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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4129-15T1

EDWARD NEWTON,

Plaintiff-Respondent,

v.

STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,

Defendant-Appellant.

Submitted February 27, 2018 – Decided March 27, 2018

Before Judges Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-2898-
15.

Scarinci & Hollenbeck, LLC, attorneys for
appellant (Ramon E. Rivera, of counsel;
Christina M. Abreu and Shana T. Don, on the
briefs).

Pickett & Craig, attorneys for respondent
(Robert T. Pickett, of counsel and on the
brief).

PER CURIAM

Defendant, the State-Operated School District of the City of
Newark (District), appeals from April 13, 2016 Law Division orders

vacating an arbitration award rendered pursuant to the Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1, and denying the District's motion to dismiss plaintiff Edward Newton's complaint, which sought to vacate the award. The arbitration award revoked Newton's tenure and terminated his employment with the District based on a charge of inefficiency. In vacating the award, the court ordered Newton reinstated to his teaching position. Having reviewed the parties' arguments in light of the record and applicable legal principles, we affirm.

I.

For the narrow purposes of this appeal, we adopt the following succinct background facts drawn from the arbitrator's decision:

[Newton] has a New Jersey middle school math certification and obtained tenure in or about 2010. He has taught math and science at the elementary and middle school level in the District since 2006 and taught at Lincoln Elementary school from 2008 until the instant tenure charges. At Lincoln, [Newton] taught as a classroom teacher in math and science for three years, and more recently as a math problem solving teacher and classroom math teacher. Prior to the 2012-2013 school year [Newton] received annual evaluations of satisfactory or proficient. [Newton] received Annual Summative Evaluation Ratings of "Partially Effective" for the 2012-2013 and 2013-2014 school years. As a result of his receiving ratings of Partially Effective for two consecutive years, the District filed the instant inefficiency tenure charge.

The tenure charge was filed with the Commissioner of Education (Commissioner) on or about September 24, 2014. It alleged that "[d]uring the period from September 2012 to the present, [Newton] has demonstrated an inability to completely and responsibly execute [his] duties as a teacher" in various specified manners.

On December 22, 2014, the Commissioner referred the tenure charge for arbitration. The referral stated: "[Newton's] answer [to the tenure charge] has been reviewed pursuant to N.J.S.A. 18A:6-17.3(c); upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date the case is being referred to [the arbitrator] as required by statute."

The arbitration hearing was conducted over three non-consecutive dates in February 2015. On March 23, 2015, the arbitrator entered an award sustaining the District's tenure charge. In his written opinion the arbitrator concluded the District established the charge of inefficiency. The arbitrator found the District had substantially adhered to its evaluation process during the 2012-2013 and 2013-2014 school years, and that the charge warranted termination of Newton's employment. Notably, the arbitrator rejected Newton's argument, and the rulings in several other teacher-tenure arbitrations involving the District, that the evaluations performed by the District during the 2012-

2013 school year could not appropriately be considered for purposes of efficiency tenure charges.

Newton filed a complaint and order to show cause in the Law Division seeking to vacate the arbitration award pursuant to N.J.S.A. 2A:24-8(a) and (d). Newton contended that, pursuant to applicable statutory provisions and guidance from the Office of the Commissioner, the "District's teacher evaluation tool and rubrics in effect during the 2012-2013 school year served only as a 'pilot' year evaluation assessment. . . ." Rather, the statutory and regulatory provisions allowing for the removal of a tenured teacher for alleged "ineffective" and/or "partially effective" performance in two consecutive school years did not take effect until the 2013-2014 school year. Newton asserted that, because the District and the arbitrator improperly relied on the 2012-2013 evaluations, the arbitration award was procured by "undue means" and the arbitrator "exceeded or imperfectly executed [his] powers." The District opposed the application and cross-moved to dismiss the complaint.

On April 13, 2016, the trial judge entered companion orders denying the District's motion to dismiss the complaint and granting Newton's application to vacate the arbitration award. In a terse two-paragraph handwritten statement of reasons, the judge stated:

The decision of [the arbitrator] of [March 23, 2015] is hereby vacated. This court finds that the arbitrator exceeded his authority in ruling whether [Newton] was evaluated in "two consecutive annual evaluations." The court rules that the procedures outlined in N.J.S.A. 18A:6-17.3 were violated and the tenure charges should be dismissed.

In addition, the [c]ourt holds . . . pursuant to N.J.S.A. 18A:6-123(c), (d) and the related regulations that: the 2012-2013 school year was a pilot year and should not have been counted against [Newton] under TEACH NJ and the tenure charges brought by the [District]. The "evaluation process" has not been followed. Ordered that Newton be reinstated to his teaching position.

The District's appeal followed.

II.

We begin with a brief review of the relevant authority that frames our analysis.

New Jersey's TEHL provides tenured public school teachers with certain procedural and substantive protections from termination. N.J.S.A. 18A:6-10 provides that no tenured employee of the public school system "shall be dismissed or reduced in compensation . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause."

[Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11 (2017).]

In August 2012, the Legislature enacted The Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACH NJ), 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 [federal No Child Left Behind Act, 20 U.S.C. §§ 6301 to 7941]." N.J.S.A. 18A:8-118(b).

A key provision in TEACH NJ mandated that the Commissioner "review and approve evaluation rubrics submitted by school districts" N.J.S.A. 18A:6-123(a). Further, TEACH NJ required the Department 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) to -123(d). TEACH NJ 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, TEACH NJ amended the procedural process applicable to those charges. In Pugliese v. State-Operated School District of City of Newark, 440 N.J. Super. 501, 510 (App. Div. 2015), we noted that, prior to its amendment in 2012, N.J.S.A. 18A:6-16 provided:

[I]f the [C]ommissioner determined that [tenure] charges, if sufficient, warranted dismissal, the matter was referred to an administrative law judge (ALJ). The ALJ issued a recommended decision, which the [C]ommissioner could adopt, modify or reject. Thus, the agency, using its expertise, reviewed the ALJ's decision. Thereafter, an agency determination could be appealed directly to the Appellate Division. [That] agency review process no longer exists.

[(Citations omitted).]

Following the 2012 amendment to N.J.S.A. 18A:6-16, "[i]f [the Commissioner] determine[s] that such charge is sufficient to warrant dismissal . . ., he shall refer the case to an arbitrator" pursuant to N.J.S.A. 18A:6-17.1 for a hearing. As the Court recently explained in Bound Brook, 228 N.J. at 11-12, under this revised statutory rubric:

"The arbitrator's determination shall be final and binding," but "shall be subject to judicial review and enforcement as provided pursuant to N.J.S.[A.] 2A:24-7 through N.J.S.[A.] 2A:24-10." N.J.S.A. 18A:6-17.1. Pursuant to the cross-referenced statutes, there are four bases upon which a court may vacate an arbitral award:

a. Where the award was procured by corruption, fraud or undue means;

b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;

c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;

d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made.

[N.J.S.A. 2A:24-8.]

III.

On appeal, the District argues the trial judge (1) failed to make any findings with respect to its motion to dismiss Newton's complaint, and (2) failed to provide findings of fact or legal authority to support his conclusion that the arbitrator exceeded his authority.

It is well-settled that a trial judge "shall, by an opinion or memorandum decision, either written or oral, find the facts and state [his or her] conclusions of law thereon in all actions tried without a jury" R. 1:7-4(a). "The rule requires specific findings of fact and conclusions of law" Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:7-4 (2018). Our Supreme Court has expounded on this essential obligation:

Failure to perform that duty "constitutes a disservice to the litigants, the attorneys and the appellate court." Naked conclusions do not satisfy the purpose of [Rule] 1:7-4. Rather, the trial court must state clearly its factual findings and correlate them with the relevant legal conclusions.

[Curtis v. Finneran, 83 N.J. 563, 569-70 (1980) (citations omitted).]

We agree with the District that the judge failed to provide any findings of fact or conclusions of law with respect to its motion to dismiss Newton's complaint, which sought to vacate the arbitration award. Nevertheless, by implication, the reasons the judge denied the District's motion to dismiss can be gleaned from the statement of reasons he gave as to why the award should be vacated.

We also agree the judge did not explain in detail his conclusion that the arbitrator exceeded his authority and the District violated the procedures for evaluating teacher

effectiveness under the TEACH NJ Act. Consequently, we are unable to discern from the court's statement of reasons the basis for these conclusions.

