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

In the Matter of the Tenure Arbitration Between:

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

"Petitioner"

and

MARIA LOPES-ANASTASI

"Respondent"

OPINION AND AWARD ON MOTION TO DISMISS COUNT ONE

Agency Docket No. 259-11/17
[Maria Lopes-Anastasi]

BEFORE
ARNOLD H. ZUDICK
ARBITRATOR

Appearances:

For the Petitioner
Shana T. Don, Esq.
Scarinci Hollenbeck, LLC

For the Respondent
Genevieve M. Murphy, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.

PROCEDURAL HISTORY

On October 4, 2017 the Newark School District [District or Petitioner] served Maria Lopes-Anastasi [Respondent or Anastasi] with a Notice of Tenure Charges pursuant to *N.J.S.A.* 18A:6-11. Charge One alleged Inefficiency; Charge Two alleged Conduct Unbecoming; and, Charge Three alleged Respondent failed to adhere to District policies and procedures. This is a Decision on the Respondent's Motion to Dismiss [Motion] Charge One – the Inefficiency allegations - made by the Petitioner in its tenure charges against the Respondent.

In its Notice of Tenure Charges the District, through Mario Santos, Principal of East Side High School, alleged in Charge One that Anastasi's Annual Summative Rating for the 2015-2016 school year was "Ineffective" prompting it to place her (Anastasi) on a Corrective Action Plan (CAP) for the 2016-2017 school year. Nevertheless, the District alleged Anastasi still received an Ineffective Annual Summative Rating for the 2016-2017 school year.

The Petitioner alleged, for example; that Respondent failed to: implement curricular goals and objectives; design coherent instruction; manage student behavior; engage students in learning; demonstrate promptness and attendance and other allegations in addition to the above noted Ineffective Summative Ratings.

On or about October 17, 2017 the Respondent filed a response to those allegations and on November 9, 2017 filed an Answer to the Charges. Respondent denied all of the Charges, but with regard to Charge One specifically denied her performance was ineffective in either 2015-2016 or 2016-2017. Rather, Respondent argued that her 2015-2016 and 2016-2017 observations and evaluations failed to comply with applicable

statutory and regulatory procedures, they contained mistakes of fact, and thus her summative evaluations for those years were inaccurate and should not be considered. The Respondent in her Answer also argued that her Corrective Action Plan was inadequate; did not measure student growth objectives; failed to contain time frames or deadlines and did not contain steps to assist in the improvement of her teaching performance.

The Respondent argued that the Inefficiency Charge was in part the product of harassment and retaliation for refusing to execute election to work agreements; her evaluators failed to consider that her students made measurable progress during the 2015-2016 school year; her CAP was created inappropriately and was not given to her until December of the 2016-2017 school year; and, other arguments.

On October 30, 2017, the Petitioner's State District Superintendent having considered the charges, supporting evidence and the Respondent's submission, concluded that the charges, if credited, were sufficient to warrant Respondent's dismissal or reduction of salary. The Superintendent, therefore, certified the charges to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-17.3. Based upon the Superintendent's certification the Respondent was suspended pursuant to *N.J.S.A.* 18A:6-14 effective November 2, 2017.

On November 27, 2017 the Department of Education, Bureau of Controversies and Disputes [Bureau] determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary and it referred the matter to me as the Arbitrator pursuant to *N.J.S.A.* 18A:6-16.

The Respondent filed its Motion to Dismiss with me on December 5, 2017. The District filed its responsive brief on December 19, 2017.

POSITIONS OF THE PARTIES ON THE MOTION

RESPONDENT

Respondent alleged that Anastasi's 2016-2017 summative evaluation was fatally flawed and, therefore, could not be considered as the basis for the Inefficiency charge. Respondent primarily alleged:

> 1) that Anastasi did not receive a CAP until December 5, 2016 for the 2016-2017 school year, alleging it was more than a month after the October 31 deadline set forth in *N.J.A.C.* 6A:10-2.5(b).
>
> > *N.J.A.C.* 6A:10-2.5(b) provides in relevant part:
> >
> > (b) The corrective action plan shall be developed and the teaching staff member and his or her designated supervisor shall meet to discuss the corrective action plan by October 31 of the school year following the year of evaluation . . .
>
> 2) that Anastasi was formally observed by the District twice prior to receiving her CAP in contravention of *N.J.A.C.* 6A:10-4.4(c)(5).
>
> > *N.J.A.C.* 6A: 10-4.4(c)(5) provides in relevant part:
> >
> > (c)(5)Upon receiving a final summative evaluation that necessitates a corrective action plan, in accordance with *N.J.A.C.* 6A:10-2.5(a), any remaining required observation(s) shall not be conducted until the corrective action plan has been finalized.

Respondent more specifically explained that Anastasi had received her summative evaluation for the 2015-2016 school year on June 15, 2016 and, therefore, consistent with *N.J.S.A.* 6A:10-2.5(b) she should have received – and placed on a CAP – no later than October 31, 2016. The Respondent also noted that the District's evaluation guide entitled "Framework for Effective Teaching" [Framework] contained the same October 31

deadline as contained in *N.J.A.C.* 6A:10-2.5(b). That Framework language provides in pertinent part that:

> CAP's must be completed and on file with their administrator by October 31st.

The Respondent emphasized that two of the four observations Anastasi received for the 2016-2017 school year occurred on October 27 and November 11, 2016, respectively, which were before she received her CAP on December 5, 2016 and, therefore, they were in contravention of the law. Her other two observations occurred on December 12, 2016 and April 6, 2017.

Respondent acknowledged in her brief that although the regulation in *N.J.A.C.* 6A:10-4.4(c)(5) was not formally adopted until February 2017; the *AchieveNJ 2016-17 and Beyond* guide the Department published in June 2016, and the *Summary of Legal Requirements for Teacher Evaluation and Tenure Cases* document it issued emphasized that teacher "observations may not occur between receipt of summative score and implementation of a CAP". Thus, the Respondent noted that the Petitioner had notice of that requirement in the summer of 2016 and prior to the commencement of the 2016-2017 school year. According to the Respondent, the District was aware of the requirement noting that the "CAP Reflection" portion of Anastasi's October 27, 2016 observation form was blank because the CAP had not yet been completed and implemented.

Relying upon *N.J.A.C.* 6A:10-4.4 the Respondent also argued that where a District's tenure charges have failed to follow the required evaluation process the Commissioner of Education is prohibited from forwarding such charges to arbitration, *N.J.A.C.* 6A:3-5.1(c)(6). According to the Respondent, by letter of October 17, 2017, it notified the Superintendent that the District had not implemented Anastasi's CAP by

October 31, 2016 as required, but the Commissioner still forwarded the matter to arbitration.

The Respondent asserted that the practical effect of the District's failure to provide Anastasi with a timely CAP was:

> 1) Respondent was denied the "robust" and "necessary support" legally required for teachers identified as struggling based upon their annual summative rating; and,
>
> 2) Respondent was denied an opportunity to demonstrate improvement since two (2) out of her four (4) observations were conducted without the benefit of a CAP.

The Respondent relied upon several arbitration decisions governed by TEACHNJ to support its argument. See, *In re Tenure Hearing of Davis Hannah, State Operated School District of the City of Newark*, Essex County,.(279-9/15) (motion to dismiss inefficiency charges granted for failure to comply with evaluation procedures); *In re Tenure Hearing of Rinita Williams, State Operated School District of the City of Newark*, Essex County,(241-8/14 and 17-1/15) (dismissed charges for failure to conduct an announced observation and failure to adhere to evaluation process) and, *In re Tenure Hearing of Lawrence Henchey, New Milford School District*, Bergen County,(322-11/14) (dismissed charges for District's failure to perform minimum number of observations as required by law).

PETITIONER

The Petitioner disputed the arguments the Respondent made in support of the Motion. The District contends that only the Commissioner can determine the sufficiency of the evaluation procedures and that I lack the authority – particularly prior to conducting an evidentiary hearing- to decide a Motion to Dismiss over whether the

District properly conducted the evaluation; that an evidentiary hearing is required to determine if the District complied with the evaluation procedures; and, that such a hearing would support its position that it has substantially complied with the CAP requirements in *N.J.A.C.* 6A:10-2.5 and 6A:10-4.4(c)(5).

First, in questioning my authority to decide this Motion the District, relying on *N.J.S.A.* 18A:6-16, argued that a motion to dismiss tenure charges based upon a district's alleged failure to follow the evaluation process may only be made to the Commissioner of Education prior to referral of the matter to an arbitrator. That Statute requires the Commissioner to make a determination on the sufficiency of the charges and provides in pertinent part:

> If, however he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator . . .for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

The District explained that pursuant to *N.J.A.C.* 6A:3-5.3(a)(1) and *N.J.A.C.* 6A:3-1.5(g) a respondent may file a motion to dismiss to the Commissioner in lieu of an answer to the tenure charges. According to the District, a respondent's failure to file such a motion with the Commissioner precludes the respondent from filing that motion with an arbitrator. Rather, the District contends that pursuant to *N.J.S.A.* 18A:6-17.3(2)(c), the Commissioner is solely authorized to determine if a district properly followed the evaluation process in assessing the sufficiency of tenure charges.

N.J.S.A. 18A: 6-17.3(2)(c) provides:

> c. Notwithstanding the provisions of *N.J.S.A.* 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner

> shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

The District argued in this case that by the issuance of the November 27, 2017 letter to the parties [Don, Exhibit C] the Commissioner determined that the evaluation process had been followed. That letter provides in pertinent part:

> Please be advised that, following receipt of respondent's answer on November 15, 2017, the above-captioned tenure charges have been reviewed pursuant to *N.J.S.A.* 18A:6-17.3c. Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made 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. 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.

According to the Petitioner, any appeal of the Commissioner's decision must be filed with the Appellate Division pursuant to *N.J.S.A.* 18A:6-9.1.

The District argued that an arbitrator's authority is limited as provided by *N.J.S.A.* 18A:6-17.2 (23)(a) to consider whether or not:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as

> prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

Second, the District contends that there is no provision in the TEACHNJ Act or the regulations for an arbitrator to dismiss a tenure case without a hearing on the facts. It vigorously argued that to the extent that the Respondent claimed that the CAP rules were not fully complied with, a question of fact existed over whether the evaluation procedures were followed which could not be resolved without a hearing.

Relying on the language in *N.J.S.A.*18A:6-17.2 (23)(a) and (b):

> Section (b) provides:
>
> (b) In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

the District argued that in order for the Arbitrator to consider whether Anastasi's evaluation failed to adhere substantially to the evaluation process as listed in 18A:6-17.2 (23)(a)(1) above, and in order to determine whether any such failure materially affected the outcome of the evaluation as required by 18A:6-17.2(23)(b) above, I must hear evidence to determine if such error materially affected Anastasi's evaluation.

Third, the District argues that it substantially complied with the intent of *N.J.A.C.* 6A: 10-2.5(b) and 6A:10-4.4(c)(5) which could be demonstrated at hearing. It contends that the procedures contained within its Framework for Effective Teaching include procedures for the implementation of an Individualized Professional Development Plan (IPDP) and a CAP. The District notes that the Framework provides that teachers must

initiate the IPDP or CAP forms online in the District's computer system and share them with their administrator. According to the Framework, the CAP replaces an IPDP for teachers rated Ineffective or Partially Effective, and that the content of a CAP resembles the content of the IPDP but is more robust to give the teacher more support. The Framework also provides that:

> CAPs must be completed and on file with their administrator by October 31st.

The District contends that Respondent was fully aware that she had received an "Ineffective" rating at the end of the 2015-2016 school year and should have known she was required to use a CAP form, not an IPDP form in September 2016. Nevertheless, the District argues that Respondent's IPDP is "identical in substance" to the CAP she eventually received in December 2016. According to the District, Anastasi participated in creating her IPDP which included a goal-setting conference on or about September 20, 2016. The District disputed the Respondent's claim that Anastasi was denied "robust and necessary support" by not having her actual CAP form by October 31, 2016. Rather, it contends she was observed on October 27 and November 15, 2016; provided a pre-observation conference on or about October 25, 2016 and two post observations on or about October 28 and November 23, 2016 respectively, allegedly in accordance with her IPDP.

The District distinguished the Respondent's reliance upon the *Hannah* case where a motion to dismiss was granted arguing that there the District had conceded that it had not substantially complied with the observation requirements and, therefore, there was no dispute of material facts. But the District maintains it has substantially complied with the CAP requirements in this case because Anastasi's IPDP was essentially the same as her

CAP, and a hearing is needed to resolve the dispute. The District distinguished other arbitration decisions granting motions to dismiss arguing those motions were granted after a full hearing.

Finally, the District argued that it complied with *N.J.A.C.* 6A:10-2.5(b)(1) by developing Anastasi's CAP within 25 days of learning on November 21, 2016 that Anastasi had failed to prepare a CAP form. *N.J.A.C.* 6A: 10-2.5(b)(1) provides:

> (b)(1) If the ineffective or partially effective summative evaluation rating is received after October 1 of the school year following the year of evaluation, a corrective action plan shall be developed, and the teaching staff member and his or her designated supervisor shall meet to discuss the corrective action plan within 25 teaching staff member working days following the school district's receipt of the teaching staff member's summative rating.

According to the District any error created by not having the actual CAP form completed by October 31, 2016 did not materially affect the outcome of Anastasi's evaluation.

DISCUSSION

The Arbitrators Authority

This case is not the first time this District raised the argument that an arbitrator on the TEACHNJ panel lacks authority to determine - in a motion to dismiss - the sufficiency of the evaluation process. In *I/M/O Tenure Hearing of Marie Ebert, State Operated School District of the City of Newark, Essex County*, (#267-9/14) [*Ebert*] this District raised many of the same arguments it raised here.

The issue regarding the *Ebert* motion concerned whether the District complied with the production of evidence and discovery requirements after the arbitrator was appointed. Relying on *N.J.S.A.* 18A:6-17.3c the District apparently argued – as it did in

the instant case – that the Commissioner had sole authority to determine whether the evaluation process was properly followed; that a motion to dismiss must be filed with the Commissioner prior to the case being referred to an arbitrator; and that the Commissioner's determination can only be appealed in accordance with *N.J.S.A.* 18A:6-9.1. The District in *Ebert* further argued that in accordance with *N.J.S.A.* 18A:6-17.2 (a) and (b) an arbitrator is confined to determining whether:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

and argued that an arbitrator could not determine whether a flawed evaluation process materially affected the outcome of the evaluation without an evidentiary hearing.

In *Ebert,* Arbitrator Denenberg rejected the District's arguments and concluded that the motion was properly before her for determination. She explained that in creating TEACHNJ the Legislature intended the Commissioner to decide whether a district had taken the necessary steps for completing an evaluation, whereas arbitrators are asked to determine whether those steps were correctly followed in accordance with the regulations. She noted that the issues raised by the motion in *Ebert* arose after her appointment – that is, whether the District complied with its obligation to timely produce evidence – and could not have been a matter for the Commissioner.

Arbitrator Denenberg also concluded in *Ebert* that a full evidentiary hearing is not a prerequisite to considering a motion to dismiss finding no statutory provision limiting an arbitrator's ability to resolve motions before conducting a hearing. In *Ebert* she found that the District failed to comply with *N.J.S.A.* 18A:6-17.1(b)(3) and granted the motion to dismiss without conducting a full hearing.

In *Hannah* this District again questioned the arbitrator's authority to consider a motion to dismiss and contended that a full evidentiary hearing was required for the arbitrator to determine whether any error made by the District in the evaluation process materially affected the outcome of the evaluation.

Relying on her decision in *Ebert*, Arbitrator Denenberg again held that the Commissioner's statement – that he was unable to determine that the District had not followed the evaluation process – did not preclude her from determining whether the District properly carried out each step of the evaluation process. She again held that no statutory provision limited her ability to rule upon such motions without holding a hearing. In *Hannah,* Arbitrator Denenberg found – without hearing – that the District failed to comply with *N.J.A.C.* 6A:10-4.4 (c) regarding observation requirements and granted the motion to dismiss.

In addition to *Ebert* and *Hannah* where motions to dismiss were granted by an arbitrator, in another case involving this District, *I/M/O Tenure Hearing of Va'Lorie James State-Operated School District of the City of Newark, Essex County* 181-6/16 (4/17/17) [James], I too, without a hearing, granted a motion to dismiss concerning most of the charges in the case.

