

In the Matter of
Arbitration
Regarding the Tenure
Charge for Inefficiency

Opinion and
Award

Michael Wilson)

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-and-

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Agency Docket No. 302-10/15

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The State Operated)
School District of the)
City of Newark, Essex)
County

)

December 12, 2015

Ruling on Respondent's Motion to Dismiss

Hearing Days (Telephonic):

December 7, 2015

December 9, 2015

Appearances:

Teresa L. Moore, Esq.

Riker Danzig Scherer

Hyland & Perretti, LLP

For the Petitioner

Nicholas Poberezhsky, Esq.

Caruso, Smith Picini, P.C.

For the Respondent

Lewis R. Amis
Arbitrator

BACKGROUND

The Respondent, Michael Wilson, has been employed by the State Operated School District of Newark since 1996. He acquired tenure and until the 2013-14 school year taught mathematics at the eighth grade level. During that time, his performance evaluations were consistently satisfactory. Beginning in the 2013-14 school year, the district transferred Wilson to the Ivy Hill Elementary School and assigned him to teach science and social studies at the seventh and eighth grade level.

In the school years of 2013-14 and 2014-15, respectively, the school district gave Wilson summative evaluations of "partially effective" and "ineffective." Those evaluations became the basis for the principal of the Ivy Hill Elementary school to file a charge of inefficiency against Wilson as required by P.L. 2012, as amended by P.L. 2015, C.109, chapter 26, the TEACHNJ Act. The principal requested his dismissal from his tenured position and suspension without pay. The State District Superintendent, on September 30, 2015, confirmed the charges against the Respondent, finding probable cause to credit the supporting evidence and that if true the charge was sufficient to warrant dismissal or salary reduction. The superintendent

determined, as well, that the Respondent should be suspended as requested.

The matter was then forwarded to the commissioner of Education for hearing. The Respondent replied to the charges on October 13, 2015. The Commissioner advised the parties' counsel on October 23, 2015, that the matter was being referred to arbitration:

Dear Counsel:

IN THE MATTER OF THE TENURE HEARING OF MICHAEL WILSON,
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
ESSEX COUNTY, AGENCY DKT NO. 302-10/15

Please be advised that, following receipt of respondent's answer on October 13, 2015, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A 18A:6-17.2, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.

The balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator, including, but not limited to, whether N.J.S.A. 18A:6-17.2 and 6-17.3 now provide the exclusive mechanism for bringing inefficiency charges. The arbitrator shall review those charges brought pursuant to N.J.S.A 18A:6-16- which are not dismissed as the result of a motion- under the preponderance of the evidence standard.

Accordingly, on this date, the charges are being referred to Arbitrator Lewis R. Amis pursuant to N.J.S.A 18A:6-16 as amended by P.L.2012,c.26 and P.L. 2015,c.109.

The Act provides as follows at C.18-A: 6-17.1, 22, b. (3)

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board 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. Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

Further, Section f. of this paragraph provides:

f. Timelines set forth herein shall be strictly followed...

In a letter dated November 5 citing Section (3) above, the Respondent's attorney claimed that the school district had not timely presented all of its evidence as required by statute, primarily the witness list with a complete summary of the testimony to be presented. Respondent included an arbitration award: Tenure Hearing of Marie Ebert, Agency Docket No. 267-9/14, in support of its position and requested a briefing schedule for a motion to dismiss.

The school district responded on November 6, 2015, with additional evidentiary materials, including a list of witnesses with summaries of their testimony and copies of the *Framework for Effective Teaching* for 2013-14 and 2014-15 describing the teacher performance evaluation system for those years. Petitioner also argued that any motion to dismiss should be denied because the Respondent had actual or constructive knowledge of all the evidence upon which the district would rely.

The Respondent filed a Motion for Summary Dismissal and a letter brief on November 27, 2015 citing the following grounds:

- A. Petitioner failed to abide by its disclosure obligations as mandated by law.
- B. Respondent's summative evaluation for the 2014-15 school year was improperly derived, thereby rendering the tenure charges defective.
- C. Petitioner's tenure charges were filed pursuant to incompatible provisions of the TEACHNJ Act, thereby rendering them defective.

At the initial arbitration hearing in this matter held by telephone on December 7, 2015, the issue was reduced to whether the Petitioner disclosed pertinent mandated evidence in a timely fashion and if not, what should the remedy be?

The Petitioner contends that Respondent's motion should be denied because Petitioner complied with its disclosure obligations under New Jersey law. Petitioner would have the Arbitrator reject the Respondent's timeliness argument because

he had the information regarding witnesses and their testimony as early as September 1, 2015, when he was served with detailed documents pertaining to the Respondent's evaluations, including the identity of the evaluators, whom he could assume would be witnesses in Petitioner's presentation. Petitioner thus argues that the Respondent was in no way injured by any delay in its producing the evidentiary basis for its case.

The Respondent contends that the Petitioner did not meet its statutory disclosure obligations under N.J.S.A 18A:17-3 (b) (3). The Respondent argues that the statute is clear as to when disclosure is required--at the time the matter is referred to arbitration--and as to the requirement that timeliness be strictly observed. In neither case, the Respondent argues, did the Petitioner meet its statutory obligations; therefore, the tenure charges should be dismissed.

DISCUSSION AND FINDINGS

The Respondent shall prevail in this matter. The Act is clear that all evidence to be used by the Petitioner must be presented upon referral of a case to arbitration. In this case, that would have been on October 23, 2015. The Act also plainly states that evidence presented by the parties prior to the hearing is the only evidence allowed at the hearing except for the purpose of impeaching witnesses.

Petitioner did not submit a witness list with complete summaries of testimony as specified in 18A:6-17.1(3) until November 6, 2015. In addition, Petitioner added other documents not previously provided to the Respondent.

The Act is also clear that all timelines must be strictly adhered to. They were not in this case; therefore, I must find the Petitioner to have been in violation of the specific and general requirements for submitting its evidence in a timely manner.

The Act is a radical attempt to improve educational outcomes by improving the quality of instruction, using as one vehicle a system for teacher evaluations the legislature believes is superior to previous systems. The Act has strict rules for eliminating teachers who do not meet the standards of the evaluation system, and it has its own appeals procedures for adjudicating tenure disputes that are separate and distinct from standard grievance and arbitration procedures that might be found in collective bargaining agreements.

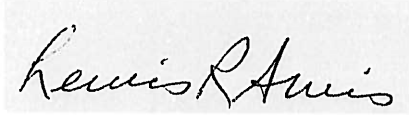
Perhaps the most notable aspect of the appeal process is that arbitrators are specifically excluded from reviewing an evaluator's determination of the quality of an employee's classroom performance. Otherwise, the arbitrator's function is largely to determine that the evaluation procedure is substantially followed, that the outcome is not influenced by considerations extraneous to the legitimate pedagogical goals of the school district, and that the procedures set forth in the Act for processing

appeals are followed. In short, the arbitrator's job, though it does not include any assessment of the judgments of professional educator/evaluators, is to assure that the due process provisions written into the Act are followed.

The Act's timelines and procedures for presenting evidence are rigid and are designed to provide sufficient but not unlimited time for parties to prepare their cases so that a fair and expeditious conclusion can be achieved. Any significant delay in the presentation of salient evidence by one party prejudices the other party's ability to represent its client. In this case, the Petitioner delayed presenting certain evidence it would use for fourteen days after the matter was referred to arbitration. That significantly curtailed the time Respondent had to prepare and present its evidence which was due within ten days of the first hearing--a hearing that must be and was scheduled forty-five days after the arbitrator's appointment as provided in 18A:6-17.1b(1). The Petitioner clearly failed to observe statutory timelines and offered no basis for that lapse; therefore, the Respondent's Motion for Dismissal will be granted

AWARD

The Respondent's motion for dismissal is granted based on the school district's failure to meet the requirements of N.J.S.A. 18A:6-17.1b(3). Michael Wilson shall be reinstated as a teacher with full back pay and benefits.

A handwritten signature in cursive script that reads "Lewis R. Amis". The signature is written in black ink on a light-colored background.

Lewis R. Amis, Arbitrator

December 12, 2015