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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5064-14T1

IN THE MATTER OF THE TENURE  
HEARING OF FELICIA A.  
PUGLIESE, STATE-OPERATED  
SCHOOL DISTRICT OF THE CITY  
OF NEWARK, ESSEX COUNTY.

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Argued February 1, 2018 – Decided February 23, 2018

Before Judges Simonelli, Haas and Rothstadt.

On appeal from the New Jersey Department of  
Education.

Richard A. Friedman argued the cause for  
appellant Felicia A. Pugliese (Zazzali,  
Fagella, Nowak, Kleinbaum & Friedman,  
attorneys; Richard A. Friedman, of counsel and  
on the briefs; Flavio L. Komuves, on the  
briefs).

Brenda C. Liss argued the cause for respondent  
State-Operated School District of the City of  
Newark (Riker Danzig Scherer Hyland &  
Perretti, attorneys; Brenda C. Liss, of  
counsel and on the brief).

Lauren A. Jensen, Deputy Attorney General,  
argued the cause for respondent New Jersey  
Department of Education (Gurbir S. Grewal,  
Attorney General, attorney; Melissa D.  
Schaffer, Assistant Attorney General, of  
counsel; Lauren A. Jensen, on the brief).

PER CURIAM

In this appeal, we must determine whether the Commissioner of Education (Commissioner) violated our directive in Pugliese v. State-Operated School District of City of Newark, 440 N.J. Super. 501 (App. Div. 2015) that on remand, the Commissioner was to determine the validity of Pugliese's defense to tenure charges filed by respondent State-Operated School District of the City of Newark (District) that the District illegally assigned her to teach a course for which she was not "highly qualified."

By way of background, Pugliese was employed by the District from 2004 to 2013. She has an undergraduate degree in sociology, a master's degree as a reading specialist, an elementary certification, and was "highly qualified" to teach language arts literacy. From 2004 to 2010, she taught language arts and reading to elementary students, and acquired tenure in this position. Beginning in the 2010-2011 school year, the District reassigned her to teach large departmentalized social studies classes for middle school students in grades five through eight. Pugliese asserted that because she had no social studies endorsement, she was not properly certified under State regulations for the assignment, and was not "highly qualified" to teach social studies,

as required by the federal No Child Left Behind Act of 2001 (NCLB Act), 20 U.S.C.A. §§ 6301 to 7941.

For the school years 2010-2011 and 2011-2012, Pugliese received ratings of "basic" and "unsatisfactory," respectively. The District provided services to help rectify identified problems, but Pugliese did not improve. In September 2012, the District certified tenure charges alleging inefficiency in Pugliese's performance as a departmentalized middle school social studies teacher during those school years.

Prior to the time the District certified the charges, tenure charges were governed by the Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1, which states that "[n]o person shall be dismissed or reduced in compensation . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to ]N.J.S.A. 18A:6-10.]" Tenure charges were filed with the Commissioner pursuant to N.J.S.A. 18A:6-16 (1998). The Commissioner had exclusive jurisdiction to hear and determine the charges. N.J.S.A. 18A:6-9 (1995).

Before charges could be filed with the Commissioner, they had to be filed with the board of education, which determined "whether there [was] probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to

warrant a dismissal or reduction of salary." N.J.S.A. 18A:6-11 (1976). If the board of education determined that there was probable cause and the charge was sufficient to warrant dismissal or reduction in salary, "it shall forward such written charge to the [C]ommissioner for a hearing pursuant to [N.J.S.A.] 18A:6-16[.]" Ibid.

After filing the charge, the employee had fifteen days to submit a written response. N.J.S.A. 18A:6-16 (1998). The Commissioner then had fifteen days to review the charge and render a determination on whether the charge was sufficient to warrant dismissal or a reduction in salary. Ibid. If the Commissioner determined the charge was sufficient to warrant dismissal or a reduction in salary, the Commissioner had to refer the case to the Office of Administrative Law (OAL). Ibid. Once in the OAL, the board of education had the burden to prove the charge by a preponderance of the evidence. In re Polk, 90 N.J. 550, 560 (1982). An administrative law judge would then issue an initial decision for the Commissioner's review and the Commissioner would issue the final decision. N.J.S.A. 52:14B-10.

In August 2012, the Legislature enacted The Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACHNJ), N.J.S.A. 18A:6-117 to -129, "to raise student achievement by improving instruction through the adoption of

evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions[.]" N.J.S.A. 18A:6-118(a). In passing the Act, the Legislature declared that "[c]hanging the current evaluation system to focus on improved student outcomes, including objective measures of student growth, is critical to improving teacher effectiveness, raising student achievement, and meeting the objectives of the [NCLB Act].'" N.J.S.A. 18A:8-118(b).

A key provision in TEACHNJ mandated that the Commissioner "review and approve evaluation rubrics submitted by school districts[.]" N.J.S.A. 18A:6-123(a). Further, TEACHNJ required the State Board of Education to "promulgate regulations . . . [and] set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals." N.J.S.A. 18A:6-123(b). At a minimum, these standards had to include four annual rating categories: "ineffective," "partially effective," "effective," and "highly effective." N.J.S.A. 18A:123(b)(1). The Commissioner had to approve the rubrics by December 31, 2012, and the board of education had to implement "a pilot program to test and refine the evaluation rubric" by January 31, 2013. N.J.S.A. 18A:6-123(c) and (d). TEACHNJ also provided that, "[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted

evaluation rubric for all educators in . . . the district."  
N.J.S.A. 18A:6-123(e).