Nonetheless, in his brief statement of reasons, the judge did explain that the 2012-2013 school year was deemed a "pilot year" under the TEACH NJ Act, and that an evaluation conducted in a pilot year cannot be used to support a tenured teacher's removal. Although we determine these limited remarks by the motion judge were adequate to allow our review of this determination, we note that Rule 1:7-4 requires judges to provide specific findings of fact and conclusions of law for an order or judgment.

"Because the matter at issue is legal in nature, our review of the motion judge's decision is plenary." Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 507 (App. Div. 2004) (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947-48 (1995) for the principle that "review of arbitration award requires no special standard; findings of fact must be accepted if not clearly erroneous and questions of law are decided de novo"). See also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference").

The provisions of the TEACH NJ Act specifically implicated here provide in relevant part as follows:

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the [District's] evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

[N.J.S.A. 18A:6-123(d) to -123(e) (emphasis added).]

We review the statute's plain language, giving its "words their ordinary meaning and significance," in the context of "related provisions so as to give sense to the legislation as a whole." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citations omitted). A reviewing court does not "rewrite a plainly-written enactment of the Legislature," or infer "that the Legislature intended something other than that expressed by way of the plain language." Ibid. (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)).

Here, the plain language of the statute leads us to conclude that, although the District implemented its evaluation rubric

prior to the 2012-2013 school year, it was not until the 2013-2014 school year that the statute was in full force and effect so that evaluations would "count" for purposes of tenure charges.

Moreover, the Department of Education's first set of regulations implementing TEACH NJ became effective on March 4, 2013. Specifically, N.J.A.C. 6A:10-2.3 required school districts to adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members. However, the March 2013 regulations did not specify the number and type of observations to be conducted.

In October 2013, new regulations were adopted that specified the required evaluation procedures for teaching staff members under TEACH NJ. These regulations required that all tenured teachers be observed at least three times per school year; that teachers with a corrective action plan ("CAP") receive one additional observation; that at least one of the observations for any teacher with a CAP be announced, with a pre-observation conference, and that at least one observation be unannounced; and that the remaining two observations be announced or unannounced. N.J.A.C. 6A:10-4.4(c).

Thus, the regulations designed to implement the TEACH NJ Act were not finalized until October 2013. Consequently, we conclude the District could not properly rely on the evaluations it

conducted during the 2012-2013 school year to charge Newton with inefficiency prior to the finalization of the substantive evaluation standards thereafter established by the Department.

Our conclusion finds additional support in the Department of Education's own guidance on this issue. In the "Educator Evaluation Frequently Asked Questions (FAQ)" published on its website, in response to the question "Will summative ratings 'count' this year (2012-13) toward tenure decisions?" the Department stated:

No -- the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when [the] summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start.

While the Department's FAQ statements are informal in nature and do not rise to the status of a regulation, they nonetheless represent the practical interpretation of the statute by the agency charged with instructing local school districts on how to comply with the new statutory rubric.

An arbitration award that is procured by "undue means" must be vacated. N.J.S.A. 2A:24-8(a). "'Undue means,' as used in N.J.S.A. 2A:24-8(a), ordinarily encompasses situations where the arbitrator has made a mistake of fact or law that is either

apparent on the face of the record or admitted to by the arbitrator." N.J. Highway Auth. v. Int'l Fed'n of Prof'l and Tech'l Eng'rs, Local 193, 274 N.J. Super. 599, 609 (App. Div. 1994) (citations omitted). "'Undue means' has been construed to mean basing an award on a clearly mistaken view of fact or law." Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227-28 (App. Div. 1967) (citation omitted). Undue means does not apply to the use of facts based on credibility determinations by the arbitrator. Local No. 153, Office & Prof'l Emps. Int'l Union v. Trust Co. of N.J., 105 N.J. 442, 450 n.1 (1987).

In the present case, the District erred when it used 2012-2013 as one of the two evaluation years in seeking to revoke Newton's tenure based on inefficiency. The arbitration award that sustained the District's position was infected by this legal error. The award was therefore procured by "undue means" and accordingly it was properly vacated on this basis.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION