Gloucester County, ("the District"), by letter dated December 22, 2020 submitted Amended/Supplemental Charges ("A/STC 256-12/20") in the above-captioned matter to the Commissioner of Education ("Commissioner"). On January 11, 2021 Respondent Gregory Janicki ("Mr. Janicki") submitted a Motion to Dismiss ("MTD") said A/STC 256-12/20. The parties made additional submissions to the Commissioner in January 2021, as recited below, whereupon on February 8, 2021, the Commissioner advised the parties that following receipt of Mr. Janicki's MTD, the District's A/STC 256-12/20 had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to the Undersigned arbitrator's decision on the MTD. Accordingly, the Commissioner referred the A/STC 256-12/20 to the Undersigned, noting that should the MTD be denied by the Undersigned, Mr. Janicki shall file an answer directly with the Undersigned, who shall then consider and address the merits of the A/STC 256-12/20.

Parties' Submissions

As noted above, on December 22, 2020 the District submitted its A/STC 256-12/20 to the Commissioner and on January 11, 2021 Mr. Janicki his MTD regarding the A/STC 256-12/20. Thereafter, the District also submitted a January 22 Response to the MTD and on January 29 a Supplemental Brief in opposition to the MTD regarding a recently issued New Jersey Appellate Division decision in Simadiris v. Paterson Public School District, Docket No. A-0197-19T3 ("Simadiris"). On January 29, Mr. Janicki submitted a Reply Brief to the District's January 22 Response to the MTD.

December 22, 2020 - District's Submission of A/STC 256-12/20 to the Commissioner.

In the District's submission to the Commissioner of its A/STC 256-12/20, it described the contents thereof as including, first, the April 1, 2020 Opinion and Award of Arbitrator Arnold Zudick ("Zudick Award")[1] in a discipline arbitration brought by the Washington Township Education Association ("WTEA") on Mr. Janicki's behalf in which WTEA include the April 1, 2020 Opinion and Award of Arbitrator Arnold Zudick ("Zudick Award") in a discipline arbitration brought by the Washington Township Education Association ("WTEA") on Mr. Janicki's behalf that involved a challenge by the WTEA and Mr. Janicki to an increment withholding action taken by the District in June 2019 against Mr. Janicki for his refusal to attend faculty meetings dealing with LGBTQ issues in April 2019 and his conduct during a lock down drill in June 2019. The arbitration hearing was conducted prior to the filing of the original Tenure Charges; the Award was issued after the District certified the original Tenure Charges to the Commissioner on February 25, 2020. The Award upheld the District's increment withholding and made specific findings that Mr. Janicki was insubordinate and untruthful related to some of the same incidents at issue in the original Tenure Charges The disciplinary withholding action and the underlying incidents that formed the basis for the withholding were referenced in the original Tenure Charges and Statement of Evidence, but because there was no indication of when the arbitrator's decision would be forthcoming, the

[1] The District has made the Undersigned aware of an Order to Confirm Arbitration Award involving the parties: SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-C-55-20, Civil Action ORDER TO CONFIRM ARBITRATION AWARD. Therein, Judge Robert Becker on February 12, 2021 issued an Order in which, *inter alia*, as to the Undersigned, Judge Becker ordered that the Undersigned give preclusive effect to the Opinion and Award of Arbitrator Arnold H. Zudick dated April 1, 2020. Mr. Janicki has also made the Undersigned aware that he has filed a Motion for Reconsideration of the Court's February 12, 2021 Order which is scheduled to be heard on March 26, 2021.

original Tenure Charges were filed prior to the final decision on the disciplinary arbitration. Subsequently, the District noted, the Undersigned denied its request to supplement the original Statement of Evidence to include the written Zudick Award, under what the District described as a strict interpretation of N.J.S.A. 18A:6-17.l(b)(3) of the TEACHNJ Act, and reserved for a later date a determination of whether to treat the substantive findings of the Zudick Award with preclusive effect.

The District further described the contents of its A/STC 256-12/20 as also including, second, additional information uncovered in the course of interviewing witnesses in preparation for the tenure arbitration hearing in TC 52-2/20, reporting that it was unknown to the District at the time the original Tenure Charges were filed that Mr. Janicki had admitted to a colleague that he committed the primary offense noted in Charge I of A/STC 256-12/20 and lied about it to the administration, and made other comments to a colleague that further illustrated his animus toward the LGBTQ community.

In support of the District's filing of its A/STC 256-12/20, it notes that nothing in the TEACHNJ Act precludes a District from filing tenure charges whenever a tenured employee exhibits unbecoming conduct. While newly uncovered evidence of unbecoming conduct may not be used to supplement the record in a case already pending before an arbitrator, the District argues that there is no bar to such new evidence forming the basis for additional charges and such is not without precedent, as in Sch. Dist. of Asbury Park v. Bd. of Educ. of Asbury Park, 1985 N.J. Super. Unpub. LEXIS 7 at *4 (App. Div. July 17, 1985) ("Asbury Park"), wherein a school district that was unable to produce certain evidence to support its tenure charges in discovery because that evidence was being used for a criminal proceeding against the respondent and would not be made available until after it had been presented to a grand jury, the tenure case was placed on the inactive list until the grand jury evidence was available for inspection. When the district later uncovered additional evidence it sought to amend its tenure charges, but the request was denied by the Administrative Law Judge ("ALJ") who instead instructed the district to certify new tenure charges and move to consolidate the two tenure cases. Id. at 4.

The District argues that this is exactly the process it has taken in this matter after it uncovered additional evidence that is both relevant to the pending charges and also supports additional tenure charges and. precluded from supplementing its evidence

regarding the first charges, it is instead, certifying amended/supplemental tenure charges to the Commissioner that are based, in part, on the Zudick Award and the newly-discovered evidence. Also, consistent with the ALJ's instruction in the Asbury Park case, the District asserts, it also requested that the Commissioner transmit these charges to the Undersigned, before whom the first tenure charges are currently pending, to allow for consolidation for economy, efficiency, and consistency.

January 11, 2021 - Mr. Janicki's MTD Regarding A/STC 256-12/20

In support of Mr. Janicki's January 11 MTD, he asserts that the District seeks to Amend/Supplement the original Tenure Charges in TC 52-2/20 to negate rulings by the Undersigned that were arguably unfavorable to it, maneuverings that are transparent in an attempt to circumvent those rulings during a pending Hearing with its "new" filing, and argues that it is estopped from amending the charges in an attempt to "get around" unfavorable rulings and in essence vacate what it describes as the Undersigned's valid rulings and decisions. Accordingly, Mr. Janicki asserts, the Commissioner must dismiss A/STC 256-12/20.

In support of Mr. Janicki's assertions, he notes that the District did not consider or rely upon the contents of the A/STC 256-12/20 when the tenure charges in TC 52-2/20 were prepared, certified and served on Respondent, a choice and plan of action the District made.

As to the Zudick Award, Mr. Janicki next notes the Undersigned's rulings on August 24 and December 1, 2020 to the effects that

> August 24: "[t]he undersigned finds that the clear language of NJSA 18A6-17.1b(3) establishes without doubt that the District is precluded from supplementing its evidence after its Statement of Evidence has been submitted. In that regard, the Undersigned finds that the exceptionalism that the District's argument attempt to attach the April 1 arbitration award [the Zudick Award] is insufficient to overcome the meaning and intent of the statute's crystal clear language, which establishes a razor sharp cutoff of additional evidence after the District's evidence has been submitted."
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> December 1: "The Undersigned first notes that the matter of the District withholding an increment from Mr. Janicki is included among the charges upon which it relies herein in establishing just cause for his tenure removal. The Undersigned next notes that the arbitration award - upon which the District relies in its argument that an award has issued in an arbitration

> proceeding that is final and binding upon the parties - was the subject of a prior determination by the Undersigned on August 24, 2020 in which he did not grant the District's request to supplement its Statement of Evidence with that award and did not accord the award arbitral notice because the award issued after the District's submission of its Statement of Evidence. As a result, the award has not been received into evidence in this proceeding."

As to the additional information that the District reports it uncovered in the course of interviewing witnesses, Mr. Janicki next notes the Undersigned's rulings on November 13, 2020 when the District attempted to call and elicit testimony from WTEA Building Representative and District employee Jennifer Wisor after Mr. Janicki objected to the scope and relevancy of the District's questioning of Ms. Wisor, regarding which the Undersigned repeatedly sustained objections that such was an attempt to elicit testimony outside of the scope of the tenure charges and statement of evidence and outside of the scope of the summary of anticipated testimony detailed on Respondent's witness list. The Undersigned precluded Ms. Wisor's anticipated testimony insofar as its substance was not referenced or a part of the tenure charges and statement of evidence and was not relied upon by the District when it certified the charges; ruling that rather,

> this additional evidence is perhaps permissible for the purposes of impeachment, that question is more reasonably resolved once we know what we are impeaching. . . . [T]o put meat on those bones, that means after Mr. Janicki has testified.

Mr. Janicki further objects that the District was aware of the outstanding grievance arbitration at the time it decided to prepare and serve Respondent with a sworn copy of TC 52-2/20 and made the decision to move forward with it almost simultaneously to the increment grievance arbitration; it knew exactly what it was doing when it filed the tenure charges before a decision had been issued in the increment grievance arbitration, although it had the option to await the arbitrator's decision therein before proceeding with TC 52-2/20. Whatever the District's strategy or motivation may have been, it moved forward without awaiting the Arbitrator's increment withholding opinion and award. Consistent with the tenure law, neither the District nor the assigned Arbitrator may rely upon an arbitration decision which was not provided and had not even been issued upon the referral of this case for arbitration or relied upon by the District at the time it certified the tenure charges. N.J.S.A. 18A:6-17.1(b). It was not included in the charges or statement of evidence or relied upon by the District at the time it certified the charges.

In support, Mr. Janicki cites In the Matter of Tenure Hearing of Noel Gordon, School

District of the City of Englewood, Bergen County, Agency Docket No. 24-1/18, Decision on Motion to Dismiss, issued August 13, 2018 ("Englewood"):

> N.J.A.C. 6A:3-5.1(b) places the onus on a board of education to line up all 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.

Mr. Janicki urges that the District is estopped from amending the charges at this time in an attempt to get a "third bite at the apple" on that issue and vacate the two prior rulings on the issue by the Undersigned. In that regard, Mr. Janicki objects to the District's reliance upon Asbury Park in support of its position that the filing of supplemental and additional tenure charges based upon newly discovered evidence and subsequent consolidation with an already-pending case record is appropriate in this matter. Mr. Janicki argues that the cited case law is not at all analogous to the case at hand in that therein, a County Prosecutor's Office denied the Board permission to use evidence necessary in support of the initial tenure charges while criminal proceedings were pending, whereas, herein, the District was obviously aware of the pending increment withholding arbitration decision at the time it decided to proceed with the tenure charges and made the strategic decision to certify tenure charges when it did; later, faced with unfavorable and evidential rulings, it wants to change paths and proceed in a different way. This is not simply a matter of the District not being aware of the documentary evidence, but rather a strategic decision to move forward with the original Tenure Charges without the increment withholding arbitration award; now, it wishes to vacate the Undersigned's rulings and ignore the statutory requirements of N.J.S.A. 18A:6-17.1(b)(3). Moreover, Mr. Janicki further asserts, Asbury Park did not decide the point of law of whether the District has the ability to amend tenure charges but rather, it addressed entitlement to salary during the tenure process.

Mr. Janicki also object to the District's attempt to circumvent the Undersigned's rulings as causing unnecessary delay to the pending proceedings, an increased expense to all and a waste of judicial resources, asking: "Moreover, what if every District, on every certified tenure charge, was permitted to proceed in this fashion?" to which he answers: "Absolute uncertainty, chaos and no finality, and a waste of time, expense and resources."

Mr. Janicki also argues that the Undersigned's procedural and evidentiary rulings during the hearing were entirely within the purview of the arbitrator and consistent with N.J.S.A. 18A:6-

10 *et al.* and the AAA Rules of Arbitration such that there is no legal basis for setting aside the rulings.

January 22, 2021 - District's Response to Mr. Janicki's MTD

In the District's January 22 Response to Mr. Janicki's MTD, it asserts that it is not seeking to overturn the adverse rulings against it, but rather in pursuing A/STC 256-12/20, it is ensuring that the procedural safeguards put in place by the Legislature to protect the process of removal of tenured teachers from employment are followed as closely as the Legislature, and as the Undersigned intended, by coming through the Commissioner to certify additional tenure charges based on newly acquired evidence. The District asserts that the filing of amended tenure charges based on new evidence, or the re-filing of charges after previous charges have been dismissed without prejudice, has been recognized as a legitimate exercise of the Commissioner's jurisdiction over tenure proceedings under the NJTEACH Act. Further, by requesting that the matter be transmitted to the Undersigned for consolidation, the District asserts, it is seeking the most expeditious resolution of the matter possible that upholds concepts of judicial economy, continuity and fairness.

As to the Zudick Award, the District notes that the Undersigned denied the District's request to admit it into evidence based on his interpretation of N.J.S.A. 18A:6-17.1(b)(3), which he determined to establish a "razor sharp cut off date" for any additional evidence. Significantly, the District asserts, the Undersigned made no mention of, nor did he preclude the District from, filing amended tenure charges with the Commissioner. After the District asked the Undersigned to give preclusive effect to the decision under the principle of res judicata, collateral estoppel, issue preclusion and/or authoritative precedent to prior final and binding arbitration awards, he reaffirmed his decision on the introduction of the written Zudick Award, but reserved decision on the preclusion issue and held it "in abeyance until such time as such a ruling may become relevant and therefore necessary."

As to the testimony of Ms. Wisor, the District notes that at the November 13, 2020 Hearing, it reported that it had recently became aware of statements by Mr. Janicki to Ms. Wisor about which it had no knowledge until after the original tenure charges were filed. The District notes that the Undersigned was concerned with Ms. Wisor's factual testimony not being included in the District's original Statement of Evidence, along with her being the WTEA union

representative, but, recognizing that Ms. Wisor's testimony may be warranted for impeachment purposes, depending upon what Mr. Janicki's testimony will be (assuming he testifies), the Undersigned ruled that:

> it really would be more appropriate for you [Betley] to be impeaching Mr. Janicki with this witness after he testifies .... I think we'll be in a better position to determine that after Mr. Janicki has testified
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> And
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> I think to put meat on the bones, that means after Mr. Janicki has testified. Then we know the purposes-how to assess whether you are entitled to additional evidence to impeach Mr. Janicki's testimony.

The District also notes the Undersigned made no mention of, nor did he preclude it from, filing amended tenure charges with the Commissioner concerning the Wisor testimony, even in the face of its specifically referencing the option of filing amended charges.

Based upon these considerations, the District presents a two-prong argument that Mr. Janicki's MTD should be denied, the first being that the Commissioner should send A/TSC 256-12/20 to the Undersigned[2] and second, that nothing in the TEACHNJ Act precludes its filing of amended or supplemental tenure charges whenever there is newly discovered evidence of unbecoming conduct by a tenured employee.

As to whether nothing in the TEACHNJ Act precludes the District's filing of amended or supplemental tenure charges whenever there is newly discovered evidence of unbecoming conduct by a tenured employee, it notes Asbury Park and Englewood in support, Asbury Park, as it did in support of its filing of A/STC 256-12/20,[3] for the principle that the filing of additional tenure charges based upon newly-discovered evidence and subsequent consolidation with an already-pending case has been specifically recognized and authorized, and Englewood for the principle that a district can be given multiple chances to perfect its charges through refiling.

As to Asbury Park, the District notes that the school district therein was unable to produce certain evidence to support its tenure charges in discovery because that evidence was being used

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[2] A request that the Commissioner has granted by virtue of the referral of A/STC 256-12/20 to the Undersigned, based upon which development the Undersigned does not present or discuss herein much of the District's series of arguments in support of the referral. Also, as a result of the Commissioner's referral, the Undersigned does not present or discuss herein the Simadiris case, presented in support of the Commissioner taking such action, in the District's January 29 Supplemental Brief in opposition to the MTD.

[3] See Pp. 3-4 herein.

for a criminal proceeding against the respondent, and would not be made available until after it had been presented to a grand jury. The tenure case was placed on the inactive list until the grand jury evidence was available for inspection. When the district later uncovered additional evidence, it sought to amend its tenure charges, but the request was denied. Instead, the ALJ instructed the district to certify new tenure charges and move to consolidate the two tenure cases. Id. at 4.

Regarding Englewood, wherein the board was given multiple chances to perfect its charges through refiling, the District notes that it does not seek to imply that the process outlined in N.J.S.A. 18A:6-10 *et al* is a revolving door of unlimited visitations. However, the District asserts that it suggests that a local board of education can go back to the Commissioner to perfect existing charges that were dismissed without prejudice, and to file amended charges, if the circumstances are warranted (as is the case here with the newly discovered evidence of Mr. Janicki's conversations with Ms. Wisor and the Zudick Award that did not exist at the time of the original charges) and there is no evidence of abuse or violation of due process.

As to Mr. Janicki's MTD, the District asserts that his arguments should be disregarded, including the argument in the MTD that the District chose to go forward without waiting for the Zudick Award; the District argues that it referenced in its Statement of Evidence that a decision from Arbitrator Zudick was forthcoming and included its brief to him in its tenure charges. Under Asbury Park, the District argues, it should be permitted to include it in A/STC 256-12/20.

The District also argues that the Zudick Award and the testimony of Ms. Wisor support new, additional charges of unbecoming conduct that only came to light after the filing and transmittal of the currently-pending charges. The fact the Award and the testimony of Ms. Wisor also support those other charges is irrelevant, because the bearing of particular evidence on one proceeding does not disqualify the District from relying on that same evidence for other charges.

The District further argues that it has every right to introduce the Zudick Award through the filing of the Amended Charges with the Commissioner and is not seeking to vacate the rulings of the Undersigned that established a strict cut-off date for evidence for the tenure charges that were in front of him, since nothing prevents the District from going through the tenure charge process seeking an amendment of the charge given the timing of the issuance of the Zudick Award. Mr. Janicki's argument in support of preventing the District from amended the charge to include the Zudick Award is an overly technical, procedural sleight of hand at its best and disingenuous at

its worst, the District asserts, and procedural niceties and technical obstructionism should not be encouraged when the end result is to cover up a highly relevant arbitration decision that is at the core of the Amended Charges: it is pure sophistry to argue that the District has a lifetime ban on introducing the Award because it decided to proceed with the original tenure charge while the parties were awaiting the decision from Arbitrator Zudick, with the timing of its issuance unknown and unpredictable. The District contends that it could not possibly include the Zudick Award at the time TC52-2/20 was filed with the Commissioner in March 2020 since the Award was not issued until April 1, 2020. Mr. Janicki's logic places the District in a classic Catch 22 situation. To suggest that the District should have waited an unknown amount of time before the Zudick Award was issued before it filed the original Tenure Charges (all the while having to pay Mr. Janicki while on this administrative leave) is specious, since the District did not control Mr. Zudick's calendar, and to wait an indefinite amount of time to file the Tenure Charges would have exposed the District to a timeliness/laches argument by Mr. Janicki. Plus, the District asserts, Mr. Janicki ignores discussion of the aftermath if Arbitrator Zudick sustained the grievance. If the increment withholding were reversed, and the District moved forward with the tenure charges based on the same set of operative facts at issue in the increment withholding, would Mr. Janicki be arguing that the Award doesn't exist because of the District's tactical decision? Of course not. Conversely, the District argues, it should not have the "thrill of victory" over the favorable arbitration award finding just cause for the discipline, be taken away and substituted with the "agony of defeat" in not being able to have the Zudick Award see the light of day (and thus being forced to retry the underlying incidents relevant to the increment withholding), simply because of a timing issue.

The District also argues that forcing a school district to delay the filing of additional tenure charges creates a circumstance where current and/or future arbitrators may render decisions on incomplete information, and where finality in a tenure matter is delayed for an extended period of time. It also needlessly extends the process of severing the employee/employer relationship by requiring that, in the event the first-in-time tenure proceedings are decided in the respondent's favor, he or she could immediately face additional tenure charges that had been held in abeyance before they can return to work. On the other hand, if the tenure charges are upheld and an appeal follows, the school district is faced with a potentially extended delay before filing the additional charges. While it is obvious to see why Mr. Janicki would like to delay the filing of additional

tenure charges in the instant case, the holding of additional charges in abeyance is not consistent with the tenure law, and cannot have been intended by the Legislature when it crafted the procedure

In addition, the District notes that it made specific and detailed references to the pending arbitration and the facts leading up to the arbitration in the original Statement of Evidence, and included its post-arbitration brief in the initial disclosures to counsel that were sent on March 18, 2020. All of the underlying events and factual allegations that are part of the arbitration proceedings before Arbitrator Zudick were incorporated into TC 52-2/20. The purpose of having the District gather and produce all of its evidence early on in the tenure dismissal proceeding, and specifically upon the referral of the case to arbitration as set forth in N.J.S.A. 18A:10-17(b)(3), is to prevent surprise and to give the employee against whom tenure charges have been filed a full and fair opportunity to know the evidence that supports the charges. Mr. Janicki was provided with a full and complete summary of the evidence that led to the increment withholding and the factual basis as to why those facts that were central to the prior arbitration are relevant to the within Tenure Charges. Again, obstructionism, and not allowing the Arbitrator to see the full range of facts, is the motivation of the Respondent.

January 29, 2021 Mr. Janicki's Reply to District's January 22 Response to the MTD

In support of Mr. Janicki's January 29 Reply Brief to the District's January 22 Response, he noted that in his view, the District, in opposing the MTD, is continuing with its "fast and loose" approach, asserting that it "has every right to introduce the Zudick Award through the filing of the amended charges with the Commissioner," without addressing that it was issued on April 1, 2020, eight months before it certified A/STC 256-12/20 to include it, while the parties engaged in seven hearing dates in TC 52-2/20 during which there were rulings adverse to the District on those issues. The District had the opportunity to gather proofs in support of TC 52-2/20 at the time the charges were considered, prepared, and filed. In Mr. Janicki's view, the District then decided to revisit the substance of its underlying charges in TC 52-2/20 to see if it could supplement its evidence and charges, in an attempt to "make them better," which it now attempts to do with in TC 52-2/20. In view of these circumstances, Mr. Janicki disputes the District's assertion that he has not made any showing of surprise, prejudice or lack of due process.

As to whether the Undersigned did not specifically preclude the District from filing amended tenure charges concerning the arbitration award or Ms. Wisor's testimony, Mr. Janicki

notes that the issue was never presented to him, formally or informally, yet the District thinks it has a "green light" to seek to supplement its tenure charges, more than half way through the underlying tenure hearing, contending that it is simply supplementing its original charges with new evidence discovered in good faith after the charges were submitted. Mr. Janicki also points to Asbury Park and Englewood, distinguishing the former as involving a district that was precluded from submitting evidence being used for a criminal proceeding and unavailable until after it had been presented to a grand jury and the latter as a case where numerous procedural mistakes allowed a District to perfect its filing with the Commissioner, whereas the instant matter is a pending tenure matter wherein the District is seeking to circumvent the rulings of the Undersigned without a basis in law at this juncture and for this purpose. Mr. Janicki objects that a ruling in favor of the District on the MTD would have devastating consequences on all tenure proceedings going forward, allowing a District to hit the reset button on its proofs and charges well into a tenure hearing and after adverse evidential rulings, noting that the TEACHNJ Act places the onus on a school district to gather evidence in support of its tenure charges and be confident that its evidence, if true, is sufficient to warrant the dismissal or reduction in salary of a tenured teacher.

Here, Mr. Janicki notes, the Zudick Award is not subsequently-discovered evidence nor evidence that did not exist at the time of the filing of TC 52-2/20 in that the District, having participated in an increment withholding arbitration, knew it followed that an award would be forthcoming and decided to proceed with prior to the receipt of the Zudick Award and then waited eight months and participated in seven hearing dates before certifying A/STC 256-12/20.

As to the anticipated testimony of Ms. Wisor, Mr. Janicki asserts that it is also not subsequently- or newly-discovered evidence, but rather, testimony it seeks to offer to bolster its case in chief, in the midst of its case in chief, to circumvent the Undersigned's ruling, actions that are working against the interests of economy, efficiency, consistency and fairness. Mr. Janicki notes that the District had the opportunity to interview witnesses and secure statements prior to the preparation and filing of the underlying tenure charges and it is unduly prejudicial to him for the District to be permitted to continue an expedition for evidence in support of the underlying tenure charges during the pending tenure hearing.

Mr. Janicki also rejects the District's argument that it is prejudiced from filing additional tenure charges pending the finality of another tenure matter and offers the example of a proper

instance of such: In the Matter of the Arbitration between The State Operated School District of the City of Jersey City v. Gilda Nicole Harris, Agency Docket Nos. 342/11/14 & 379/12/14 ("Jersey City") wherein the District served the Respondent with two sets of tenure charges and the Commissioner consolidated the matters. In that instance, the first set of charges was served on September 23, 2014. On November 18, 2014, the District certified the charges to the Commissioner of Education. On November 21, 2014, the District issued a set of seven additional tenure charges. The Commissioner consolidated the two sets of charges prior to referring the matter to arbitration pursuant to N.J.S.A. 18A:6-16.

Here, by contrast, in the home stretch of TC 52-2/20, Mr. Janicki asserts, the District has taken uneconomical and time consuming steps to amend/supplement its charges in lieu of moving forward with the pending hearing, while asserting that it is Mr. Janicki who "would like to delay the filing of additional tenure charges in the instant cases." Yet it is the District, in Mr. Janicki's view, that is silent, while speaking to the efficiency of consolidating both matters before the Undersigned, as to the statutory rights which would be afforded to him if the newly filed tenure charges were permitted to proceed: consolidation of the two sets of charges and permitting the District to supplement its evidence would afford Mr. Janicki time to engage in discovery as permitted by statute. Otherwise, merely folding new charges and alleged evidence into the pending hearing, without protecting Mr. Janicki's statutory rights, would allow school districts the unfair opportunity to back door additional charges or evidence at any point during a pending proceeding, where discovery has already been exchanged between the parties and the respondent has already prepared his or her defense based on the District's prior statement of evidence.

In summary, Mr. Janicki asserts that it is uncontested that at the time that the District certified TC 52-2/20, it was aware of the outstanding Zudick Award and made the determination to proceed with the tenure charges as prepared, knowing that the Zudick Award could, in fact, be returned in its favor. Moreover, the District thereafter did not attempt to amend or supplement the charges with that award until eight months and seven hearing days had passed, with adverse rulings against the District as to it and the Ms. Wisor testimony, before it certified A/STC 256-12/20. Under these circumstances, Mr. Janicki asserts, there is nothing "overly technical," as the District alleges, regarding the uncontested timeline of events that now lead to his MTD that argues that the District should be estopped from proceeding with A/STC 256-12/20.

Summary

Above, the Undersigned has provided a comprehensive report of the Parties' submissions. As succinctly as practical, those submissions are summarized as follows:

The District contends that nothing in the TEACHNJ Act precludes filing tenure charges whenever a tenured employee exhibits unbecoming conduct, while conceding that newly uncovered evidence of unbecoming conduct may not be used to supplement the record in a case already pending before an arbitrator, it also argues that there is no bar to such new evidence forming the basis for its additional charges (A/STC 156-12/20), as was done in Asbury Park.[4] The District also argues that for economy, efficiency and consistency, the charges should be consolidated with TC 56-2/20 and transmitted to the Undersigned.

Mr. Janicki contends that the District did not consider or rely upon the contents of A/STC 256-12/20 when filing the tenure charges in TC 52-2/20; accordingly, he views the filing of A/STC 256-12/20 as contrary to N.J.S.A. 18A:6-17.1(b) of the TEACHNJ Act and a transparent maneuver to negate unfavorable rulings by the Undersigned in TC 52-2/20, as well as distinguishable from Asbury Park and contrary to the Court's holding in Englewood that "the onus [is] on a board of education to line up all its ducks before it commences the local processing of charges" and distinguishable from the facts in Asbury Park. Mr. Janicki notes that the District had the opportunity to interview witnesses and secure statements prior to the preparation and filing of the underlying tenure charges and it is unduly prejudicial to him for the District to be permitted to continue an expedition for evidence in support of the underlying tenure charges during the pending tenure hearing

Mr. Janicki also objects that the District's actions are causing unnecessary delay to the pending proceedings in TC 52-2/20, an increased expense to all and a waste of judicial resources, and asks: "Moreover, what if every District, on every certified tenure charge, was permitted to proceed in this fashion?" to which he answers: "Absolute uncertainty, chaos and no finality, and a waste of time, expense and resources."

The District responds that the evidence it submitted in A/STC 256-12/20 is newly acquired and the Undersigned made no mention of nor precluded it from filing amended tenure charges

[4] See Pp. 3-4 and 8-9 herein.

with the Commissioner. As to Englewood, wherein the board was given multiple chances to perfect its charges through refiling, the District argues that the holding therein suggests that a local board of education can go back to the Commissioner to perfect existing charges that were dismissed without prejudice, and to file amended charges, if the circumstances are warranted, as is the case here with newly discovered evidence, and the absence of evidence of abuse or violation of due process. The District also notes that it referenced in TC 52-2/20 that a decision from Arbitrator Zudick was forthcoming and included its brief to Mr. Zudick and it, along with the testimony of Ms. Wisor, support new, additional charges of unbecoming conduct that only came to light after the filing and transmittal of the currently-pending charges.

The District asserts that the purpose of having it gather and produce all of its evidence early on in the tenure dismissal proceeding, and specifically upon the referral of the case to arbitration as set forth in N.J.S.A. 18A:10-17(b)(3), is to prevent surprise and to give the employee against whom tenure charges have been filed a full and fair opportunity to know the evidence that supports the charges. In that regard, the District argues that Mr. Janicki was provided with a full and complete summary of the evidence that led to the increment withholding and the factual basis as to why those facts that were central to the prior arbitration are relevant to the Tenure Charges. Again, the District asserts, obstructionism, and not allowing the Undersigned to see the full range of facts, is the motivation of Mr. Janicki.

Lastly, the District asserts that it has every right to introduce the Zudick Award and the testimony of Ms. Wisor in that nothing prevents it from going through the tenure charge process seeking an amendment of the charge, given the timing of the issuance of the Zudick Award and its learning of Ms. Wisor's information. Contrary to Mr. Janicki's arguments, the District asserts, which is an overly technical, procedural sleight of hand at its best and disingenuous at its worst, the District argues that procedural niceties and technical obstructionism should not be encouraged when the end result is to cover up a highly relevant arbitration decision and it is pure sophistry to argue that it has a lifetime ban on introducing the Award.

ANALYSIS

As noted earlier herein, on February 8, 2021, the Commissioner referred A/STC 256-12/20 to the Undersigned and advised the parties that A/STC 256-12/20 had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to the Undersigned's decision

on the MTD. The Commissioner noted that should the Undersigned deny the MTD, Mr. Janicki shall file an answer directly with the Undersigned, who shall then consider and address the merits of the A/STC 256-12/20.

In that regard, the Undersigned views his role in deciding the MTD, as referred to him by the Commissioner, to be to determine whether Mr. Janicki has provided in his MTD sufficient bases for dismissing the District's filing of A/STC 156-12/20 because, under all the circumstances present, based upon the District's arguments in support of its filing of A/STC 156-12/20 and Mr. Janicki's arguments in his MTD, the District's filing does not comport with the controlling authority herein: the TEACHNJ Act.

Discussion

The Undersigned first notes the District's opening argument, which underlies its entire set of arguments as to the reasons that it believes the MTD should be disregarded, in which the District argues that nothing in the TEACHNJ Act precludes filing tenure charges whenever a tenured employee exhibits unbecoming conduct, based upon which the District further argues that there is no bar[5] to such new evidence forming the basis for additional charges, such as A/STC 256-12/20, as was done in Asbury Park.

The Undersigned first notes that while it is literally a fact that nothing in the TEACHNJ Act precludes the filing of additional charges, the Undersigned finds less significant what the District contends is absent from the TEACHNJ Act than what the Act itself contains. In that regard, the Undersigned turns to the text of the TEACHNJ Act and notes that it provides an extensive set of procedures to accomplish its goals. Of strongest relevance herein are the procedures established in N.J.S.A. 18A:10-17(b), particularly its Paragraph (3), which recites the very specific steps to be taken by "an employing board of education" upon referral of a case for an arbitration hearing, to wit, the board

> 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, and all other documents to the employee or the employee's representative. The employing board of education shall be

[5] The Undersigned also notes the District's extension of this line of argument to the Undersigned's having made no mention of, nor precluded it from, filing amended tenure charges. In the absence the District's presenting any argument herein as to the possible significance of whether the Undersigned did or did not make any such mentions, he does not consider the matter of his non-mentions further.

> precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.[6]

The Undersigned particularly notes that the crafters of this provision described in detail what "all evidence" included and then continued with a portion of the provision that precluded both parties "from presenting any additional evidence at the hearing" - and then included an exception: "for purposes of impeachment of witnesses." Notably, to the Undersigned, the crafters did not provide any other exceptions, such as, for example, related or momentous or previously hidden evidence, regarding each of which an alternative approach might have prevailed - but did not. Instead, the crafters indicated their clear intentions by stating the preclusion was "from presenting *any* [emphasis added] additional evidence," with only the sole exception stated.

While the Undersigned considers the preceding excerpt from N.J.S.A. 18A:10-17(b)(3) of primary importance, also notable are other complementary provisions that are highly relevant to the instant matter. N.J.S.A. 18A:10-17(b)(1) provides that the hearing shall be held within 45 days of the assignment of the arbitrator to the case. N.J.S.A. 18A:10-17(d) provides that the arbitrator shall render a written decision within 45 days of start of the hearing. N.J.S.A. 18A:10-17(f) and (g) provide that the timelines set forth herein shall be strictly followed, absent the approval of the Commissioner.[7]

Therefore, notwithstanding that it is the case that, as the District asserts, nothing in the TEACHNJ Act precludes filing tenure charges whenever a tenured employee exhibits unbecoming conduct, based upon which the District further argues that there is no bar to such new evidence forming the basis for additional charges, such as A/STC 156-12/20, as it contends was done in Asbury Park, it is the view of the Undersigned that the Act's provisions demonstrate that the Act should be approached from a different perspective, that of its provisions, not of its nothings. To wit, in sum, the Undersigned notes that the cited portions of the Act put great emphasis upon the requirement of strict adherence to its comprehensive descriptions regarding the provision of evidence by both parties, following which both parties are precluded from presenting *any*

[6] Identical requirements are imposed upon the employee, effective at least 10 days prior to the Hearing.

[7] The Undersigned notes that, as the Parties acknowledge, it has not been possible to meet these timelines in the instant matter from its outset during the pendency of the coronavirus disruption. However, the Undersigned also notes, his inability and that of the Parties to meet the timelines during the pendency of the coronavirus disruption has played no role in the Parties' arguments herein as to the disputed A/STC 156-12/20. Accordingly, the Undersigned considers the timeline goals of the Act, although suspended in the instant matter, fully applicable to his deliberations thereon.

[emphasis added] additional evidence at the hearing, with only one exception - for purposes of impeachment of witnesses. These provisions also emphasize the arbitrator's strictly timely start of the hearing after its assignment and his or her strictly timely completion of a written decision following the hearing's start, except otherwise as approved by the Commissioner. These timeliness requirements of course reflect the urgency that the crafters wished to communicate should be applied to the processing of tenure charges.

Accordingly, the Undersigned approaches the District's and Mr. Janicki's arguments regarding the MTD from the perspective of the crafters' emphases in the TEACHNJ Act.

Turning to the District's citation of Asbury Park in support of its view that it should be permitted to file A/STC 256-12/20, the Undersigned notes his report above as to the District's explanation of its position at Pp. 3-4 and 8-9, as well as Mr. Janicki's distinguishing of Asbury Park in that the board therein was denied permission to use evidence necessary in support of the initial tenure charges while criminal proceedings were pending, whereas, herein, the District was obviously aware of the pendency of the Zudick Award at the time it decided to proceed with the tenure charges and made the strategic decision to certify its tenure charges when it did. As to the Ms. Wisor testimony, Mr. Janicki cites the plain meaning of N.J.S.A. 18A:10-17(b)(3) and argues that after-acquired evidence is not to be accepted. Mr. Janicki notes that the District had the opportunity to interview witnesses and secure statements prior to the preparation and filing of the underlying tenure charges and it is unduly prejudicial to him, under the provisions of N.J.S.A. 18A:10-17(b)(3). for the District to be permitted to continue an expedition for evidence in support of the underlying tenure charges during the pending tenure hearing.

The Undersigned next notes that among the District's arguments, it did not discuss the differences between the circumstances of Asbury Park and those herein, in which a Hearing in TC 52-2/20 was already being held pursuant to the unique and strict evidentiary and timeliness requirements recited above of the TEACHNJ Act, which was enacted decades after the court's decision in Asbury Park. In addition, the Undersigned notes, the Asbury Park circumstances are also distinguishable, as Mr. Janicki argues, in their dependence upon evidence known by a party that was withheld from that party by a county prosecutor, whereas the District has failed to discuss whether, at the time the District filed its tenure charges in TC 52-2/20, either the Zudick Award or the proffered Ms. Wisor testimony were similar or different from the Asbury Park information,

which was under restraints. In addition, the Undersigned also notes, the posture of the matter when the consolidation was directed by the ALJ in Asbury Park and the matter's outcome are not provided by the District, making it impossible to determine its aptness.

Therefore, in view of these considerations, the Undersigned finds that the District has not provided adequate justifications for its assertion that the holding of Asbury Park supports its arguments that it should be permitted to file its charges in A/SC 256-12/20.

Turning to the Englewood decision, which Mr. Janicki cites for its holding that the onus is on a board of education to line up all its ducks before it commences the local processing of charges, the District argues that the board therein was given multiple chances to perfect its charges through refiling, suggesting that a board can go back to the Commissioner to perfect existing charges that were dismissed without prejudice, and to file amended charges, if the circumstances are warranted, as is the case here, the District asserts, with newly discovered evidence and the absence of evidence of abuse or violation of due process. However, once more, the Undersigned notes, the District's arguments fail to specify under what circumstances the Englewood holding would warrant permitting the District to engage in filing amended charges with newly discovered evidence, in the context of the unique and strict evidentiary and timeliness requirements of the TEACHNJ Act recited above. Instead, the District merely offers its speculation that the Englewood holding suggests that the District might be warranted to file amended charges. By contrast, Mr. Janicki distinguishes Englewood by providing an example of a far more compelling circumstance, one in which the Commissioner did consolidate two different sets of charges: Jersey City, wherein the Commissioner, *prior to referring the matter to arbitration*, consolidated the two sets of charges following the district's submissions therein of different charges on November 18 and November 21, 2014. As noted by the Undersigned above, of course, prior to the Commissioner's referral of the matter for arbitration, the cited strict evidentiary provisions of N.J.S.A. 18A:10-17(b)(3) have not gone into effect. Herein, of course, the arbitration hearings in TC 52-2/20 were already under way when the District filed A/STC 156-12/20 and sought consolidation with TC 52-2/20.

Therefore, the Undersigned finds that the District has not sufficiently distinguished Englewood's holding - that the onus is on a board of education to line up all its ducks *before* [emphasis added] it commences the processing of charges, a holding that also does not support the District's arguments that it should be permitted to file its charges in A/STC 256-12/20.

The Undersigned next notes that in the absence of support for the District's position from either Asbury Park or Englewood, the District's position relies essentially upon its contention that nothing in the TEACHNJ Act precludes filing its charges in A/STC 156-12/20. However, the Undersigned has described the reasons for his preference for viewing the provisions contained in the Act, rather than what is not contained, in determining the issues herein. In addition, the Undersigned finds, Mr. Janicki has provided a number of arguments in support of applying the Act's strict and comprehensive evidentiary provisions to preclude the acceptance of the subject matters in the District's filing of A/STC 256-12/20 after the start of the hearings herein, in particular, his arguments against admitting evidence that violates N.J.S.A. 18A:10-17(b)(3)'s preclusions of any additional evidence that was not provided by the District upon the Commissioner's referral of TC 52-2/20 for arbitration.

In addition. Mr. Janicki further argues against the District's actions in filing A/STC 256-12/20 with his assertion that such also causes unnecessary delay to the pending proceedings in TC 52-2/20, an increased expense to all and a waste of judicial resources, noting that if every board, on every certified tenure charge, was permitted to proceed as the District wishes herein, uncertainty, chaos and no finality, and a waste of time, expense and resources would ensue. The Undersigned finds that even in as regrettably delayed a proceeding as the instant matter, Mr. Janicki's concerns resonate; they illustrate that permitting the District's filing of A/STC 256-12/20, or similar filings, in the circumstances present herein would also be inconsistent with the TEACHNJ Act crafters' goal of achieving the normally strictly enforced 45 day timeliness parameters set forth in N.J.S.A. 18A:10-17(b)(1), N.J.S.A. 18A:10-17(d) and N.J.S.A. 18A:10-17(f) and (g) of the TEACHNJ Act, parameters with which we can expect to be required to achieve compliance once normal times have returned.

In sum then, the Undersigned finds that the District's position that its submission of its filing of A/STC 256-12/20 should be accepted has been rebutted by the arguments that Mr. Janicki makes in his MTD.

In this context, the Undersigned lastly turns to the District's concern that the Zudick Award and assertedly unbecoming conduct by Mr. Janicki will escape the view of the Undersigned if Mr. Janicki's overly technical and disingenuous procedural sleights of hand and procedural niceties and technical obstructionism are accepted. Notwithstanding the District's expressed concern, the

Undersigned's view, as discussed above, is that, rather, the provisions of the TEACHNJ Act lead to the conclusions determined herein as to whether to permit the additional submissions sought by the District in A/STC 256-12/20.

Conclusions

Under all the circumstances described above, the Undersigned concludes that none of the arguments or case authorities cited by the District supports its assertion that its filing of A/STC 256-12/20 should be permitted under the provisions of the TEACHNJ Act. Rather, under the circumstances present herein, the Undersigned finds that in Mr. Janicki's MTD, he has persuasively argued that permitting the District's filing of A/TSC 256-12/20 would be in substantial conflict with a number of provisions of the TEACHNJ Act. In the view of the Undersigned, that Act's N.J.S.A. 18A:10-17(b) provisions, as recited above, with their carefully crafted restrictions and unique and strict evidentiary and timeliness requirements, dictate the determinations made herein and are not subject to being overridden by the exigencies of a particular case or situation.

Therefore, for the reasons discussed above herein, the Undersigned finds that Mr. Janicki has supported his MTD with meritorious bases and that it should be granted.

DECISION

The Undersigned grants Mr. Janicki's Motion To Dismiss the District's Amended/Supplemental Charges in A/STC 256-12/20.

DATE: March 25, 2021

Gary T. Kendellen
GARY T. KENDELLEN

STATE OF NEW JERSEY:
SS:
COUNTY OF UNION:

I hereby affirm pursuant to CPLR Sec. 7507 that I am the individual described in and who executed this instrument, which consists of my Decision.

DATE: March 25, 2021

Gary T. Kendellen
GARY T. KENDELLEN

ARBITRATION PROCEEDINGS

BEFORE ARBITRATOR GARY T. KENDELLEN

In the Matter of the Tenure Hearing Gregory Janicki School District of the Township of Washington, Gloucester County Agency Docket No. 256-12/20	**ADDENDUM TO ARBITRATOR'S DECISION ON MOTION TO DISMISS AMENDED/ SUPPLEMENTAL CHARGES**

COUNSEL:

For the District — Joseph F. Betley, Esq.
Capehart Scatchard, P.A.

For Gregory Janicki: — Matthew B. Wieliczko, Esq.
Zeller & Wieliczko, LLP

ADDENDUM

Based upon the Undersigned's granting on March 25, 2021 of Mr. Janicki's Motion To Dismiss the District's Amended/Supplemental Charges in A/STC 256-12/20, the Undersigned dismisses the Amended/Supplemental Charges in A/STC 256-12/20.

DATE: March 29, 2021

Gary T. Kendellen
GARY T. KENDELLEN

STATE OF NEW JERSEY:
SS:
COUNTY OF UNION:

I hereby affirm pursuant to CPLR Sec. 7507 that I am the individual described in and who executed this instrument, which consists of my Decision.

DATE: March 29, 2021

Gary T. Kendellen
GARY T. KENDELLEN