Having considered the parties' arguments and the holdings in both *Ebert* and *Hannah* I agree with Arbitrator Denenberg's conclusion that the Commissioner's issuance of a letter referring tenure charges to an arbitrator does not automatically mean that an arbitrator lacks authority to decide a motion to dismiss before hearing over whether a district has properly carried out the steps of the evaluation process.

In fact, a review of the Commissioner's November 27, 2017 letter in this case referring the matter to me for arbitration [Don, Exhibit C contained above] shows that it twice refers to motions which may be filed with the arbitrator. The first paragraph of that letter clearly explains that the arbitrator's decision on the charges must be made pursuant to the requirements listed in *N.J.S.A.* 18A:6-17.2, but such decision is subject to determination by the arbitrator – not only of the respondent's defenses - but also subject to:

> . . . any motions which may be filed with the arbitrator.

The second paragraph of the letter begins with explaining that the charges were deemed sufficient, if true, to warrant dismissal or reduction in salary of the Respondent, but made that holding subject to the arbitrator's determination of the Respondent's defenses and – just like the first paragraph – subject to:

> . . . any motions which may be filed with the arbitrator.

The second sentence of the second paragraph is even more telling because it recognizes that the arbitrator may, as a result of any motion – dismiss charges brought pursuant to *N.J.S.A.* 18A:6-16. That sentence provides:

> 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.

The reference in that sentence to dismissing charges based on a motion is not referring to motions made to the Commissioner before a case is referred to arbitration. Rather, that authority in the second sentence of the second paragraph to dismiss charges based upon a motion refers back to the first paragraph and the first sentence of the second paragraph where motions are filed with the arbitrator.

Based upon the above I find that the Department of Education's letter of November 27, 2017 recognizes that the arbitrator has the authority to consider and decide motions regarding the charges and there is no requirement stated therein that limits consideration of such motions until after the conduct of an evidentiary hearing. Consequently, I consider the Respondent's Motion properly before me for determination.

Merits of the Motion

Having determined that I have the authority to consider the Respondent's Motion, I now consider the Petitioner's other defenses to the Motion. They include:

> 1) That having received an Ineffective rating at the end of the 2015-2016 school year, and as required by the District's Framework for Effective Teaching, Anastasi knew – or should have known - to use a CAP form, not an IPDP form in September 2016, and that she failed to notify the administration of her error.
>
> 2) That the Respondent participated with the Vice Principal in creating the IPDP including a goal- setting conference on or about September 20, 2016, and that the Respondent's IPDP form is identical in substance to the CAP form she executed in December 2016.
>
> 3) That Respondent was provided with robust and necessary support consistent with a CAP as a result of the goal-setting conference with Vice Principal DeAntonio on or about September 20, 2016 and a pre-observation conference on or about October 25, 2016 and two post observation conferences on or about October 28, 2016 and November 23, 2016 in accordance with her IPDP which functioned as a CAP.
>
> 4) That an evidentiary hearing is necessary for me to determine whether any errors I may find in the completion of the evaluation process materially affected the outcome of the evaluation.

5) That the cases Respondent relied upon are distinguished from the instant matter, and;

6) That consistent with *N.J.A.C.* 6A:10-2.5 (b)(1) Respondent's CAP was completed, signed and executed in less than 25 days of the time Vice Principal DeAntonio discovered that an IPDP rather than a CAP form had been created.

Overlaying all of those defenses is the Petitioner's argument that a full evidentiary hearing is required in order for those defenses to be properly considered. In addressing that concern I am mindful of the New Jersey Supreme Court's decision in *Brill v. Guardian Life Insurance Co. of Americ*a, 142 *NJ* 520, 540 (1995). In that decision the Court explained that where a dispute of material facts is asserted as a defense to a summary judgment motion, the fact finder – in determining whether a genuine issue regarding material facts exists – must consider the competent materials presented viewed in the light most favorable to the non-moving party. If by viewing such materials in favor of the non-moving party the fact finder finds those materials sufficient to resolve the disputed facts in favor of the non-moving party then, at the very least, a hearing would be required otherwise the motion must be denied. I have applied that concept here in considering the Petitioner's defenses.

First, I find that there are no material facts in dispute regarding the Motion. There is no doubt that by the end of the 2015-2016 school year, Anastasi knew she had received an Ineffective rating in her 2015-2016 Summative Evaluation making her a candidate for a CAP, not an IPDP, for the 2016-2017 school year. Based upon that fact the District seems to put all of the responsibility for creating the CAP on the Respondent. But the language in the District's Framework for Effective Teaching (Don, Exhibit E) indicates that administrators share in the creation and implementation of the CAP.

According to the Framework, a CAP must include both student learning goals and professional development goals which are set by a teacher and administrator working together at a goal-setting conference. While the Framework indicates that teachers must initiate the IPDP or CAP, they must share them with administrators. *Id.* p.16.

The Framework refers to the completion of the CAP by teachers and administrators stating:

> By completing the IPDP or CAP during the goal-setting conference at the start of the year, teachers and administrators will have a shared tool to use in communicating about goals and anticipating growth areas. *Id.*

That same section of the Framework requires that the CAP, be completed, and on file with their administrator by October 31st.

The documents submitted to me by the parties show that Vice Principal DeAntonio knew that Anastasi had received an Ineffective Summative Evaluation at the end of 2015-2016. Since he participated in a goal-setting conference with Anastasi in September 2016 he, like Anastasi, had to know that a CAP had to be created for Anastasi for the 2016-2017 school year and that said CAP had to be on file with DeAntonio by October 31, 2016. In his email to Anastasi on November 21, 2016, DeAntonio acknowledged that he and Anastasi had completed the wrong form. He wrote in pertinent part:

> I just learned today, Monday, November 21, 2016 that we completed the incorrect form in EdReflect (Bloom Board) back in September. (Don, Exhibit B).

I find that the above language in the Framework is consistent with the language in *N.J.A.C.* 6A:10-2.5(a), (b) and (d) which requires a teacher's supervisor to develop a CAP with the teacher.

Based upon the above Framework information, email and code language, it is apparent that DeAntonio, as the administrator, and not Anastasi, had the primary responsibility to see that the Respondent's CAP was created and in place by October 31, 2016. Consequently, I find that any failure by Anastasi to achieve that requirement is not a sufficient defense to the directive in *N.J.A.C.* 6A:10-2.5 (a) and (b) that the CAP be in place by October 31.

Second, the District seems to argue that because DeAntonio and Anastasi participated in a goal-setting conference for Anastasi in September 2016 when an IPDP was "mistakenly" created; and because, according to the District, that IPDP was "identical in substance" to the CAP that was eventually completed on December 5, 2016; the District effectively complied with the requirement in *N.J.A.C.* 6A:10-2.5 (b) to have Anastasi's CAP in place by October 31, 2016.

I find that argument lacks merit. The IPDP and CAP are not identical nor is all the information on each form identical to the other. The CAPS definition in the Framework guidelines explains that while:

> The content of the CAP related goals closely resembles the content of the IPDP . . .

the CAP:

> is more robust to ensure struggling teachers receive the necessary support for their growth.
> (Don, Exhibit E p.16).

Additionally, DeAntonio, in his November 21, 2016 email to Anastasi (Don, Exhibit B), noted that although most of the information from the IPDP could be transferred to the CAP, additional questions needed to be answered.

The point here is that since the CAP plays such a pivotal role in the process leading to a teacher's summative evaluation it should not be one constructed almost as an afterthought. This goes to the heart of Arbitrator Denenberg's point, that is, the arbitrator has the authority to determine whether the steps of the evaluation process were properly followed. I find that here they were not. It is critical to the effectiveness of that process that a CAP be properly prepared and implemented by October 31 as required. Noting that the facts here show there are differences between an IPDP and a CAP, I find that the IPDP prepared for Anastasi in September 2016 could not substitute for the CAP which was not finalized until December 5, 2016.

Third, the District argues that even though Anastasi's CAP was not implemented by October 31, she still received robust and necessary support referring to the September goal-setting conference, the October 25th pre-observation conference, and the two post-observation conferences on October 28 and November 23, 2016, respectively. I recognize that Anastasi's September 2016 goal-setting conference may have been the same even if she and DeAntonio had been preparing a CAP form, but otherwise the District's argument is not persuasive.

Even assuming that the IPDP created in September 2016 was sufficient to substitute for the eventual CAP, once the District was aware on November 21, 2016 that the Respondent's CAP had not, in fact, been finalized and implemented by October 31, 2016, then, pursuant to *N.J.A.C.* 6A:10-4.4 (c) (5), it should not have relied upon the October 27 and November 15, 2016 observations in reaching Anastasi's 2016-2017 Summative Evaluation.

N.J.A.C. 6A:10-4.4 (c) (5) clearly provides that any remaining required observations not be conducted until the CAP was finalized. The reason for holding off on doing observations until after the CAP is properly in place is because it is designed to assist a teacher in improving her/his skills. Anastasi's CAP was not finalized until December 5, 2016, thus, the 2016-2017 observations conducted prior thereto cannot be considered in reaching the summative evaluation. To consider those observations would essentially negate the purpose of the CAP and puts the teacher, in this case Anastasi, on the defensive before she has had the full benefit of a completed CAP.

Fourth, the District contends that if errors were made in the evaluation process a hearing is needed to determine whether such errors materially affected the outcome of the Summative Evaluation. I have already determined above that serious errors were made in the steps of the evaluation process. They include the failure to implement a CAP by October 31, and more particularly, the District's reliance on observations conducted prior to the December 5 implementation of the CAP.

A hearing is not necessary to find that those observations constituted at least part of the District's thought process leading to the Summative Evaluation. To suggest otherwise is like trying to put the genie back in the bottle. The District in its papers did not even suggest that it did not consider the results of those observations. Rather, it argued that it effectively complied with the creation of a CAP and that the Respondent received an Ineffective rating on all four of the observations that were conducted of her in 2016-2017 which included the two observations that were conducted before her CAP was finalized. The reliance on those observations, are clear without the need for a hearing.

Thus, I find the District violated *N.J.A.C.* 6A:10-4.4 (c) (5) and that those observations materially affected the Respondent's 2016-2017 Summative Evaluation.

Fifth, certainly the facts of this case are different from those in the *Hannah* case. The District argued that in *Hannah* it had admitted to denying Hannah several entitlements, but that it made no such admission in this case. But my reliance on *Hannah* was not primarily because Arbitrator Denenberg sustained a motion to dismiss on the merits. Rather, as I previously explained, she found that an arbitrator on the TEACHNJ panel has the authority to consider and decide a motion to dismiss regarding the correctness of the steps of the evaluation process and may do so prior to an evidentiary hearing.

Finally, the District's argument that it complied with *N.J.A.C.* 6A:10-2.5 (b) (1) by implementing the Respondent's CAP in less than 25 days from when it discovered that a CAP had not been created as a defense to not implementing the CAP by October 31, 2016 lacks merit. That provision in *N.J.A.C.* 6A:10-2.5 (b) (1) applies when a teacher's summative evaluation is received after October 1, in which case a district needs to have a CAP in place within 25 teaching staff member working days following the district's receipt of the teacher's summative rating. Here, Anastasi received her 2015-2016 Summative Evaluation by June 13, 2016. Consequently, the 25 day requirement in that provision does not apply in this case and is not a viable defense to the district's failure to have implemented the CAP by October 31, 2016.

Having considered the parties' submissions, arguments and positions, and based upon my findings and Discussion above I grant the Respondent's Motion to Dismiss

Charge One – the Inefficiency Charge – and that part of Charge Three making the same Inefficiency allegations.

Accordingly, I issue the following:

AWARD

The Respondent's Motion to Dismiss Charge One and to the extent the same inefficiency allegations are repeated in Charge Three is granted.

Absent some agreement between the parties regarding the remaining allegations, we will proceed to hearing on the remaining Charges as previously scheduled.

Arnold H. Zudick
Arbitrator

Dated: January 10, 2018
Morrisville, Pennsylvania

Commonwealth of Pennsylvania}
County of Bucks }

On this 10th day of January 2018, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SUSAN M. ZUDICK, Notary Public
Falls Twp., Bucks County
My Commission Expires September 2, 2018