

BEFORE THE COMMISSION OF EDUCATION  
OF NEW JERSEY DEPARTMENT  
OF EDUCATION

In the Matter of Tenure Charges

between

State-Operated School District  
of the City of Newark, NJ,

Petitioner,

and

Priscilla Umeizu,

Respondent.

MOTION-TO-DISMISS

Dr. Andrée Y. McKissick  
Arbitrator

Agency Docket No. 273-10/16

**RULING ON RESPONDENT'S PRE-HEARING MOTION-TO-DISMISS**

**APPEARANCES:**

**For the District: Petitioner:** Teresa L. Moore, Esquire  
Riker Danzig Scherer Hyland Perretti  
Headquarters Plaza  
One Speedwell Avenue  
Morristown, New Jersey 07962-1981

**For the Respondent:** Colin M. Lynch, Esquire  
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**BACKGROUND**

The record reflects that on November 1, 2016, the New Jersey Commission of Education referred this charge to arbitration. On November 3, 2016, there was a conference between the Parties and the Arbitrator. It was established that the hearing would be held on the following days: December 12, December 13, and December 21, 2016. However, on

December 8, 2016, the Respondent moved to dismiss the charges for lack of discovery due to untimely and incomplete responses by the District. By email, the Respondent notified the Arbitrator on Friday, December 9, 2016 and requested that the Motion-to-Dismiss be considered. Thereafter, the Arbitrator entertained the Respondent's Motion. The hearing was to commence on Monday, December 12, 2016. The Respondent's brief was mailed to the Arbitrator later on December 27, 2016. The District's reply brief was mailed on January 6, 2017 as well. On January 14, 2017, the Arbitrator granted the Respondent's Motion-to-Dismiss. Tentative dates were allotted for a hearing on January 18, 19, and 20, 2017. However, these dates were subsequently cancelled because of the Arbitrator's ruling to dismiss the charges for procedural reasons.

### **STATEMENT OF FACTS**

Principal Pellegrine of Louise A. Spencer School filed a charge of inefficiency against Priscilla Umeizu, a tenured teacher employed by the State-Operated School District of the City of Newark. The Notice of Tenure Charge of Inefficiency of the above teacher was rated as Partially Effective and Ineffective in three (3) consecutive annual evaluations in the following years: Partially Effective in her 2012-2013 annual evaluation; Partially Effective in her 2013-2014 annual evaluation; Ineffective in her 2014-2015 annual evaluation (see Exhibit A).

On August 14, 2015, the Respondent received Tenure Charges. On September 8, 2015, the Respondent submitted a Position Statement to the State-District Superintendent. The record reflects that the Tenure Charges were not certified until a year later, on September 8, 2016. Thereafter, the District served the "Supplemental Statement of

Evidence” to revive the dormant Charges. On September 26, 2016, the Respondent filed a Supplemental Position Statement with the Superintendent opposing the renewed Charges (Exhibit D). Thus, there was a referral to arbitration on November 1, 2016.

On the day of the conference call between the Parties and the Arbitrator on November 3, 2016, the District served the Respondent with a witness list, amounting to a seven-hundred-twelve (712)-paged document (Exhibit F). On November 11, 2016, the Respondent served the District with twenty-five (25) interrogatories (Exhibit G). However, the interrogatories were not answered until after business hours on Friday, December 9, 2016 (Exhibit J). The hearing was to commence on Monday, December 12, 2016.

#### **ISSUE**

**Whether or not this Motion-to-Dismiss should be granted?**

**If not, what shall the remedy be?**

#### **PERTINENT PROVISIONS**

##### **N.J.S.A. 18A: 6-17.1 (b) (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 ten (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 twenty-five (25) without subparts.

N.J.S.A. 18A: 16-14

... the board may suspend the person against whom such charge is made ... without pay, but if the determination of the charge by the arbitrator is not made within one hundred twenty (120) calendar days after certification of the charges, excluding all days which are granted at the request of such person, then the full salary ... of such person shall be paid beginning on the one hundred twenty-first (121<sup>st</sup>) day until such determination is made.

**POSITIONS OF THE PARTIES**

It is the District's position that there is no legal basis to dismiss the Tenure Charges because the statute provides no deadline for serving or responding to interrogatories. The District argues that there is no sanction provided for failure to respond to interrogatories.

In regards to the Respondent's complaint regarding the witness list being short, repetitive and essentially a generalized summary, the District counters that the Respondent failed to object from November 3, 2016 to December 27, 2016. Moreover, the District points out that the first time an objection was made to the District's witness list was during the second conference call on December 14, 2016, after the adjournment of the hearing.

Moreover, the District also points out that the Respondent identified no deficiency as to the answers to the twenty-five (25) interrogatories. Instead, the Respondent's sole argument was that the answers to the interrogatories were submitted to him too close to the hearing date, December 12, 2016.

