

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5336-15T1

HELEN TOBIA,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF
LAKEWOOD TOWNSHIP,

Defendant-Respondent.

Submitted February 13, 2018 - Decided March 12, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Chancery Division, Ocean County, Docket No.
C-000098-16.

McLaughlin & Nardi, LLC, attorneys for
appellant (Pauline M.K. Young, of counsel and
on the briefs).

Schenck, Price, Smith & King, LLP, attorneys
for respondent (Marc H. Zitomer, of counsel
and on the brief; Joseph L. Roselle, on the
brief).

PER CURIAM

This appeal concerns a teacher-tenure arbitration conducted
pursuant to the Tenure Employees Hearing Law (TEHL), N.J.S.A.

18A:6-10 to -18.1. Plaintiff Helen Tobia, a tenured special-education supervisor employed by the school district (District) of the Township of Lakewood (Township), appeals from a June 30, 2016 Chancery Division order confirming an arbitration award rendered pursuant to the TEHL. The award revoked Tobia's tenure and terminated her employment with the District based on her unbecoming conduct in handling the eligibility and placement of the District's special education students. For the reasons that follow, we affirm.

We begin with a brief review of the relevant authority, as recently stated by our Supreme Court in Bound Brook Board of Education v. Ciripompa, 228 N.J. 4, 11-12 (2017):

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." If the charges are substantiated, they are submitted for review by the Commissioner. N.J.S.A. 18A:6-11. If the Commissioner determines the tenure charges merit termination, the case is referred to an arbitrator. N.J.S.A. 18A:6-16. "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.]

Tobia first became employed as a teacher with the Lakewood Board of Education (Board) in 1995, and was granted tenure in 1998. Pertinent to this appeal, Tobia most recently served as Supervisor of Pupil Personnel Services, where her job responsibilities primarily involved oversight over the District's special education program. In this capacity, from time to time, plaintiff would interact and attend hearings with Board counsel, Marc H. Zitomer, Esq., and other members of his law firm, Schenck, Price, Smith & King, LLP (SPSK).

On August 7, 2015, the District's State-Appointed Monitor, Michael Azzara, filed tenure charges against plaintiff, alleging unbecoming conduct, inefficiency, and other just cause warranting dismissal. The eighteen tenure charges alleged that plaintiff acted improperly by: (1) lying under oath; (2) willfully violating various State and Federal special education regulations; (3) directing that a student be found ineligible for special education services prior to the Child Study Team's evaluation of the student; (4) making unilateral student placement decisions; (5) failing to work collaboratively with District representatives and Board counsel; and (6) violating various other District policies.

On August 26, 2015, the Board certified the tenure charges, suspended plaintiff, and forwarded the charges to the Commissioner of Education (Commissioner). On October 5, 2015, the Commissioner referred the charges for arbitration.

On October 23, 2015, Tobia filed a motion to disqualify Zitomer from acting as counsel, and other SPSK attorneys from testifying, on behalf of the Board at the arbitration hearing. On November 12, 2015, the arbitrator denied the motion.

The arbitration hearing was conducted over four non-consecutive dates in November and December, 2015. On February 4, 2016, the arbitrator entered an award terminating Tobia's employment with the District. In his comprehensive 158-page

written opinion, the arbitrator carefully reviewed the evidence presented at the hearing, found Tobia's testimony was not credible, and determined she engaged in all the various acts of unbecoming conduct alleged in the tenure charges. In short, the arbitrator concluded "[t]he District's prima facie showing of [Tobia's] unbecoming conduct was easily accomplished based upon the voluminous evidence relied upon by the [District] in bringing the tenure charges, coupled with the credible testimony of its witnesses."

Tobia filed a complaint in the Chancery Division seeking to vacate the arbitration award. She argued that the arbitrator wrongfully denied her motion to disqualify SPSK as Board counsel and witnesses, and the arbitration award was procured by undue means due to SPSK's alleged conflict of interest. In response, the Board contended: (1) Tobia's motion to vacate the award was time-barred under N.J.S.A. 2A:24-7; (2) plaintiff should have filed an interlocutory appeal challenging the arbitration award; and (3) plaintiff did not meet her burden to vacate the award based on alleged conflicts of interest with SPSK counsel and "undue means" used to procure the award.

On June 30, 2016, Judge Francis R. Hodgson, Jr., denied Tobia's application, and granted the Board's application to confirm the award. Procedurally, Judge Hodgson disagreed with the

Board that Tobia's motion to vacate the award was time-barred. However, on the merits, the judge noted that Tobia again "pointed primarily to the same two issues that [she] raised before the arbitrator. Those two issues involve the disqualification of counsel as well as disqualification of witnesses based on the allegation that [she] enjoyed the status as a client [of SPSK]."

Reviewing the evidence adduced at the arbitration hearing, Judge Hodgson found that Tobia's participation "with the three [SPSK] lawyers who testified against her [was] primarily as a fact witness before mediators or as a fact witness providing facts." The judge also noted Tobia's "participation in those hearings is what drew the attention of the attorneys and ultimately the attention of the [State-appointed] monitor to what is alleged to have been her misconduct."

Relying on New Jersey Rules of Professional Conduct (RPC) 1.13 and 4.2, Judge Hodgson found it clear that "[t]he only persons represented by an entity's attorney are those that fall within the litigation control group." The judge concluded Tobia did not fall within that category. He elaborated:

[Tobia] clearly is not in the control group. The school board itself retains counsel and sets the policy. [Tobia] is entrusted with carrying out that policy. [It is] clear from the decision of the arbitrator as well as the transcripts that were provided to the [c]ourt, [that Tobia], as supervisor

for special education, did not fall within the litigation control group as defined by [RPC] 1.13. The supervisor of special education was not responsible for or significantly involved in the determination of the Lakewood School Board's legal position and the subject matters. Furthermore, to be a part of the litigation control group, [Tobia] would have had to do more than merely supply factual information or data respecting the matter, which [she] clearly did not do . . . [.] [S]ince [Tobia] was not within the litigation control group and had not obtained other representation, she was not a client. Indeed, in this matter, [Tobia] was not responsible for the formulating of legal policy but has been found to have disregarded the policy of the school board as well as . . . state law including . . . at the due process meetings with students and their advocates. And it was in part the [B]oard attorneys who reported this behavior and ultimately testified against her in the hearings.

I referred specifically and directly to [RPC] 1.13, because I believe since it is demonstrated that . . . Tobia was never a client of [SPSK], that all [her] arguments . . . fail. That is[,] having not been a client, there is no duty of confidentiality owed either by the attorneys or by the other witnesses.

On appeal, Tobia argues the trial court erred by failing to set aside the arbitration award. She renews her argument that the Board's attorney should have been disqualified from representing the Board in the arbitration proceeding, and other members of the SPSK law firm should not have been permitted to testify in that

proceeding. She relies specifically on RPC 1.7, which provides in relevant part that

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Alternatively, Tobia contends that SPSK violated RPC 1.9, which enumerates various duties owed by a lawyer or law firm to a former client.

However, as Judge Hodgson aptly recognized, plaintiff's arguments hinge on her claim that she was a client or former client of SPSK while performing her duties as Supervisor of Pupil Personnel Services. In relevant part, RPC 1.13 (Organization as the Client) provides:

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the

organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation

For substantially the reasons expressed by Judge Hodgson in his thoughtful June 30, 2016 oral decision, we conclude that Tobia was not a member of the Board's litigation control group and hence not a client of SPSK. Therefore, SPSK's prosecution of Tobia's tenure charges did not amount to a conflict of interest under RPC 1.7. Nor did it implicate RPC 1.9, because Tobia was never a former client of SPSK.

Tobia also relies on RPC 3.7(b) as the basis for her contention that SPSK attorneys should have been precluded from testifying as fact witnesses at her tenure hearing. Again we disagree.

RPC 3.7(b) provides "[a] lawyer may act as [an] advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9." As stated above, RPC 1.7 and 1.9 do not apply to Tobia because she is not a client or former client of SPSK. Accordingly, under RPC 3.7(b), SPSK attorneys were permitted to

testify, while Zitomer, who did not testify, represented the Board at the tenure hearing.

Finally, for the first time on appeal, Tobia argues that the arbitration award should be vacated because it was obtained through fraud, corruption, and/or undue means. However, it is well settled "that [we] will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). Accordingly, because Tobia did not raise this issue before the trial court, the issue is not jurisdictional in nature, and the issue does not implicate the public interest, we decline to consider it.¹

Affirmed.

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


CLERK OF THE APPELLATE DIVISION

¹ We also deny Tobia's reserved motion to supplement the record with additional documents that were not presented to nor considered by either the arbitrator or the trial court.