

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION
WALLKILL VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION

IN THE MATTER OF TENURE HEARING)
)
 between)
)
 WALLKILL VALLEY REGIONAL HIGH SCHOOL)
 BOARD OF EDUCATION)
 SUSSEX COUNTY, NEW JERSEY)
)
 and Petitioner)
)
 JAMES MARION)
 Respondent)
)
 DOCKET NO. 249-9/22)

**OPINION AND
AWARD**

Before: Lisa C. Charles
Arbitrator

APPEARANCES

FOR THE PETITIONER

Paul E. Griggs, Esq. and Dennis McKeever, Esq.
Cornell, Merlino, McKeever & Osborne, LLC

FOR THE RESPONDENT

Sandford R. Oxfeld, Esq.
Oxfeld Cohen, PC

BACKGROUND

James Marion (Respondent) is a tenured teacher at the Walkkill Valley Regional School District, Sussex County, New Jersey (Petitioner or District). Respondent has been employed by the District as a science teacher since January 2002. In March 2022, three female students reported to James Hamil, the school psychologist, that Respondent made them feel uncomfortable with sexually provocative comments and daily hugging and touching their shoulders. Mr. Hamil reported the matter to Adam Vazquez, Assistant Principal, who reported it to David Carr, Superintendent of School/Principal. Principal Carr authorized Taryn Geuther, Director of Curriculum, to conduct a school investigation and she interviewed five students on March 21-22, 2022. The District placed Respondent on a paid suspension during the school investigation. Also on March 21, 2022, the matter was reported to the New Jersey Department of Children and Families Institutional Abuse Investigation Unit (IAIU), which investigated the matter as a child sexual abuse/risk of sexual abuse concern. On May 17, 2022, the IAIU's report determined that the Respondent's behavior did not rise to the level of sexual abuse, that the students were not harmed or placed at risk of harm by the Respondent, and that the child sex abuse/risk of sexual abuse concern was "unfounded."

On August 4, 2022, based on the complaints of the same three students and two other students interviewed during the school investigation, the Petitioner instituted five tenure charges against Respondent for Unbecoming Conduct, Inappropriate Behavior, Violation of Regulations 3280 and 3281, and Other Just

Cause. On September 7, 2022, the District placed Respondent on an unpaid suspension for 120 days, and on September 15, 2022, Paul Griggs, Counsel for the Petitioner, submitted the following documents to the Commissioner of Education:

- (1) a Statement of Tenure Charges
- (2) a Statement of Evidence
- (3) Certified Copy of Certificate of Determination and CM (certified mail) receipts

On September 22, 2022, the Respondent denied all the charges and filed an answer opposing the charges. The Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and referred the charges for arbitration on October 12, 2022.

On February 3, 2023, Sandford Oxfeld, Counsel for the Respondent, filed a Motion in Limine to dismiss the tenure charges with prejudice asserting that the Petitioner violated *N.J.S.A. 18A:6-17.1(b)(3)*. That statute states in relevant part:

Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statement of witnesses, and a list of witnesses with a complete summary of their testimony to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

The Respondent notes that it did not receive the student witnesses' names until December 2022, that it did not receive the IAIU report until February 2023, and that to date, it has not received the summary of the witnesses' testimony and other required pretrial disclosures. The Respondent's motion seeks to exclude

the testimony of any witnesses and any other evidence the Petitioner may offer at the arbitration hearing that was not provided to the Respondent upon referral of the case for arbitration. The Petitioner submitted its brief regarding the motion on March 7, 2023, and the Respondent submitted its response brief on March 22, 2023. The Petitioner submitted a sur-reply on April 4, 2023, and on that same day, the Respondent objected to its consideration.

Respondent Position

The Respondent argues: (a) that the Petitioner cannot present its case in chief since it is barred by statute from providing any evidence at the hearing which it had not disclosed upon referral of the case for arbitration; (b) that the IAIU report was available when the charges were referred for arbitration but the Petitioner failed to secure it or provide it to the Respondent; (c) that the Petitioner did not provide the students' names, a list of witnesses, a summary of their testimony, and other mandated disclosures specified in *N.J.S.A. 18A:6-17.1(b)(3)* when the case was referred for arbitration; (d) that the instant case is governed by the procedures established in the Opinion and Award written by Arbitrator Gerard G. Restaino in Atlantic City Board of Education v. John Toland DOE Dkt 167-8/20 dated October 13, 2021, which the Superior Court of New Jersey upheld; and (e) that the Motion in Limine was filed prior to setting the trial date to avoid having the students recount the events if the motion prevailed. The Respondent requests that the tenure charges against Mr. Marion be dismissed with prejudice.

Petitioner Position

The Petitioner argues: (a) that the IAIU report was not disclosed to the Respondent upon referral of the case for arbitration because it was not available; (b) that the students' names were not initially provided to Respondent because the parties had not agreed upon a Protective Order; (c) that the Statement of Tenure Charges included an Appendix of Exhibits containing a witness list and a summary of their testimony, and that along with the Statement of Evidence, and Certified True Copy of Determination and CM receipts provided to Respondent satisfied the statutory requirements; and (d) that the Motion in Limine was filed prematurely since according to New Jersey Court Rule 4:25-7 the parties are to exchange pretrial information seven days prior to the initial hearing or trial date but the trial date has not yet been set. The Petitioner requests that the Motion in Limine be dismissed.

DISCUSSION

The Respondent's argument that the Petitioner cannot present its case in chief since it is barred by statute from providing any evidence at the arbitration hearing which it had not disclosed upon referral of the case for arbitration is persuasive. Although the witness list and a summary of their testimony was in the Appendix of Exhibits attached to the Statement of Evidence, the District acknowledges that it did not provide the Respondent the students' names and the IAIU report upon referral of the case for arbitration in October 2022. In addition, the District's argument that the IAIU report was not provided because it

was not available was not supported by the facts. The evidence reveals that the IAIU report was prepared in May 2022, and although the District requested it in July, November, and December 2022, it did not take the necessary steps to obtain the IAIU report. The evidence shows that the IAIU report was obtained only after the Respondent subpoenaed for its release in January 2023. The District provided no explanation why it did not subpoena the report prior to the referral of the case for arbitration.

In addition, the District's argument that it did not supply the students' names because there was no Protective Order agreed upon by the parties is unpersuasive. The evidence shows that the parties signed a Protective Order in December 2022. Again, the District provided no explanation why it did not seek a Protective Order prior to that date so that the students' names could have been provided to the Respondent when the case was referred for arbitration. Thus, the evidence reveals that the District did not comply with the provisions of *N.J.S.A. 18A:6-17.1(b)(3)*, which requires that all specified disclosures be provided to the Respondent upon referral of the case for arbitration.

Moreover, the Respondent's argument that the instant case is governed by the procedures established in the Atlantic City Board of Education v. John Toland DOE Dkt 167-8/20 Opinion and Award written by Arbitrator Gerard G. Restaino, dated October 13, 2021, and confirmed by the Superior Court of New Jersey is persuasive. In the Toland case, the Petitioner failed to provide the Respondent with a witness list and a summary of their testimony. The procedures established in the Toland case and upheld by the Superior Court on

January 20, 2022, established that the District is statutorily prohibited from calling undisclosed witnesses and/or presenting evidence in its case in chief when it fails to adhere to the mandates of *N.J.S.A. 18A:6-17.1(b)(3)*. Arbitrator Restaino held that the consequence of non-compliance with the statute is mandatory. Thus, he granted the Motion In Limine to bar the testimony of undisclosed witnesses since the District did not adhere to the statute. In his Award, Arbitrator Restaino stated that:

“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.”

The facts in the instant case are similar to those in the Toland case as both Petitioners failed to comply with the statute’s requirement to provide the Respondent with all specified disclosures mandated by the statute. In the instant case, the Petitioner failed to provide documents, specifically, the IAIU report and a list of the students’ names. In confirming Arbitrator Restaino’s Award, the Superior Court ruled that since the Award was based upon the District’s failure to comply with the statute, the tenure charges filed against the Respondent should be dismissed. The Court concluded that:

“...plaintiff is entitled to appropriate notice as to the evidence which will be presented against him in support of the charges....Plaintiff is a tenured employee and is defending his job and career. Therefore, an individual in Plaintiff’s position should be entitled to strict compliance with statutory rules due to the extremely important rights involved in tenure employment termination matters.


Furthermore, the District’s argument that the Statement of Tenure Charges, Statement of Evidence, and Certified True Copy of Determination and

CM receipts satisfied the statutory requirements is not supported by the facts. The language of the statute specifically requires the District to “provide all evidence including, but not limited to, documents, electronic evidence, statement of witnesses, and a list of witnesses with a complete summary of their testimony....” As noted above, the evidence reveals, and the District acknowledges, that it did not provide all the specified disclosures to the Respondent upon referral of the case for arbitration since it did not include the IAIU report or the students’ names. Thus, the District provided insufficient evidence to support its claim that the above noted items it provided to the Commissioner of Education satisfy all the specific statutory requirements.

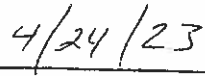
Finally, Respondent’s argument that the Motion in Limine was filed prior to setting the trial date to avoid having the students recount the events if the motion will prevail is persuasive. In its brief, the Petitioner cited the New Jersey Court Rule 4:25-7 requirement that parties exchange pretrial information seven days before the trial date. However, the Petitioner also acknowledged that “...there is no specific guidance regarding the procedures for the filing and handling of a *motion in limine* in relation to an administrative action.” Since the arbitration process is an administrative action outside of the Court, I find that the cited Court Rule is not applicable, and thus, the Respondent’s motion is not premature. In the instant case, there is no need to further involve the students if the case could be dismissed on procedural grounds.

Therefore, I grant the Respondent's Motion in Limine to dismiss the tenure charges against James Marion, DKT NO. 249-9/22, with prejudice since the District failed to adhere to the requirements of *N.J.S.A. 18A:6-17.1(b)(3)*.

It is so ordered.



Lisa C. Charles
Arbitrator



Date

State of New Jersey}
County of Mercer}
Sworn to and affirmed before me on April 24, 2023



Notary Public

NIVATIA. MARFATIA
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES 07/25/2024