As to the lack of sufficiency regarding the witness list, the District asserts that the same six (6) individuals named in that list are the same persons cited in the "Statement of Evidence" received by the Respondent on August 15, 2015. In particular, the District still further points out that the Respondent did not cite this deficiency regarding the witness list in his brief, requesting a dismissal of charges. Instead, the District contends that the Respondent's sole basis for asking for a dismissal was the late interrogatories only.

In response to the Respondent's argument that he was prejudiced by the deficient summaries of the witness list, the District rebuts that there is no basis for a dismissal of charges for a defective witness list. Moreover, the District further contends that the statute provides no sanction except for the preclusion of the testimony of witnesses. Based on the foregoing, the District sums up that there are no sanctions to be imposed on them for the Respondent's attempt to evade review on the merits. Thus, the District concludes that the Motion-to-Dismiss must be denied and the hearing should commence as tentatively scheduled for January 18, 2017.

In support of the District's position to deny this Motion-to-Dismiss, the District offers the following cases: State v. Santomauro, 261 N.J. Super. 339 (N.J. Super. App. Div. 1993); Barcon Associates v. Tri-County Asphalt Corp., 86 N.J. 179, 190-91 (N.J. 1981); Nogue v. Estate of Santiago, 224 N.J. Super. 383, 385-87 (App. Div. 1988); Plainfield v.

Public Service Electric and Gas Company, 82 N.J. 245, 258-59 (N.J. 1980). These cases shall be discussed in the Findings.

It is the Respondent's position that there is little time to engage in the discovery process because it is the District that controls access to information. Thus, the Respondent reasons that it is imperative for the arbitration process to move forward as expeditiously as possible. In particular, the Respondent asserts that after the case is filed that the Respondent must receive all evidence which includes a complete summary of each witnesses' testimony expeditiously. Moreover, the Respondent further asserts, when a District does not meet its discovery obligation under N.J.S.A. 18A: 16-17.1 (b) (3), then the statute provides that the District is prohibited from presenting additional evidence at the hearing with the limited exception, the impeachment of witnesses.

Specifically, the Respondent contends that the District failed to meet its discovery obligations in two (2) ways. First, the Respondent asserts that it failed to provide a timely response to the Respondent's interrogatories. The Respondent adds that this was not an inadvertent omission because the District was reminded of this obligation via email. Instead, the Respondent asserts that the District ignored this request and only provided its response to interrogatories on the last business day and after business hours prior to the commencement of the hearing. Second, the Respondent also contends that the District was remiss in never providing a complete summary of its witnesses' testimony, as required by the statute.

The Respondent further asserts that the Notice of Charges was provided over a year and a half ago. Thus, the Respondent maintains that there is no reason that the complete summaries could not also have been prepared long ago. The Respondent further points out

that such summaries are critical to preparing a viable defense to the charges presented. Therefore, the Respondent still further asserts that without a complete summary, a teacher does not have an opportunity to discern what specific matters will be raised by the District's witnesses. Correspondingly, the Respondent contends that this means that there will be no opportunity to query potential witnesses or obtain responsive documents. In sum, the Respondent concludes that these factors unfairly prejudices his client and that prejudice has a continuing effect. Thus, the Respondent concludes that such late and inadequate presentation is violative of the TEACH NJ Act and this Motion-to-Dismiss must be dismissed. Besides, the Respondent adds that there is no evidence which the State-Operated School District can be legally presented at the hearing.

In support of this Motion, the Respondent offers the following arbitration award: In the Matter of the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County, Agency Docket No: 267-9/14, Tia Schneider Denenberg, Arbitrator, dated January 30, 2015. This case will be discussed in depth in the Findings.

## **FINDINGS AND DISCUSSION**

After a careful review of the briefs presented and prevailing case law along with attached exhibits, this Arbitrator finds that this Motion-to-Dismiss must be granted for the following reasons.

First, the District failed to meet its discovery obligations in a timely and sufficient manner. Specifically, it failed to provide a timely response to the Respondent's interrogatories. Instead, the record indicates that the District finally responded on the last business day and after business hours prior to the commencement of the hearing. In addition, the District was remiss in never providing a "complete" summary of its witnesses' testimony, as required by the statute.

N.J.S.A. 18A: 6-17.1 (b) (3) states, in pertinent part, 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, 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 ...

Applying this provision to our factual scenario, this case was referred to this Arbitrator on November 1, 2016. A conference call was held between the Parties on November 3, 2016. This was the same day that the District served the Respondent with a witness list, amounting to a seven-hundred-twelve (712)-paged document. On November 11, 2016, the Respondent served the District with twenty-five (25) interrogatories. Nonetheless, the interrogatories were not answered until after business hours on Friday, December 9, 2016. The hearing was to commence on the following Monday, December 12, 2016 and continue to December 13 and December 21, 2016.

Based on the foregoing, the District breached the discovery obligations of N.J.S.A. 18A: 6-17.1 (b) (3). Consequences of that breach, as set forth in that provision, is that the District shall not present any additional evidence at the hearing except for purposes of impeachment of witnesses.



Second, although the District counters that on December 14, 2016 during the second conference call was the first time that the Respondent objected to the lack of a “complete” summary, the record reflects that the statute is quite clear that “all” evidence must be submitted upon the referral to an arbitrator. It also is clear that a “complete summary” of the witness is an absolute requirement.

In regards to the cryptic responses of the District’s answers to the twenty-five (25) interrogatories, such short, pithy responses did not include specific information. As such, these answers were non-responsive and prevented the Respondent from preparing a viable defense to the charges presented. Notwithstanding the District’s position that the Respondent was not prejudiced by such summaries or the December 9, 2016 answers to the Respondent’s interrogatories sent just before the December 12, 2016 hearing, this Arbitrator disagrees with this assessment.

Third, in support of the Respondent’s position, it offers: In the Matter of the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County, Agent Docket No: 267-9/14, Tia Schneider Denenberg, Arbitrator, dated January 30, 2015. The Respondent correctly finds this case to be directly applicable to our current case. The Ebert case (Exhibit K) also deals with tenure charges for inefficiently and conduct unbecoming a public school teacher. Most importantly, the Ebert case directly addressed N.J.S.A. 18A: 6-17.1 (b) (3) where Arbitrator Denenberg granted a Motion-to-Dismiss for the District’s failure to comply with the timeliness mandate of this provision. As with our case, the Ebert case lacked also a complete summary of the witnesses’ testimony, as required by said statute. In addition, the facts of the Ebert case reveal a production of late documents despite being reminded by the Respondent of their tardiness.

This is again also directly analogous to our current case. In sum, the Ebert case points out the effect of late and untimely responses is that the Respondent then lacks a detailed account of the facts which witnesses will testify about. Moreover, the Respondent is essentially left to guess about information which emerges at the hearing. Thus, the Respondent in Ebert concludes that the Motion-to-Dismiss must be granted because additional evidence is precluded by statute due to the District's late responses. In sum, it is also interesting to note this school district in our case is the same one discussed in Ebert.

Fourth, on the other hand, the District offers a series of non-applicable cases to support its position of opposition to the Motion-to-Dismiss. For instance, in Barcon Associates v. Tri-County Asphalt Corporation, 86 N.J. 179, Supreme Court of New Jersey, decided May 28, 1981, this case involves the ruling of an illicit business relationship with a party-designated arbitrator, who failed to disclose his business interest with one of the parties. Clearly, this case has nothing to do with the failure to respond to the discovery process of TEACH NJ Act, the prevailing statute of our case.

Another case the District cites is: In the Matter of the Estate of Dudley B. Dawson, Deceased, Late of Boston, Morris County, NJ, decided on June 9, 1994. This case's focus is upon corporate distributions to shareholders where stock splits were confused with stock dividends. Again, this case is not on point. It has no applicability to discovery obligations under our TEACH NJ statute.

Still another case, the District offers in opposition to the Motion-to-Dismiss is: The State of New Jersey, Department of Environmental Protection and Energy, Division of Fish, Game and Wildlife v. Richard Santomauro, decided January 15, 1993. This case involves the difference between res judicata and collateral estoppel as it relates to a statute's

applicability to deer heads. Clearly, there is no applicability of this case to current case involving discovery obligations under the TEACH NJ Act statute.

Fifth, based upon the totality of the pre-hearing record of events and the merits of the Respondent's position, as delineated, this Arbitrator finds that the Motion-to-Dismiss must be granted. To rule otherwise, would be a travesty to due process and in violation of N.J.S.A. 18A: 6-17.1 (b) (3), the prevailing statute.

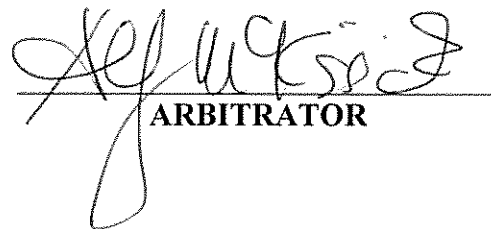
### **RULING**

The Respondent's Motion-to-Dismiss shall be granted due to the District's failure to comply with the timeliness mandate of N.J.S.A. 18A: 6-17.1 (b) (3). Priscilla Umeizu shall be reinstated with full back pay and benefits. This dismissal is without prejudice to the District's right to file charges again.

### **AFFIRMATION**

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

**DATE OF AWARD: January 28, 2017**

  
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**ARBITRATOR**