70-22

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

IN THE MATTER OF THE TENURE HEARING OF	)	
	)	OPINION
CRYSTAL SAYLOR, RESPONDENT	)	AND
SCHOOL DISTRICT OF WEST NEW YORK	)	DECISION
	)	
DKT NO. 236-12/21	)	

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE RESPONDENT

Sanford R. Oxfeld, Esq., Oxfeld Cohen, P.C.

FOR THE DISTRICT

Lester E. Taylor, III, Esq., Partner, Steinhardt, Cappelli,
Tipton & Taylor, LLC

BACKGROUND INFORMATION COMMON TO ALL CHARGES

"Respondent was hired by the West New York Board of Education (Board) as the secretary to the Business Department commencing January 16, 2010 and entered an employment contract for the remainder of the 2009-2010 school year, with an annual salary of $33,000. She was reappointed to the same secretarial position for the 2010-2011 and 2011-2012 school years. In November 2011, the Board contracted to employ Saylor for the 2011-2012 school year as the Administrative Assistant to the Assistant Superintendent of Educational and Personnel Services, with an annual salary of $40,000. She was reappointed to that position for the 2012-2013, 2013-2014 and 2014-2015 school years with modest raises. On July 1, 2015, the assistant superintendent with whom Respondent had been working since November 2011 was promoted to superintendent. Two weeks later, the Board approved the new superintendent's recommendation to appoint Respondent as Secretary to the Superintendent of Schools at a pro-rated salary of $72,500. Respondent remained in that position until her termination in June 2018."

"During her employment with the Board, Respondent was, at all times, subject to the terms and conditions of her employment contracts. These contracts obligated Respondents to faithfully perform the duties of the position in accordance with any and all Board policies and any and all applicable laws, rules and regulations."

West New York Board of Education Policy No. 4281 *Discipline* states: "The Board of Education directs all support staff members to observe statutes, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct. Violations of those statutes, rules, policies, and regulations will be subject to discipline. The immediate supervisor and/or the Director of Human Resources shall deal with disciplinary matters on a case-by-case basis. Discipline will include, as appropriate, verbal and written warnings, transfer, suspension, freezing wages, and dismissal; discipline will provide, wherever possible, for progressive penalties for repeated violations. In the event disciplinary action is contemplated, notice will be given to the employee in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based; the text of the statute, policy, rule, or regulation that the employee is alleged to have violated; a date when the employee may be heard and the administrator who will hear the matter; and the penalty that may be imposed."

West New York Board of Education Policy No. 4281 *Inappropriate Staff Conduct* states: "The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district…there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare." Furthermore, the Policy states that: "The Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. In appropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district."

SPECIFICATION OF CHARGES

CHARGE 1

CONDUCT UNBECOMING A PUBLIC EMPLOYEE AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT

The foregoing background information, and the facts alleged therein, are incorporated by reference as it fully set forth herein. Crystal Saylor has engaged in unbecoming conduct including misconduct, insubordination and other just cause by her acts and omissions relative to her employment by the Board. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming and insubordination.

Count 1

On January 19, 2017, at or about 1:30 pm, Respondent left her post unattended, and did not return for work for the remainder of the afternoon. Respondent failed to provide notification to her primary supervisor, the Superintendent of Schools, with regards to her absence. Further, at no time did the Superintendent approve her absence.

Count 2

On June 5, 2018, while in the common area outside of the Superintendent's office, and in earshot of other Central Office employees, Respondent aggressively confronted the Superintendent of Schools, used vulgar, threatening, and inappropriate language towards the Superintendent, and Respondent's overall conduct throughout the day was unbecoming a public employee. On the same day, Respondent was given a notice of immediate

termination of employment with the West New York Board of Education and was relieved of her duties effective immediately.

CHARGE 2

INSUBORDINATION AND CONDUCT UNBECOMING FOR USE OF INAPPROPRIATE AND VULGAR LANGUAGE TOWARDS SUPERINTENDENT

The foregoing background information, and the facts alleged therein, are incorporated by reference as it fully set forth herein. Crystal Saylor has engaged in unbecoming conduct including misconduct, dishonesty, insubordination and other just cause by her acts and omissions relative to her employment by the Board. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming and insubordination.

Count 1

On June 5, 2018, Respondent exhibited conduct demonstrative of insubordination in her use of inappropriate, threatening, and vulgar language towards the Superintendent in the work area outside the Superintendent's Office and within earshot of other Central Office employees. Respondent also engaged in defiant conduct throughout the same day, resulting in her immediate termination.

CHARGE 3

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S CONDUCT

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as it fully set forth herein.

Each of the foregoing charges and counts individually warrant dismissal. Additionally, in their totality within the context of the Respondent's behavior, it is evident that she engaged in a pattern of unbecoming conduct, neglect of duty, incapacity, and insubordination or other just cause, warranting dismissal. The allegations, jointly and severally, demonstrate her unfitness to continue to serve in a position of trust, warranting her immediate dismissal.

Dated: November 29, 2021

_____
Clara Brito Herrero, Superintendent

MOTION TO DISMISS – LACHES

In lieu of an Answer to the Tenure Charges, Respondent submitted a letter memorandum dated December 22, 2021 to Acting Commissioner Allen-McMillan in support of her Motion "to dismiss the tenure charges administratively due to the application of the doctrine of laches."

Respondent notes that "on June 5, 2018 the Board of Education gave Ms. Saylor a 'Notice of immediate termination' due to an alleged incident that was witnessed by no one, with no investigation, and most importantly despite her tenured status. She was never interviewed and none of the rights she possessed as a tenured secretary were afforded to her in that the Board knowingly simply ignored her tenured status…"

Respondent asserts that "the Board's filing of the instant tenure charges, at the outset, are stale and are being filed over three and a half years after the only alleged incident which gave rise to Ms. Saylor's illegal immediate termination. As Ms. Saylor notes in her Certification, three and a half years is a

long time to try to remember one incident. Memories fade over time. No statements were taken at the time to help refresh her recollection (See paragraph 10 of the Saylor Certification). This inexcusable delay, especially when the Board was specifically advised at the time of Ms. Saylor's rights and the procedure which ought to have been followed, mandates an analysis of the doctrine of laches to the undisputed facts of this matter."

"However, there is an additional salient factor which must be considered and mandates that the Doctrine be applied and the Board's tenure charges dismissed forthwith. The single incident was provoked by the actions of the superintendent (the same superintendent who is now filing the instant charges) as to the medical treatment required of Ms. Saylor's partner, Justin Feurtado, who was employed at the time by the Board as a technology engineer (See paragraph 8 of the Saylor Certification). In short, the superintendent was aware of Mr. Feurtado's 'serious health issues' and was also aware of said doctor's appointment. Clearly overstepping her boundaries and any semblance of propriety, the superintendent cancelled Mr. Feurtado's doctor's appointment, and did not even have the decency to advise him beforehand. It was when Mr. Feurtado went to the appointment that his doctor informed him that the superintendent had cancelled his appointment."

"What is relevant, at this point to our inquiry, is not the superintendent's unconscionable conduct immediately prior to the run-in from over three and a half years ago; rather it is the fact that Mr. Feurtado died on August 23, 2019 (See paragraph 6 of the Saylor Certification). Had the Board followed the

appropriate procedure and certified tenure charges against Ms. Saylor on or about June 5, 2018 (or perhaps if the Board had done even a rudimentary investigation and interviewed Mr. Feurtado at the time), then Ms. Saylor would have been able to prove all of the above by having Mr. Feurtado testify."

"To be clear, the only reason that Ms. Saylor cannot now avail herself of Mr. Feurtado's testimony, which is of tremendous relevance herein, is because the Board, despite receiving actual notice, determined to ignore the law and wait over three and a half years to first file tenure charges against Ms. Saylor."

"The law on point is both clear and supports our application herein. In Fox v. Polymer Packaging, 201 N.J. 401, 417 (2012), the New Jersey Supreme Court held that laches is an equitable doctrine that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party. Here the delay is both unexplainable and inexcusable, not only because the courts have sustained our position, but because we specifically advised the Board of the law pertaining to tenured secretaries at the time. Moreover, there is clearly prejudice to Ms. Saylor as her key witness had died in the interim. In Lavin v. Hackensack BOE, 90 N.J. 145, 152 (1982), the Court held 'The length of delay, reasons for the delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs…The length of the delay alone or in conjunction with the other elements may result in laches.'"

"It is submitted the Board's actions herein mandate the application of the doctrine of laches so as to preclude it from receiving any relief by way of the

instant tenure charges. Frankly, the Lavin matter appears to directly parallel precisely what the Board has done herein. While the superintendent has remained the same all these years later, the board secretary/business administrator has changed and, most significantly, Mr. Feurtado had passed away, in the interim."

Whereas the Respondent argued that the application of the doctrine of laches to the instant case was a question for the Commissioner to resolve, she acknowledges that this motion to dismiss on the grounds of laches has been referred to the undersigned Arbitrator pursuant to N.J.S.A. 18A:6-16 as discussed above.

Second Count – Violation of NJSA 18A:6-17.1 (b)(3)

In the second count of its Motion to Dismiss the Tenure Charges, the Respondent contends that the Board has violated NJSA 18A:6-17.1(b)(3), which reads as follows:

A) It reads in pertinent part, at NJSA 18A:6-17.1(b)(3), as follows:

> *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 with a complete summary of their testimony,* to the employee or the employee's representative. The employing *board shall be precluded from presenting any additional evidence* at the hearing, except for purposed of impeachment of witnesses.

6. To be clear, let's parse this section of the statute.it clearly and unequivocally mandates that the West New York board of education was *required* (after all that is the legal meaning of "shall") to provide Ms. Saylor or the undersigned, with all evidence, to:

The Respondent maintains that the above section of the statute "clearly and unequivocally mandates that the West New York Board of Education was

required (after all that is the legal meaning of 'shall') to provide Ms. Saylor or the undersigned, with all evidence, including, but not limited to:

a. All documents and electronic evidence,
b. Statements of all witnesses, and
c. A list of their witnesses with a complete summary of their testimony."

The Respondent emphasizes that it is "upon referral…for arbitration" when the "above 'evidence' and disclosures are made." Moreover, Respondent notes that the statute provides that if the employing board, "herein the West New York Board of Education, does not fulfill this clear statutory mandate the Board can present no evidence in addition to what it has disclosed pursuant to the statutory requirements. As this board has identified no witness statements, provided no statements, and proffered no list of witnesses (even without a complete summary of their testimony), there is absolutely nothing the employing board can present in its case in chief."

Inasmuch as the Board was notified by the Commissioner that the instant matter was referred to the Arbitrator on December 29, 2021, the Board should have known that "its pre-trial disclosures, mandated by the aforesaid statute, were required to be served "upon Respondent's counsel on or about that time."

In further support of its Motion to Dismiss on the ground that the Board failed to comply with NJSA 18A:6-17.1(b)(3), the Respondent alludes to the Interrogatories it propounded to the Board, by email dated January 17, 2022, specifically Question #16. It reads:

> "On what date did the board of education provide Ms. Saylor or her representative with the following:

a. All evidence, including, but not limited to, documents and electronic evidence.
b. Statements of all witnesses."

In its response to Question #16, the Board wrote for subparts (a), (b) and (c).

> "The West New York Board of Education objects to this Interrogatory to the extent that it is vague, overbroad, and lacking the specificity required for an answer."

The Respondent argues that the Board's response is disingenuous "because Question 16 specifically and directly requested but one thing, the date that the board might claim it complied with the statutory pretrial disclosures. They were supposed to have been made on or about December 29, 2021, and it is submitted, rather than acknowledging its total failure to do what was required of it, it chose to prevaricate."

In addition, the Respondent relies on a recent case, specifically the decision of Arbitrator Gerard G. Restaino, dated October 13, 2021, in Atlantic City Board of Education v. John Toland, DOE DKT. No. 167-8/20. In the Toland case, Respondent filed a Motion in Limine, seeking to preclude the Board of Education from presenting any additional evidence at the hearing except for the purposes of impeachment" based on its non-compliance with N.J.S.A. 18A.6-17(b)(3).

In granting the Respondent's Motion in Limine, Arbitrator Restaino, inter alia, found:

> "What is missing from the Petitioner's exhibits is a list of witnesses with a complete summary of their testimony.
>
> ***
>
> [The Board] failed to do so and I have no recourse other than to adhere to the language of the statute. I do not have the authority

> to state that the Petitioner complied with NJSA 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 full force and weight."

In concluding that the statute required him to bar the testimony of undisclosed witnesses, including the Respondent, the Arbitrator wrote:

> "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 arbitrator, in his opinion ruling on plaintiff's motion to dismiss, found that based on Board's failure to comply with such section of the statute in the manner noted above and due to the failure to authenticate the videos, that the tenure charges filed against plaintiff should be dismissed."

The Court upheld the Restaino Award pursuant to the relevant statute and concluded:

> Continuing (on Page 11) of the Court's decision,
>
> "The court finds the arbitrator's findings as to these issues as the basis of his award was based on the strict statutory language contained in the relevant statute and was based on substantial, credible evidence in the record as it is not disputed that Board failed to adhere to the cited statute and the arbitrator found the statute required such since the statute utilized "shall be precluded" from presentation at the hearing."

The Court reinforced the remedy for non-compliance imposed by the statute, namely: "The employing Board of Education shall be precluded from presenting any additional evidence at the hearing except for the purposes of impeachment."

Finally, Respondent rejects the Board's contention that "laches should not apply because the three-and-a-half-year delay in filing tenure charges is

'excusable delay.'" According to the Respondent, the letter Respondent's counsel sent to the Board on August 1, 2018 following her termination by the Board on June 5, 2018 – "prior to the commencement of any litigation – notifying the Board that Ms. Saylor was tenured and could not be terminated without the filing of tenure charges" should have sufficed. "The Board chose to ignore that letter. In doing so, the Board gambled and lost – that was a strategic choice, not an excusable delay."

With respect to its claim that the Board failed to comply with N.J.S.A. 18A:6-17.1(b)(3), which required the Board "upon referral of the case to arbitration" to produce all evidence including a list of witnesses with a complete summary of termination, the Respondent distinguishes the Board's obligations under N.J.S.A. 18A:6-17.1(b)(3) from the employee's disclosures. Contrary to the Board's position, it is only the employee who "[a]t lease 10 [business] days prior to the hearing...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 of education or its representative."

In finding that the Board misconstrued the statute as well as the Doctrine of Laches, the Respondent reiterates that its Motions to Dismiss the tenure charges against Ms. Saylor should be granted on both procedural grounds.

Board Position

For its part, the Board maintains that "the Doctrine of Laches does not apply to the instant tenure charges" because "the Board's decision to now file

said charges can, in no way, constitute an 'unexplainable and inexcusable delay in exercising a right, which results in prejudice to another party.'" The Board recalls that "[before the institution of the present tenure charges, both Respondent and the Board were involved in litigation regarding the nature of Respondent's employment within the District; whether Respondent was a tenured employee and therefore, whether the Board had the right to terminate Respondent without bringing tenure charges against her."

In support of its contention that the Doctrine of Laches is inapplicable in the instant case, the Board provided the following chronology of events:

"On June 5, 2018, Respondent was terminated from the District. See Exhibit A. On August 23, 2018, Respondent appealed her termination from the District at the OAL level. See Exhibit D. The Administrative Law Judge, Gail Cookson, issued a decision on June 8, 2019, finding that Respondent did not have tenure, thereby affirming the propriety of the Board's decision to terminate Respondent without filing tenure charges. See Exhibit D. Respondent appealed the OAL decision to the Commissioner of Education which, once again, affirmed the Board's termination of Respondent's employment without tenure charges on September 26, 2019. See Exhibit E. Respondent subsequently appealed the Commissioner of Education's decision to the Appellate Division. See Exhibit F. On May 12, 2021, the Appellate Division issued a decision overturning Judge Cookson's decision at the OAL level and the subsequent adoption of said decision by the Commissioner of Education. See Exhibit F. On June 1, 2021, the Board filed a petition for certification to the New Jersey Supreme Court,

appealing the decision of the Appellate Division. See Exhibit G. The Supreme Court issued a decision on November 16, 2021, denying the Board's petition for certification. See Exhibit H."

The Board asserts that application of the doctrine of laches to the instant case is "illogical" because "there would have been no reason for the Board to bring tenure charges against Respondent in 2018 as the Board did not have reason to believe that Respondent had tenure. The facts clearly demonstrate the Board's good faith in not bringing tenure charges in 2018 as the OAL issued a decision on July 8, 2019, adopted by the Commissioner of Education on September 26, 2019, affirming the propriety of Respondent's termination and the non-existence of Respondent's tenure within the District." See Exhibit E. The Board's position is further supported by its June 1, 2021 appeal of the Appellate Division decision to overturn the OAL's ruling to the New Jersey Supreme Court. See Exhibit G. In reserving its right to appeal the decision regarding the existence of Respondent's tenure, the Board employed its rights through the judicial system, the proper forum, leaving the Respondent with no reason to believe the Board had abandoned its right to do so."

Inasmuch as "the Respondent was a party to the OAL decision promulgated on June 8, 2019, which ordered 'that the termination action of respondent the Board of Education of the Town of West New York is hereby affirmed.' See Exhibit D. Respondent appealed the OAL decision to the Commissioner of Education, who, in turn, rendered an opinion affirming the OAL decision and the Board's actions in terminating Respondent on September 26,

2019 and Respondent once again decided to appeal the Commissioner's decision to the Appellate Division," the Board contends that the Respondent contributed to the three year delay. Although the Appellate Division overturned the OAL's decision on May 12, 2021, "the Respondent was, nevertheless a party to the Board's petition for certification to the Supreme Court and the Supreme Court's subsequent denial on November 16, 2021." See Exhibit H. The Board notes that "the present tenure charges were filed but one month after the Supreme Court's denial of the Board's Certification on December 16, 2021." See Exhibit A.

With respect to the case law concerning the Doctrine of Laches, the Board cites Knorr v. Smeal, 178 N.J. 168, 180-181 (2003) where it was held that the doctrine of laches "may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned." From the Board's perspective, the facts herein outlined do not warrant a finding that the "Board led Respondent to believe that it had abandoned its intent to terminate Respondent's employment as Respondent was a party to the accompanying litigation since 2018."

In Fox v. Millman, 210 N.J. 401, 417 (2012), the Court found that "[o]ur courts have long recognized that laches is not governed by fixed time limits, but instead relies on analysis of time constraints that 'are characteristically flexible.'" Hence, the Board argues that the three-year time period which elapsed since the

Respondent's termination on June 5, 2018 and the filing of tenure charges on December 16, 2021 should not be dispositive of the instant case.

The Board further maintains that "Respondent has not demonstrated that she had incurred prejudice as the result of the Board's filing tenure charges." Unlike the plaintiffs in Knorr who were harmed in "undertaking significant costs associated with discovery seeing as defendants could have brought a motion to dismiss fourteen months prior…," the present tenure charges could have only been filed once the underlying issue of Respondent's employment and the existence of her tenure were resolved.

In response to Respondent's claim that she has been prejudiced by the Board's failure to conduct an investigation or file tenure charges in 2018, specifically her inability to call Mr. Feurtado, her partner, as witness, the Board argues that "[c]onsidering the litigation undertaken in the past three years, Respondent had the ability to submit a signed certification of Mr. Feurtado or call Mr. Feurtado as a witness and have his testimony on the record. Respondent did neither (See Exhibit F at 3-4 and Exhibit L-OAL Transcript with Witness List 05/20/2019) and is now attempting to characterize this failure to call Mr. Feurtado as a relevant witness, as prejudice being the current tenure charges. However, Respondent's tenuous analysis does not address the crux of the prejudice requirement. The inability of Mr. Feurtado to now testify in a tenure hearing is not an effect of the Board's filing of tenure charges at this juncture, after the completion of the accompanying litigation. Finally, any attempt to characterize Respondent's financial status as prejudice for purposes of laches is

irrelevant and immaterial. Respondent's salary in back payments for the past three years was only warranted upon the outcome of the accompanying litigation leading to the filing of the present tenure charges against Respondent."

It was the decision of the Appellate Division and subsequent denial of the Board's petition at the Supreme Court level that necessitated the Board's resort to its "only remaining recourse in relieving itself of Respondent's employment – bringing the present tenure charges." In its decision, the Supreme Court wrote:

> [Respondent] was thus entitled to face tenure charges at the tenure hearing. N.J.S.A. 18A:6-10
> Reversed and remanded for proceedings consistent with this opinion.

Finally, on this point, the Board contends that the Respondent's laches argument could only have meant "if he had waited three years after the Supreme Court's denial of certification to file the present charges and failed to take any other recourse…"

In response to the Respondent's second ground of its Motion to Dismiss, namely non-compliance with N.J.S.A. 18A:6-17.1(b)(3), the Board states that it "has not failed to comply with N.J.S.A. 18A:6-17.1 as no hearing has been scheduled by Arbitrator Simmelkjaer, which would trigger the time indicated by statute to introduce all evidence."

After citing N.J.S.A. 18A:6-16(b)(3), the Board argues that "Respondent's interpretation of the statute governing arbitration is patently false." Since the undersigned Arbitrator "has not yet set a hearing date for these charges (See Exhibit M – Hearing Schedule from Arbitrator Simmelkjaer) all the evidence the Board plans to present during a tenure hearing on the charges, including

Superintendent Herrera's summary of testimony, is therefore, not precluded by statute."

Whereas the Board acknowledges that Arbitrator Restaino's decision in the Toland case "to dismiss the tenure charges and not allow the Petitioner to present any additional evidence is based on a strict reading of the statute," it maintains that even if a "similar, strict interpretation were to be applied in this case, the matter could not be dismissed summarily because no hearing date has been scheduled. Therefore, it cannot be said that the Board has violated the relevant statute warranting dismissal of the instant tenure charges."

The Board has focused on language in the Toland Award which it construes as requiring the entirety of its evidence to be submitted within 10 days of a scheduled hearing as follows:

> 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)…Hearings in the matter at bar are scheduled to start on Monday, November 30, 2020 and continue to December 4, 2020…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, 20[20]. They failed to do so and I have no recourse other than to adhere to the language of the statute. I do not have the authority to state that Petitioner complied with N.J.S.A. 18A:6-17.1(b)(3) in spirit. (*Id*. 5-6).

In describing the legislative intent of the statute is to allow Respondent enough time to set forth defenses to the charges against them (See Toland at 4-5), the Board contends that absent a scheduled tenure hearing date "Respondent has yet to establish the Board has failed to comply with the statutory requirements set forth in N.J.S.A. 18A:6-17(b)(3)." It also notes that

"Respondent makes its argument notwithstanding the fact that a full evidentiary hearing was conducted before the OAL on 05/20/2019, during which, Superintendent Herrera testified at length and cross-examined by Respondent's counsel."

In addition to its position that "the Respondent has failed to demonstrate how the present charges must be dismissed as a matter of law, the Board asserts that "the version of events which led to the filing of the present tenure charges differ between the parties and can only be resolved in an evidentiary hearing."

The Board reiterates its" Counterstatement of Facts" wherein Superintendent Herrera's recollection of her interaction with Respondent on June 5, 2018 is set forth, specifically the Respondent's alleged "use of inappropriate, threatening and vulgar language towards Superintendent Herrera, her supervisor, evincing insubordination." According to the Board, "Respondent's actions exceeded far more than an aggressive tone" and undermined her "position of confidential secretary which is one of trust…Respondent's conduct, therefore, warrants termination not only on the basis of insubordination and conduct unbecoming a public employee, but because Respondent's actions threatened the confidential nature of her employment relationship with Superintendent Herrera."

"Further, Respondent's certification that her partner, Mr. Feurtado, was directly involved in the incident in question, bears direct contradiction to the tenure charges sworn to by Superintendent Herrera as said tenure charges

address only Respondent's actions and behavior on the date in question. See Exhibit A. The contradictory nature of the issues involved in this matter warrant an evidentiary hearing."

DISCUSSION

Considering the positions of the parties in their entirety, the Arbitrator finds that the Respondent's Motion to dismiss should be granted based on the Board's non-compliance with N.J.S.A. 18A:6-17.1(b)(3). Although the Arbitrator is not persuaded that the Respondent has established that the Doctrine of Laches is applicable in the instant case, he is persuaded that the Board, "upon referral of the case to arbitration," failed to provide Respondent or Respondent's counsel with "all evidence including, but not limited to documents, electronic evidence, statements of witnesses with a complete summary of their testimony…"

I. Motion to Dismiss – Doctrine of Laches

The Respondent's Motion to Dismiss based on laches is largely predicated on the three- and one-half-year delay which preceded the Board's filing of the tenure charges on December 16, 2021. In filing the tenure charges 3-1/2 years after the June 5, 2018 incident, which gave rise to the charges, the Board purportedly engaged in an "unexplainable and inexcusable delay" which prejudiced the Respondent. According to the Respondent, the delay resulted in the unavailability of a key witness in Ms. Saylor's defense, namely, her partner, Mr. Feurtado, who died on August 29, 2019. As the Respondent puts it, "[h]ad the Board followed the appropriate procedure and certified tenure charges against Ms. Saylor on or about June 5, 2018 (or perhaps if the board had done

even a rudimentary investigation at the time) then Ms. Saylor would have been able to prove all of the above by having Mr. Feurtado testify."

Additionally, Respondent contends that the "inexcusable and unexplainable delay" could have been avoided had the Board adhered to the specific advice provided by Respondent's counsel pertaining to tenured secretaries at the time. Rather than "knowingly" ignore the Respondent's tenured status in terminating her employment, which caused the Respondent to appeal her termination from the District at the Office of Administrative Law ("OAL") and later appeal the OAL decision to the Commissioner of Education, and subsequently appeal the decision of the Commissioner of Education to the Appellate Division, the Board had an opportunity to avoid the inexcusable delay. Ultimately, the Appellate Division overturned the decision of Judge Cookson at the OAL level and subsequent adoption of said decision by the Commissioner of Education.

In the Arbitrator's opinion, the delay caused by the parties' litigation of Ms. Saylor's tenure status cannot be solely attributed to the Board. Given its belief at the time (circa June 2018) that the Respondent did not have tenure, as the Board correctly deserves, "there would have been no reason for the Board to bring tenure charges against Respondent in 2018." Evidence that the Board acted in good faith in not bringing tenure charges in 2018 is confirmed by the OAL decision on July 8, 2019, subsequently adopted by the Commissioner of Education on September 20, 2019, "affirming the propriety of the Respondent's termination and the non-existence of Respondent's tenure within the District."

Clearly, if the status of Respondent's tenure was self-evident, as the Respondent contends, the extensive litigation on the subject which ensued would have been unnecessary. However, as OAL Judge Cookson found that for tenure purposes Respondent's position as Secretary to the Business Department was inconsistent and not contguous with her position as Administrative Assistant to the Assistant Superintendent and "confidential employee," concluding that her employment in the latter position was "without union or statutory rights," the interpretation of Respondent's tenure rights was debatable.

In addition to the ambiguity concerning Respondent's tenure status, it is undisputed that Respondent was a party to the OAL decision having appealed the Board's decision to terminate her employment on June 5, 2018, the appeal of the OAL decision to the Commissioner of Education, and the appeal of the Commissioner of Education's decision to the Appellate Division. Moreover, as the Board correctly notes, once the Appellate Division overturned the OAL's decision on May 12, 2021, "the Respondent was, nevertheless a party to the Board's petition for certification to the Supreme Court and the Supreme Court's subsequent denial on November 16, 2021."

Given the foregoing sequence of litigation, Respondent cannot reasonably assert that it was not mutually responsible for the three-year delay. Since the Board filed the instant tenure charges one month after the Supreme Court's denial of the Board's certification on December 16, 2021, the Arbitrator maintains that it acted timely and in good faith. As a result, the three-year delay can be attributed to both parties. The Arbitrator concurs with the Board in its analysis

that laches would be only appropriate if the Board had waited three years after the Supreme Court's denial of certification to file the tenure charges.

The Arbitrator is further persuaded that the Respondent has not been prejudiced by the Board's delay in filing tenure charges. Insofar as the unavailability of Mr. Feurtado's testimony is concerned, given the three-year delay to which the Respondent was a party, the Respondent was not precluded from obtaining a signed certification from Mr. Feurtado or conducting a de bene esse deposition.

Assuming arguendo that the Board was solely responsible for the delay, the Respondent here, unlike the plaintiffs in Knorr, supra, who incurred significant discovery costs, has not shown evidence of prejudice.

Finally, Respondent adduced no evidence that she detrimentally relied on the Board's representation that it had abandoned its intent to terminate Respondent's employment, as the parties were mutually engaged in litigation since 2019.

II. Non-Compliance with N.J.S.A. 18A:6-17.1(b)(3)

In the Arbitrator's opinion, the Board has misconstrued N.J.S.A. 18A:6-17.1(b)(3) to the extent it has conflated the obligations of the employing board with those of the employee. On the one hand, N.J.S.A. 18A:6-17.1(b)(3) clearly states that "[u]pon 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 with a complete summary of their testimony to the employee or the employee's representative. The employing

board shall be precluded from presenting any additional evidence at the hearing, except for the purpose of impeachment of witnesses."

On the other hand, also set forth in N.J.S.A. 18A:6-17.1(b)(3), it states: "At least 10 [business] 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 of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses."

These are two clearly distinct provisions in the statute. Whereas the obligations of the employing board are triggered "upon referral of the case for arbitration," the obligations of the employee emerge "at least 10 [business] days prior to the hearing." The Board has undoubtedly conflated its obligations as the "employing board" with those of the "employee" and exchanged or reversed its obligations under N.J.S.A. 18A:6-17.1(b)(3).

As the Respondent correctly notes, the Board has not fulfilled its clear statutory mandate because "upon referral of Ms. Saylor's tenure charges to the Arbitrator on December 29, 2021, it did not serve its pre-trial disclosures "upon Respondent's counsel on or about that time." Since there is no evidence in the record that on or about December 29, 2021, the Board provided witness statements, a list of witnesses, or a complete summary of the witnesses' testimony, the Arbitrator is compelled to conclude that the Board failed to comply with N.J.S.A. 18A:6-17.1(b)(3).

For its part, the Board has erroneously argued that "since the undersigned Arbitrator has not yet set a hearing date for these charges (See Exhibit M – Hearing Schedule from Arbitrator Simmelkjaer) all the evidence the Board plans to present during a hearing on the charges, including Superintendent Herrera's summary of testimony, is therefore, not precluded by statute."

In the Arbitrator's opinion, the West New York Board of Education has undoubtedly and unequivocally misconstrued the statute. The 10 [business] days prior to the hearing's evidentiary limitation strictly applies to the employee and not the employing board. The scheduling of the hearing date(s) by the Arbitrator will impose a 10 [business] day limitation on Respondent in terms of her ability to provide the evidence upon which she will rely. It will have no bearing on the Board because its obligations to produce the evidence upon which it will rely will have expired around December 29, 2021.

This matter has been recently addressed in the Toland Award, supra, in which Arbitrator Restaino granted a Motion in Limine to preclude the Board of Education from presenting any additional evidence based on its non-compliance with N.J.S.A. 18A:6-17.1(b)(3). In Toland, as in the instant case, the Board failed to present a list of witnesses or a complete summary of their testimony. In finding that he had "no recourse other than to adhere to the language of the statute, "Arbitrator Restaino was compelled to "bar the testimony of undisclosed witnesses, including the Respondent." He continued: "The language in question is specific not general and must be given its full force and effect."

In sustaining Restaino's Award, the Court found that "the arbitrator's findings as to these issues as the basis of his award was based on strict statutory language contained in the relevant statute and was based on substantial credible evidence in the record as it is not disputed that the Board failed to adhere to the cited statute…"

The Board's interpretation of the Toland Award conflates disparate sections in the Award language. The Arbitrator first notes that "hearings in the matter at bar are scheduled to start Monday, November 30, 2020." Later, in his decision, he writes "What is missing from Petitioner's (Board'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" (i.e., at least 10 days before the commencement of the hearing). "Respondent complied with all requirements of N.J.S.A. 18A:6-17.1(b)(3)."

Later, the Board quotes an excerpt from the opinion of Arbitrator Denenberg in DOE 267-9/14, Marie Ebert vs. State-Operated School District, City of Newark which states: "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 18A:6-17.1(b)(3)." "The arbitrator determined that the 'dismissal is without prejudice to the District's right to file the charges again.'"

Next, Arbitrator Restaino finds that "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 a lack of a witness list with a complete summary of their testimony."

In a subsequent paragraph, which appears to contain two typos, Arbitrator Restaino writes:

> 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 timeframe. 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 statute. 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.

Where it states "Petitioner (Board) was required to submit its witness list and summary of their testimony no later than November 20, 2002," Arbitrator Restaino apparently meant to write "Respondent was required to submit its witness list and summary of their testimony no later than November 20, 2020."

In the last paragraph, Arbitrator Restaino concludes: "The Respondent's Motion to bar the testimony of previously undisclosed witnesses is granted."

As noted in the Restaino Award, the consequences of non-compliance with N.J.S.A. 18A:6-17.1(b)(3) are mandatory. The West New York Board of Education, as per N.J.S.A. 18A:6-17.1(b)(3), "shall be precluded from presenting any additional evidence at the hearing except for the purposes of impeachment."

Given the failure of the Board to produce any of the disclosures required of it by N.J.S.A. 18A:6-17.1(b)(3) and as a result the Board is statutorily prohibited from calling any witnesses and/or producing any evidence on its case-in-chief as it has disclosed no witnesses nor identified any evidence. Since the remedy for non-compliance with N.J.S.A. 18A:6-17.1(b)(3) is statutorily

mandated, the Board, as the charging party, will not be able to meet its burden of proof by a preponderance of the credible evidence.

Accordingly, the Arbitrator grants Respondent's Motion to Dismiss the tenure charges against Ms. Crystal Saylor, DKT No. 236-12/21, without prejudice.

Robert T. Simmelkjaer

April 12, 2022 Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 12th day of April 2022 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument which is his Award.

April 12, 2022 _____
Notary Public