Although tenure charges are still filed under the TEHL, TEACHNJ amended the procedural process applicable to those charges, which are commonly referred to as "Section 8" charges under TEACHNJ. For example, if the Commissioner determined the charge was sufficient to warrant dismissal or reduction in salary, "he shall refer the case to an arbitrator pursuant to [N.J.S.A. 18A:6-17.1] for further proceedings[.]" N.J.S.A. 18A:6-16. The Commissioner's referral of a Section 8 charge to an arbitrator is not discretionary, "except that when a motion for summary decision has been made prior to that time, the [C]ommissioner may retain the matter for purposes of deciding the motion." Ibid. The arbitrator has sole authority to "hear and make a final determination on a controversy and dispute arising under [N.J.S.A. 18A:6-10]." N.J.S.A. 18A:6-9. The arbitrator's decision is "final and binding and may not be appealable to the [C]ommissioner of the State Board of Education[,]" but rather, "shall be subject to judicial review and enforcement" pursuant to N.J.S.A. 2A:24-7 to -10. N.J.S.A. 18A:6-17.1(e).

On October 1, 2012, the Commissioner determined the tenure charges against Pugliese were sufficient to warrant dismissal or a reduction in salary, and referred the case to an arbitrator.

The arbitrator applied the procedural standard in TEACHNJ to determine whether the tenure charges demonstrated that Pugliese failed to perform in a satisfactory manner for two consecutive years. Pugliese, 440 N.J. Super. at 511-12. This differed from the procedural standard another arbitrator applied in a companion case involving Edgard Chavez, a teacher who, like Pugliese, had tenure charges filed after TEACHNJ was enacted for conduct occurring before then. Id. at 511. We reversed, determining that "[b]oth arbitrators cannot be correct in applying different standards to similar procedural matters." Id. at 512. We remanded for the Commissioner to determine "[w]hich standard is appropriate for teachers whose tenure charges [were] brought after the passage of TEACHNJ, but before the TEACHNJ evaluation rubric [was] implemented[.]" Ibid.

Pugliese had also raised legal defenses. Ibid. Pertinent to this appeal is her defense that the District illegally assigned her to teach a course for which she was not designated "highly qualified." Ibid. The Commissioner, arbitrator, and trial court did not resolve the legal defenses. Ibid. The District argued that by sending the case to arbitrator, the Commissioner implicitly considered and rejected the legal defenses. Id. at 512-13. We rejected this argument and directed the Commissioner, on remand, "to explicitly decide those legal defenses that the Commissioner

does not expressly delegate to the statutorily-mandated arbitrator to decide." Id. at 503.

On June 1, 2015, the Commissioner issued the following final decision:

As directed by the enclosed Appellate Division decision issued May 19, 2015, the Commissioner is returning to [the arbitrator] herewith the file in the above-captioned matter for [the arbitrator] to review the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, subject to determination by [the arbitrator] each of respondent's defenses and any motions filed with [the arbitrator].

[(Emphasis added).]

On appeal, Pugliese argues the Commissioner failed to comply with his obligation to follow and implement our decision by referring the validity of her legal defense to the arbitrator without addressing the substantive law governing that defense. We disagree.

"It is beyond dispute that [an administrative agency] has the responsibility to comply with pronouncements of an appellate court." Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 306 (App. Div. 2010) (quoting Tomaino v. Burman, 364 N.J. Super. 224, 233 (App. Div. 2003)). "It is the peremptory duty of the [administrative agency], on remand, to obey the mandate of the appellate tribunal precisely as it is written." Ibid.



(quoting Tomaino, 364 N.J. Super. at 233). "Although [administrative agencies] are privileged to disagree with our decisions, 'the privilege does not extend to non-compliance.'" Tomaino, 364 N.J. Super. at 233 (quoting Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 415 (1961)). "In other words, [administrative agencies] are bound to follow the rulings and orders of the Appellate Division; they are not free to disregard them." Ibid. (citation omitted).

We are satisfied the Commissioner complied with our opinion and followed our remand instructions. We did not direct the Commissioner to decide any legal defenses. Rather, we directed the Commissioner to only decide those legal defenses that the Commissioner did not expressly delegate to the arbitrator to decide. Id. at 503. In accordance with our decision, the Commissioner delegated all legal defenses to the arbitrator to decide.

In addition, once the Commissioner determined the tenure charges against Pugliese were sufficient to warrant dismissal or reduction in salary, he was required to refer the case to the arbitrator, and had no authority to hear the case, make a final determination, or overturn the arbitrator's decision. N.J.S.A. 18A:6-10, -16 and -17.1(e). Accordingly, the Commissioner's

decision to refer the legal defenses to the arbitrator complied with the legal mandates of the TEHL and TEACHNJ.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION